

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	Docket No.	ER09-1048-000
Midwest Independent Transmission System Operator, Inc.	Docket No.	ER09-1049-000
Southwest Power Pool, Inc.	Docket No.	ER09-1050-000 ER09-1192-000
ISO New England, Inc. and New England Power Pool	Docket No.	ER09-1051-000
PJM Interconnection, LLC	Docket No.	ER09-1063-000
New York Independent System Operator, Inc.	Docket No.	ER09-1142-000

Oral Comments of Dr. John A. Anderson, President  
Electricity Consumers Resource Council (ELCON) at the  
Technical Conference on RTO/ISO Responsiveness  
February 4, 2010

At the outset, ELCON commends FERC for recognizing that there are significant problems with the responsiveness of ISOs and RTOs to consumer concerns and scheduling this Technical Conference.

The stated purpose of this Conference is to explore the responsiveness of the Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs) to their customers and other stakeholders. In the Notice announcing this Conference, FERC specifically referenced recommendations of the National Association of State Utility Consumer Advocates (NASUCA) including: “(1) the decision making process is complicated, (2) the decision making process is time intensive, and (3) most consumers and their advocates lack the resources required to meaningfully monitor and influence the stakeholder process.”<sup>1</sup> ELCON agrees with both the FERC notice and NASUCA’s stated concerns.

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<sup>1</sup> NOTICE PROVIDING AGENDA FOR TECHNICAL CONFERENCE ON RTO/ISO RESPONSIVENESS, January 8, 2010, page 2.

The establishment of ISOs and RTOs began more than a decade ago. While in theory they seemed to be a great idea, the practical application has been questioned by consumers, both large and small, for many years. FERC has recognized the consumer concerns over the years, but not implemented changes that fixed the problems.

As examples, in 2007 and 2008 FERC conducted three public conferences, an Advanced Notice of Proposed Rulemaking (ANOPR), and then a Notice of Proposed Rulemaking (NOPR), with the stated objective of ensuring that customers receive the benefits they deserve from restructured markets. These activities were followed by Order 719 requiring compliance filings from each ISO/RTO. Further, the Government Accountability Office (GAO) issued a report in September 2008 clearly pointing out that consumer concerns are serious and continuing.<sup>2</sup> ELCON participated in each of these FERC actions and contributed to the GAO Report. Unfortunately, the problems remain.

The Order 719 compliance filings and the comments on them show that absent further Commission intervention, and with the support of supply-side interests, there would be no change in the status quo. ELCON believes that although Order 719 establishes a set of sound principles, the ISO/RTO compliance filings showed that aspiration is insufficient motivation; rather, explicit directives are needed. Virtually all possible permutations of procedures and structures already have been presented to FERC by ELCON and other “demand side” consumer interests.

**Order 719 Responsiveness Criteria are Necessary but Not Sufficient** – The four responsiveness criteria established in Order 719 – inclusiveness, fairness in balancing diverse interests, representation of minority positions, and ongoing responsiveness – are necessary, but not sufficient, conditions. As was expected, in their Order 719 compliance filings the six ISOs/RTOs uniformly took the position that they were already meeting these criteria.

ELCON recognizes that ISOs/RTOs have a difficult job. They have a mix of utility (providing non discriminatory transmission service and running the power and ancillary services markets) and regulatory or quasi-regulatory (ensuring reliability, enforcement, regional transmission planning) functions. Yet they are voluntary, so dissatisfied supply side participants have some ability to walk, and there inevitably will be strong motivation to keep them satisfied. From a consumer perspective, the cost of doing so may not be justified by the benefits.

There are two structural issues that make ISO/RTO responsiveness and accountability difficult. First, the ISOs/RTOs are large non-profits, bureaucratic and nearly immune to sanctions that would positively influence their decision making and behavior. Second, the supply-side interests – generation owners and transmission owners – are more concentrated and have far greater resources than demand side interests. And a number of ISO/RTO board members are former supply-side employees.

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<sup>2</sup> Electricity Restructuring: FERC Could Take Additional Steps to Analyze Regional Transmission Organizations’ Benefits and Performance, United States Government Accountability Office Report to the Committee on Homeland Security and Governmental Affairs, U.S. Senate, GAO-08-987, September 2008.

ELCON is not the only group focused on these structural issues that need to be overcome if the ISOs/RTOs are to become more effective. The Federal Trade Commission also commented in the wholesale markets rulemaking proceeding that increasing access to the ISO/RTO board would not itself be enough. Rather, FTC said that the problem is more systemic -- that the ISOs/RTOs are not-for-profit entities and need strong incentives if they are to act in accordance with customer interests. And the GAO Report noted that the high burden of proof and difficulty of obtaining information are challenges to obtaining review of ISO/RTO decisions.

For these reasons, it is not surprising that FERC's well-intentioned efforts in establishing general principles to guide the ISOs/RTOs have not yet achieved the needed reforms. Given the public trust that has been delegated to the ISOs/RTOs, FERC is obligated to do more. In a long line of cases, the D.C. Circuit has ruled that an agency must not subdelegate its ultimate regulatory authority without specifying objective criteria to guide the private entity. The court noted in particular the need to retain "an important democratic check on government decision making" and to project against "the risk of policy drift inherent in any principal-agency relationship."

## **NEED FOR DEFINITIVE ACTION**

There is little new in the content of these recommendations – with the starting point that the ISOs/RTOs will remain in place, virtually every possible structure and procedure has already been raised. However, given the failure of the Order 719 compliance filings to trigger reform, it is now time for FERC to take definitive action.

ELCON recommends that FERC commence a new rulemaking with the objective of establishing a minimum set of explicit, focused directives, addressing four topics:

1. Processes that the ISOs/RTOs must adopt to promote full participation;
2. Governance structures that will lead to sound and balanced decision making;
3. Effective recourse to FERC, and ultimately the courts, that will ensure accountability;
4. Establish clear and definitive metrics that will allow consumers to both demonstrate that ISOs and RTOs are providing net benefits to consumers that exceed their costs and demonstrate that improvements are being made that increase these benefits.

## **1. PROCESS REFORM**

FERC should impose specific requirements that give stakeholders full rights to participation in the most essential ISO/RTO processes. Among the requirements that ELCON seeks include:<sup>3</sup>

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<sup>3</sup> NASUCA also recommends, as specifically quoted in the Notice for this Technical Conference, "...the creation of a funding mechanism, via RTO/ISO fees, which would provide resources for public

- Establishing Mission and Vision statements that clearly direct the ISOs and RTOs to work in the best interest of consumers.
- Open board meetings, with agendas published in advance and opportunity for stakeholder input on agenda items.
- Accessibility to Board and key management meetings for stakeholders without the resources to attend in person (web or teleconference).
- Written comments and appeals.
- Minimum of one annual meeting by board/management with each stakeholder group.
- Formal cost / benefit review of any significant actions, analogous to what is required for agency rules, subject to FERC review.

## 2. Structural Reforms

To provide effective access, direct involvement in the decision making process is needed. In Order 719, the Commission made it clear that it favored two structural approaches to increase responsiveness: (1) a board advisory committee; or (2) a hybrid board. At that time, the Commission decided not to mandate either option. However, the ISO/RTO compliance filings show that none plan to implement meaningful structural reforms that would make improvements over past practices.

- **Hybrid Board Requirement** – ELCON recommends that the Commission reconsider this issue and impose a specific requirement that the ISOs/RTOs adopt hybrid boards as the best long-term solution for ensuring ISO/RTO accountability to shareholders. In such event, to preserve the necessary independence of a board of directors, non-independent stakeholder members of a hybrid board should represent less than half of the total board, however, those board members representing supply-side and demand-side (consumer) interests should have equal representation.
- **Eliminate Self-Perpetuating Boards** – ELCON also recommends that FERC eliminate self-perpetuating ISO/RTO boards. For example, board members could be

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representatives of consumers to support consumer positions at all levels of the stakeholder process.” (NOTICE, January 8, 2010, page 2. ELCON agrees with NASUCA that most consumers and their advocates lack the resources required to meaningfully monitor and influence the stakeholder process. (Ibid.) In this regard, ELCON suggests that FERC initiate an inquiry into how such funding mechanism might operate. As a starting point, ELCON recommends that FERC initiate a proceeding to consider the establishment of a mechanism similar to the one presently in existence in Ontario (The Ontario Energy Board’s “Practice Direction on Cost Awards,” details available at: [http://www.oeb.gov.on.ca/OEB/\\_Documents/Regulatory/Practice\\_Direction\\_on\\_Cost\\_Awards.pdf](http://www.oeb.gov.on.ca/OEB/_Documents/Regulatory/Practice_Direction_on_Cost_Awards.pdf)). This process allows consumers to file with the OEB for reimbursement of intervention costs with substantial checks and balances to be sure that the costs are warranted and legitimate.

required to be nominated by a Nominating Committee and elected and subject to removal by Advisory Committee, each with specified stakeholder participation. An alternative would be to promote a shared governance process that could draw on components of NYISO's structure (but with improvements to its procedures respecting openness and board selection).

### 3. Accountability and FERC Review

Ultimately the issue raised by ISO/RTO responsiveness is the placement of so many important responsibilities under the control of a large, not-for-profit entity that, by its nature, is unaccountable. Despite their critical regulatory or quasi-regulatory responsibilities, they cannot be penalized for bad or unfair decision making. Accordingly, reform is needed not only to make the ISOs/RTOs responsive, but also to make them accountable.

- **De Novo Treatment of ISO/RTO Compliance Filings** – Some improvement in external accountability would be achieved if FERC were to review ISO/RTO filings on a *de novo* basis. That is, the ISOs/RTOs should not be accorded deference on the basis that they have resulted from stakeholder processes, when there is no assurance that such processes involved full and meaningful participation or sound decision making.
- **ISO/RTO Audits** – Another possibility would be for FERC proactively to conduct a detailed investigation or audit of the effectiveness of each ISO/RTO on a regular schedule. (For example, FERC might conduct reviews of two of the ISOs/RTOs each year on a staggered schedule, so that each was subject to a review every three years.) Responsiveness to stakeholders and balanced decision making could be a key focus of such reviews.

### 4. Metrics

It is not self-evident that the creation of ISOs and RTOs delivered net benefits to consumers. A significant problem in resolving the differences of opinion between consumers and suppliers regarding the benefits of ISOs and RTOs is the difficulty (or inability) to accurately and convincingly measure the performance of the ISOs and RTOs. Many attempts have been made to use analytical tools to conduct such analyses, only to find that the raw data simply are not available.<sup>4</sup> Thus, consumers continue to assert that

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<sup>4</sup> For example, the National Rural Electric Cooperative Association (NRECA) attempted to develop their "RTO Report Cards" but were hampered by a lack of data. Additionally, the American Public Power Association through its Electric Market Reform Initiative retained consultants to assess the benefits of ISOs and RTOs. They found that the lack of clear metrics made definitive findings difficult. As a specific example, William Dunn in his [Concept Paper "Data Required for Market Oversight"](#) stated: "In essence, the operation of the [ISO/RTO] markets is a black box on which those paying the bills are required to place full confidence."

net benefits are insufficient to justify the costs while suppliers (and FERC) assert that the benefits exceed the costs.<sup>5</sup>

ELCON is pleased that FERC has initiated a process to develop standardized measures that track the performance of RTO operations and markets, as GAO recommended. Such metrics must allow specific calculations of prices and actual costs in each ISO and RTO as well as provide data adequate to evaluate whether the short-term focus of market participants is harming the long-term viability of supply. The data must allow analysts to derive trend analyses for each metric going forward and, to the extent data are available, a comparison of recent past years.

It is very important that this process is not dominated by the ISOs and RTOs. As the GAO stated, FERC should “...work with RTOs, stakeholders, and other experts to develop standardized measurers that track the performance of RTO operations and markets.”<sup>6</sup> ELCON looks forward to working with FERC in the development of such metrics.

Thank you for the opportunity to offer our thoughts.

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<sup>5</sup> The GAO concluded:

“Many agree that RTOs have improved the management of the transmission grid and improved generator access to it; however, there is no consensus about whether RTO markets provide benefits to consumers or how they have influenced consumer electricity prices. FERC officials believe RTOs have resulted in benefits, however, FERC has not conducted an empirical analysis of RTO performance or developed a comprehensive set of publicly available, standardized measures to evaluate such performance.” (What GAO Found, inside cover)

<sup>6</sup> The GAO Report, op.cit., Recommendations for Executive Action, page 59.