

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>State Policies and Wholesale Markets</b>	)	
<b>Operated by ISO New England, Inc.,</b>	)	
<b>New York Independent System</b>	)	<b>Docket No. AD17-11-000</b>
<b>Operator, Inc., and PJM</b>	)	
<b>Interconnection, L.L.C.</b>	)	

**TECHNICAL CONFERENCE OPENING STATEMENT OF  
JOHN E. SHELK, PRESIDENT & CEO,  
ELECTRIC POWER SUPPLY ASSOCIATION**

The Electric Power Supply Association (“EPSA”)<sup>1</sup> appreciates the opportunity to participate in the Commission’s timely technical conference on the relative roles of wholesale markets and state policies in the Eastern ISOs/RTOs. EPSA members are among the largest competitive suppliers in these markets. EPSA member investments have increasingly focused on these regions as opposed to others because of their relative attractiveness for private capital. Whether that remains true given certain State actions taken to date and those being contemplated should be front and center throughout these discussions.

The Commission is wise to be intently focused on the many questions and issues identified in the Supplemental Notice dated April 13, 2017. The very convening of a two-day conference with the sheer length and breadth of its panels, topics, questions and speakers is quite telling. It indicates that some States have taken or are considering taking actions within the Eastern ISOs/RTOs that should not be allowed to undermine the Commission’s statutory responsibilities under the Federal Power Act (“FPA”) to ensure that wholesale rates and practices are just and reasonable, and not unduly discriminatory or preferential.

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<sup>1</sup> Celebrating its 20th anniversary in 2017, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. This pleading represents the position of EPSA as an organization, but not necessarily the views of any member with respect to any issue.

Congress intended the Commission to be the exclusive regulator as to sales of electric energy in interstate commerce, as affirmed by the U.S. Supreme Court as recently as the unanimous *Hughes* decision just last year, and in numerous cases before *Hughes*, including the *EPSCA* case. States have an important role to play given that the FPA reserves retail jurisdiction to States, which also have other policy tools. However, it is *critical* that federal and state authorities be exercised within the law and in concert to achieve federal and state policy objectives consistent with well-functioning wholesale power markets.

Well-functioning competitive wholesale markets should remain the Commission's primary objective. If market efficiency through at-risk private capital investment based on accurate price signals is no longer the means to achieve that objective, market participants need to know. If new goals are to be achieved, market-based mechanisms should be utilized. This conference should not be about how the Commission might bend over backwards to accommodate every potential State action regardless of its detrimental impact on wholesale markets. That is not the law, that is not good policy, and it certainly is not consistent with investing private at-risk capital based on market price signals.

The Eastern ISOs/RTOs are a result of federal and state public policy decisions, not federal dictates. In the Energy Policy Act of 2005, Congress rejected the proposition that the Commission could impose ISO/RTO market design on unwilling States. Commission policy has been to foster the *voluntary* formation of ISOs/RTOs. The wisdom of capturing regional efficiencies is illustrated by the growing geographic footprint of many ISOs/RTOs through *voluntary* expansion with State approval to most of the country over time.

States in the Eastern ISOs/RTOs voluntarily decided to rely on regional competitive wholesale markets and have seen the well-documented benefits of this approach. Many of those States separated generation from transmission and distribution, substituting market-based rates for generation for cost-of-service rates. Having done so, it is simply not

sustainable from the standpoint of basing investment decisions on market forces to toggle between market-based and cost-based regulation, certainly not unless all generation in a State is under the same regime. Similarly, it is not sustainable from an investment perspective if some suppliers in a State are essentially protected from challenging market conditions while their competitors are not.

Before determining what the Commission should do, it is time to be specific about what some entities are seeking through state policies that raise the questions posed for this conference in the first place. Markets have evolved to date and will continue to evolve, particularly at a time of rapid changes in the resource mix, among other transformations in how electricity is supplied and consumed. The Eastern ISO/RTO wholesale markets were designed to achieve economic efficiency, drive innovation, and shift risks from consumers to investors. These markets generally do so, though they can and should be improved, as EPSA has said for years. As with any joint undertaking, in this case between federal and state policymakers with input from market participants, new goals for wholesale markets and the means to achieve them can be explored. However, a key question is when, if ever, unilateral action inconsistent with well-functioning wholesale markets is appropriate. A policy approach that lets any given action prevail at all costs in the name of a “State preference” regardless of the detrimental impact on federally-regulated wholesale markets would be the exception that swallows the rule of law in the FPA.<sup>2</sup> If the Commission wishes to continue delivering the benefits of wholesale markets, it needs to direct steps be taken by the Eastern ISOs/RTOs by specific deadlines to ensure that wholesale markets are protected and not

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<sup>2</sup> As the U.S. Supreme Court pointed out in *Hughes*, a State “cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate” the intrusion. *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1298 n.11 (2016). Similarly, the Court stated that “... States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates ...” *Id.* at 1298.

undermined, as EPSA and others have proposed in specific dockets now pending before the Commission.

**The question should be asked: what legitimate *public interests* justify actions that undermine wholesale markets?**

***Is it about the level of wholesale prices?*** They are at the lowest levels in the history of the Eastern ISOs/RTOs through a combination of factors. Wholesale prices are generally half of what they were almost a decade ago.

***Is it about the level of retail rates?*** States have jurisdiction over retail rates, and increasingly while wholesale prices have declined dramatically, retail rates have not.

***Is it about environmental goals?*** Decades of experience show that wholesale markets can price in steps taken by suppliers to comply with federal and state environmental requirements. How to do so for carbon is a discussion worth having.

***Is it about reducing carbon in the absence of federal action to price carbon?*** Well, apparently not as the New York and Illinois Zero Emissions Credits are given to only some but not all nuclear units, much less to all suppliers that reduce carbon emissions.

***Is it about jobs, taxes and local economies?*** Only for some, based on politics, not economics. What about the jobs, taxes and local economies associated with the clear majority of the power sector that do not receive out-of-market payments for *their* at-risk plants or those already retired?

***Are the goals around fuel diversity, baseload power, or other attributes?*** Since the Eastern ISOs/RTOs have market rules on file with FERC, the Commission is the best forum to consider any changes to wholesale market rules to achieve these goals. Furthermore, reliability rests not on any one fuel or capacity factor level, but on whether *all* fuels, technologies and resources can function *together*. If attributes are to be priced, *all* needed operational and other attributes must be priced fairly and in a coordinated manner.

Instead of broad public interests, States are being importuned by private interests to take preferential out-of-market actions to offset the impacts of wholesale market conditions. It should not go unrecognized that many of the entities seeking such actions have publicly stated their corporate futures are in cost-of-service regulated transmission and distribution utility operations, not in making the competitive-based generation investments on which the Commission's wholesale market structure depends. In one State, the proffered reason is that corporate earnings are negatively impacted by lower wholesale prices, including forward prices on which hedges are available. Yet that is true for all wholesale power suppliers. Similarly, some argue State intervention is justified because they may not be recovering their cost of capital from wholesale rates. Yet that is true for many other wholesale suppliers. Still others justify special relief because they want to exit the wholesale business and retreat to the safer confines of regulated earnings by making their current wholesale assets more valuable to sell. How can Commission-approved price signals determine entry and exit if the Commission's wholesale markets are not protected from such out-of-market payments?

***Are wholesale market improvements, refinements and reforms needed?*** Yes, but on a fuel-neutral basis. This means defining attributes and letting those who can provide them compete to do so most efficiently. While progress has been made through the Commission's price formation initiatives, wholesale market pressures continue to accelerate. If wholesale markets are to continue functioning as intended then at least three Commission steps are necessary: (1) set firm deadlines to take strong measures to prevent resources receiving out-of-market payments from undermining price formation for market-based resources; (2) defend the Commission's exclusive jurisdiction over wholesale markets; and (3) comprehensively examine at the ISO/RTO level whether wholesale market rules properly value *all* necessary resources and *their* various attributes going forward to continue providing reliable service from environmentally-responsible facilities at competitive prices.