STATEMENT

Statement of
Commissioner Richard Glick on
The ISO-NE Capacity Competitive with Sponsored Policy Resources Proposal

Date: March 9, 2018

Docket Nos.: ER18-619

"In today's order, the Commission accepts ISO New England Inc.'s (ISO-NE) Competitive Auctions with Sponsored Policy Resources (CASPR) proposal. Although I agree with the decision to accept the CASPR proposal, I disagree strongly with the order's suggestion that state sponsored resources must either be subject to a Minimum Offer Price Rule (MOPR) or some alternative mechanism for "accommodating" the effects of state public policies. That rationale—which is not adopted by a majority of the Commissioners that support the order[1]—is ill-conceived, misguided, and a serious threat to consumers, the environment and, in fact, the long-term viability of the Commission's capacity market construct. The suggestion in today's order that the Commission will rely on MOPRs—or something similar—to mitigate the impacts of state public policies will eventually come to rank as a historically serious misstep.

"I am concerned that a broad application of the MOPR usurps the authority over generation resource decisions that Congress left to the states when it enacted the Federal Power Act (FPA). The better course of action would be for the Commission and the RTOs/ISOs to stop using the MOPR to interfere with state public policies and, instead, apply the MOPR in only the limited circumstance for which it was originally intended: to prevent the exercise of buyer-side market power.

"The FPA is clear that states, not the Commission, are the entities primarily responsible for shaping the generation mix.[2] Of course, by virtue of the FPA's jurisdictional scheme, in which authority over the electricity sector is divided between the Commission and the various states, actions taken pursuant to the states' legitimate authority will inevitably affect matters within the Commission's jurisdiction. As the Supreme Court has explained, the federal and state spheres of jurisdiction "are not hermetically sealed from each other"[3] and are instead the product of a

[1] My colleagues' separate statements indicate that paragraphs 22 of today's order did not receive the votes of a majority of the Commission. Accordingly, I will refer to those paragraphs as the order's rationale rather than that of the Commission.

[2] 16 U.S.C. § 824(b) (2012); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016); *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"). Although these cases deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the MOPR squares with the Commission role under the FPA.

[3] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016), *as revised* (Jan. 28, 2016).

'"congressionally designed interplay between state and federal regulation."'[4] Accordingly, the fact that state policies are affecting matters within the Commission's jurisdiction is not necessarily a problem for the Commission to "solve," but rather the natural consequence of congressional intent.

"Given Congress' design and, in particular, the allocation of jurisdiction over generation to the states, I believe that a Commission policy of "mitigating," rather than facilitating, state public policy preferences places the Commission in a role that Congress never intended it to play.[5] Although a broad application of the MOPR may not technically amount to the regulation of generation,[6] it has the potential to erect a significant impediment to states' efforts to shape the generation mix within their borders. By effectively making a state pay twice for capacity that is subject to the MOPR, the Commission is greatly increasing the cost that a state must bear in order to exercise the authority that Congress reserved to the state under the FPA.

"Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation. The extent of government involvement in the electricity sector is neither surprising nor concerning. After all, the electricity sector "is affected with a public interest" and the manner in which electricity is generated, transmitted, and consumed presents numerous important social and economic considerations.[7] I do not believe that it is—or should be—the Commission's mission to create an electricity market free from governmental programs aimed at legitimate policy considerations, such as clean air and combatting climate change.[8]

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[4] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central Pipeline Corp. v. State Corporation, Comm'n of Kan.,* 489 U.S. 493, 518 (1989); *id.* ("recogniz[ing] the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy").

[5] *Cf. Ari Peskoe*, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Markets*, 38 Energy L.J. 1, 38-40 (2017) (discussing the potential for the Commission to address these issues by designing capacity market rules to accommodate or reflect state public policy priorities).

[6] My point is not that the MOPR is *ultra vires*, even as it applies to state public policies. The courts have upheld the Commission's broad authority over capacity markets, including against specific challenges that such regulation amounts to an impermissible regulation of generation. *See, e.g.*, *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 96 (3d Cir. 2014); *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). By the same token, the Supreme Court has recognized that certain state efforts to incentivize the construction of new generation resources can intrude on FERC's exclusive jurisdiction where the state's action effectively "sets an interstate wholesale rate." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016). But these cases provide no answer to the argument that the MOPR interferes with the states' prerogatives in way that Congress neither foresaw nor intended or the argument that applying a MOPR to generation procured pursuant to states public policies is misguided insofar as it impairs the states' ability to make a political decision regarding the generation mix within their borders—a decision that they are far better equipped to make than we are.

[7] 16 U.S.C. § 824(a) (2012); *see generally* Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, Colum. L. Rev., (Forthcoming 2018) (discussing the social and political values represented in state policies to shape the generation mix).

[8] This principle is critically important because capacity markets do not account for arguably the most significant consequence of generating electricity: the unpriced externalities associated with greenhouse gas emissions, which are causing climate change.

"Nevertheless, today's order appears to suggest that it is appropriate for the Commission to insert itself into the states' domain and to single out particular forms of state government involvement for application of the MOPR. Notably, however, today's order stops short of articulating a principled basis, rooted in the FPA, for determining *a priori* when government support warrants subjecting a resource subject to a MOPR and when it does not. That may be because any such effort is, in the words of former Commission Chairman Norman Bay, "unsound in principle and unworkable in practice."[9] There is no way to truly untangle the capacity market from the various government programs that shape the current electricity sector, and there is nothing in the FPA that supports the Commission's current approach of applying the MOPR to only particular forms of state government involvement while ignoring other, perhaps more significant, governmental actions.[10]

"In addition, the Commission's application of the MOPR is constructed on the tenuous theoretical basis that capacity markets should treat certain types of government support as a "cost" when determining the lowest-cost set of resources needed to provide adequate capacity. Where implemented, this means that the Commission is using its authority over wholesale rates to effectively require load-serving entities (LSEs) to meet their capacity needs through resources that may conflict with the public policy priorities of the state in which the LSE is located. That is not, in my opinion, the role that Congress envisioned for the Commission when it provided the Commission with the authority to ensure that wholesale rates are just and reasonable and not unduly discriminatory or preferential.

"Today's order suggests that "investor confidence" is the Commission's guiding principle for capacity market design.[11] This vague term —which today's order makes no effort to define—implies that the Commission must ensure that a capacity market construct provides investors with certainty that they will recover their costs (presumably also with a handsome return on their investments). But that misses the mark for competitive markets. In the past, the Commission has always sought to protect competition, but not individual competitors.[12] This pursuit of investor confidence will cause the *over*-procurement of capacity, the imposition of unnecessary costs on consumers, and the outright frustration of state public policies.[13]

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[9] *New York Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (Chairman Bay, Concurring).

[10] The Commission has never seriously attempted to justify its policy of picking and choosing which types of government support should implicate the MOPR. For instance, the Commission has not come close to explaining why it is appropriate to apply the MOPR to Massachusetts' clean energy procurements while ignoring Federal government programs that subsidize a discrete group of generating resources, such as the Price Anderson Act, which imposes indemnity limits for nuclear power generators, *see* 42 U.S.C. § 2210(c) (2012). Even assuming that the Commission could justify its selective application of the MOPR, its failure to do so to date is both arbitrary and capricious and not the product of reasoned decision-making.

[11] *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 21 (2018).

[12] *El Paso Elec. Co. v. Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,182, 61,939 n.41 (1994) (explaining that the role of the "Commission is to protect competition in the bulk power markets, not individual competitors in those markets") (citing *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991)).

[13] It is not without irony that today's order espouses the need to promote investor confidence even as it fundamentally revises the purpose that the Commission's regulation of capacity markets is designed to serve. Indeed, change has been the only consistent feature of capacity markets in recent years. These repeated changes to the basic principles and components of capacity markets can only serve to undermine investors' confidence in their assessment of the current capacity markets.

"ISO-NE states in its transmittal letter that its region now has significant excess capacity,[14] demonstrating that the capacity market should send a price signal that induces existing resources to retire rather than cause new resources to enter the market. There is nothing in the record that supports the conclusion that, to ensure resource adequacy in New England, the Commission must act to ensure that investors in all forms of generation—both existing and new—remain confident that they will recover their costs.

"My concerns with the MOPR go beyond its effect on state public policies. By preventing state-sponsored resources from clearing the capacity market, the MOPR has the potential to impose enormous costs on consumers. In particular, by not giving a capacity supply obligation to resources that will be built *regardless* whether they receive such an obligation, the MOPR will force LSEs to procure more capacity than is needed to maintain resource adequacy, all of which consumers will be required to pay for. In addition, by increasing the market-clearing price in the capacity market, the MOPR increases the cost of *every* unit of capacity that clears the capacity auction. Indeed, it appears to me that this is precisely the motivation underlying certain generators' support for applying the MOPR to state policies: propping up their capacity-market revenues in order to address the economic pressure created by, among other things, continued low natural gas prices and increasingly competitive renewable energy technologies.

"These costs are even more difficult to justify in light of the fact that, as noted, the extra capacity market revenues may be used to support some of the very resources that state public policies are seeking to displace. In other words, the MOPR will, in certain cases, prevent states from relying on their chosen resource mix while also using the funds extracted from consumers to further impede those state policies. The MOPR, thus, not only blunts the impact of state policies, it forces consumers to prop up generators with attributes that may be inconsistent with the policies adopted by state legislators and regulators.

"In short, the Commission should get out of the business of mitigating the effects of state public policies and instead encourage the RTOs/ISOs to work with the states to pursue a resource adequacy paradigm that respects states' role in shaping the generation mix and while at the same time ensuring that we satisfy our responsibilities under the FPA.

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"Nevertheless, notwithstanding my concerns regarding the MOPR more generally, I believe that ISO-NE has satisfied its burden to show that the CASPR proposal is just and reasonable and not unduly discriminatory or preferential. The CASPR proposal addresses aspects of the current ISO-NE MOPR that could frustrate state clean energy policies within New England. For example, without CASPR, certain zero-carbon resources procured pursuant to Massachusetts' clean energy and diversity goals[15] would be subject to MOPR and might not clear the Forward Capacity Auction (FCA). This

[14] ISO-NE January 8, 2018 Filing at 11.

[15] An Act to Promote Energy Diversity, St. 2016, c. 188, § 12 (requiring that electric distribution companies jointly and competitively solicit cost-effective long-term contracts for clean energy generation, in part to help meet Massachusetts' greenhouse gas emission reductions requirements); *see also* Global Warming Solutions Act, MASS. GEN. LAWS ch. 21N, § 3 (2016) (creating a comprehensive framework for reducing greenhouse gas emissions in the state). CASPR applies only to state policies that were enacted prior to January 1, 2018. ISO-NE, however, states in its transmittal letter that it will work with stakeholders should states subsequently enact additional state policies that are not covered by CASPR. ISO-NE January 8, 2018 Filing at 14. I believe that it is critically important that ISO-NE do so. The failure to accommodate state public policies based only on their date of enactment may well render ISO-NE's tariff unjust and unreasonable or unduly discriminatory or preferential.

would result in an over-procurement of capacity in ISO-NE and require consumers to pay twice for capacity. Absent a mechanism to better accommodate state public policies, state efforts to meet clean energy targets will be stymied and the region could develop more generation resources than needed, all at an unnecessarily high total cost to consumers.

"The CASPR proposal will establish a substitution auction to enable certain state supported resources to receive a capacity supply obligation, displacing existing resources that elect to retire. I believe that this mechanism is just and reasonable and not unduly discriminatory or preferential insofar as it provides a mechanism by which state sponsored resources may secure a capacity supply obligation in the Forward Capacity Market (FCM), even if those resources are subjected to a MOPR that prevents them from clearing the primary auction. However, CASPR's success will ultimately depend on whether it facilitates the entry of state supported resources into the FCM. To the extent that, as implemented, the CASPR proposal does not facilitate the entry of state-sponsored resources, it may render ISO-NE's tariff unjust and unreasonable insofar as it leads to the over-procurement of capacity and the imposition of unjustifiable costs on consumers."