

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

Carbon Pricing in Organized Wholesale
Electricity Markets

Docket No. AD20-14-000

COMMENTS OF PUBLIC INTEREST ORGANIZATIONS

The undersigned Public Interest Organizations (name) (“PIOs”) submit these comments pursuant to the Notice of Proposed Policy Statement issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) on October 15, 2020¹. FERC proposes to “encourage” RTOs/ISOs to establish wholesale market rules to incorporate state-determined carbon pricing, and “clarify” that, as a general matter, FERC has jurisdiction over such market rules under Section 205.

I. Introduction

Reduction of greenhouse gas emissions has become a high priority for many states. States have adopted a wide variety of policy tools to realize mandated decarbonization of their economies. Carbon pricing is one of these tools. PIOs appreciate the Commission's effort to ensure that wholesale power markets support state carbon prices. However, it is critical that the Commission resist the temptation to use its authority over wholesale markets to promote some state policy decisions while frustrating others.

PIOs support a Commission policy statement encouraging state carbon pricing. In particular, such a statement can be most helpful in establishing that wholesale markets rules can, or must, address the issue of leakage, where a state carbon price merely shifts emissions to

¹ Carbon Pricing in Organized Wholesale Electricity Markets, Notice of Proposed Policy Statement, 173 FERC ¶ 61,062 (Oct. 15, 2020) (“Notice”).

nearby states. Leakage issues are especially important, and clearly within FERC's jurisdiction, in multi-state RTO/ISOs where only some states implement a carbon price.

II. FERC's final policy statement must be limited to matters within its concern.

A. FERC is not statutorily positioned to distinguish carbon pricing from other emissions pricing.

The Federal Power Act does not position FERC as an environmental regulator.² Rather, FERC's interest in state environmental regulation is limited to actions that “directly affect” wholesale rates” and are not reserved for exclusive state jurisdiction.³ In terms of emissions pricing, this limits FERC's field of action to the interaction of those prices with the markets FERC oversees. FERC may only distinguish state policies to the extent that they have distinguishable effects on wholesale rates, and may not attempt to otherwise evaluate the merits of state policy decisions.

FERC is thus not positioned to distinguish a state-determined carbon price from any other state-determined emissions price imposed upon the electricity sector. Such an action would constitute an environmental judgment as to the relative merits of pricing carbon emissions as compared with pricing other emissions,⁴ a judgment FERC has neither authority nor expertise to make. In order to avoid exceeding its authority, and to avoid creating discriminatory treatment between carbon pricing and other emissions pricing regimes, the Final Policy Statement should refer throughout to “emissions pricing” or similar generic policy tool rather than the specific “carbon pricing.” This is consistent with the Notice's affirmation that a variety of emissions costs are currently incorporated into rates on a similar basis to any other cost.⁵

² *Id.* at 4.

³ *Id.* at 8-12.

⁴ For example, New York State establishes social costs for carbon dioxide, methane, and nitrous oxide. The Final Policy Statement should be clear that all three prices are to be treated identically in terms of wholesale rates.

⁵ Notice at 5.

B. FERC cannot justify different treatment for state policies that seek to address environmental and public health harms through either imposing costs or conferring benefits.

Taxes and supports are equal but opposite measures: a tax (or fee) increases costs and thus reduces the quantity of a good or activity the state deems undesirable, while a support lowers costs and increases the quantity of those the state deems desirable. Both are economic policy tools intended to move a market away from the equilibrium it would have achieved absent policy intervention.

In earlier proceedings,⁶ the Commission has found that state policies that provide revenues to certain generators produce “unreasonable price distortions” and that a tariff that fails to neutralize the effects of state policy benefits lies “entirely outside the zone of reasonableness.”⁷ In contrast, the Notice finds that a state-imposed carbon price could significantly improve the efficiency of markets.⁸

FERC has not articulated the reasoning behind such radically different treatment of similarly situated state policy actions. That may be because if the inquiry is limited to the impacts on FERC-jurisdictional rates, there is no distinguishing between imposing a cost on undesirable resources and conferring a benefit on desirable ones. Both shift market clearing prices, and both cause some substitution of cleared resources at the margin. To be sure, a state-imposed cost will raise prices while state support will lower prices, but these are symmetric outcomes that the Commission should treat equally. In either case, the market functions properly when it correctly sends a price signal that reflects the state policy action, eventually leading to market entry or exit.

⁶ E.g., 163 FERC ¶ 61,236 (“PJM June 2018 Order”)

⁷ *Id.* at 149-150.

⁸ Notice at 15.

The Commission has found that state policies conferring a benefit on certain resources create significant uncertainty “because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies.”⁹ In contrast, the Notice cites “market certainty” as a potential benefit of incorporating carbon pricing into RTO/ISO markets.¹⁰ State subsidies and carbon pricing introduce similar uncertainty: both are defined by state action subject to change, and the price for both may be set either by fiat or through market-based auction mechanisms. Both alter the competitive playing field and create the possibility that investors face losses or windfalls from state policy actions. FERC fails to explain the apparent reversal between concluding that one state policy action creates uncertainties that ‘compromise the market’ while another similarly situated state action creates stability.

As described further in the next section, we support efforts by FERC to examine how its wholesale markets can facilitate the achievement of state-established clean energy objectives, but the Commission must do so in a way that does not arbitrarily distinguish among the policy tools that states choose to utilize—facilitating the effectiveness of some policy tools, while thwarting the effectiveness of others. Doing so places FERC in a policymaking role outside its core competency and likely outside the jurisdiction granted the agency under the Federal Power Act. We therefore urge the Commission to reconcile its positive view of its role in enabling state-determined carbon pricing with its prior decisions that work to nullify other state policy supports for resources that avoid negative environmental externalities.

⁹ PJM MOPR 2018 Order at 150.

¹⁰ Notice at 14.

C. Emissions pricing is not a substitute for other state policy tools.

The distinctions the Commission has made in favor of carbon pricing appear to be based on judgments outside the Commission's jurisdiction. The Commission cites technological neutrality as a benefit of carbon pricing, and characterizes carbon pricing as an "efficient market-based tool."¹¹ However the FPA grants states authority over generation with no mention of efficiency, markets, or technological neutrality.¹² FERC may not enforce its preferences on state policy in areas where FERC does not have jurisdiction.

Many participants at the Technical Conference argued that carbon pricing is a particularly efficient policy tool. This may be true, but it is irrelevant for purposes of distinguishing carbon pricing from other state policy actions in the context of FERC decision making. It is not the Commission's place to evaluate the merits of state policy, or to discriminate between state policies based on its own judgment of the policy's efficiency.

More generally, in designing their policies, state legislators and regulators may consider matters far beyond and outside of FERC's authority and jurisdiction. In regulating power plants and protecting the public health and welfare, states are fully within their authority to consider environmental justice, land use, labor, economic development, environmental quality, aesthetics, and nearly limitless other criteria. In contrast, FERC must limit its decision making to factors related to wholesale rates. Evaluating the purported 'efficiency' of a state policy is thus an inadvisable task for FERC, as the benefits and costs considered in state policymaking include a myriad of factors outside FERC's jurisdiction.

Conversely, though the effects of various state policies may be indistinguishable in terms of their effect on FERC-jurisdictional markets, the policies are not interchangeable in

¹¹ *Id.*

¹² 16 USC 824(b)(1).

terms of matters of concern to states. Emission pricing policies are not well-suited to address local issues, are often politically infeasible when implemented at price levels high enough to drive transformation, and do not allow states to control the specifics of resource development.¹³ Several state legislatures have passed or are considering laws specifically addressing these issues and greenhouse gasses in unified policies.¹⁴ A policy statement from FERC privileging emissions pricing over other policy approaches inhibits states' ability to fulfill their legal mandates and pursue other policy approaches aimed at issues outside FERC's jurisdiction.

In particular, carbon pricing presents unique concerns regarding environmental justice, as this tool does not lend itself to implementation of state decarbonization policies in a manner that ensures emission reductions in overburdened communities, nor to steer investment in clean resources to communities that are most in need of economic development. State and local policy makers must have the flexibility to design policies to reflect the needs of environmental justice communities, assess policy options to address both the historical impacts of the energy system and the going-forward policy goals and objectives. A bifurcated FERC approach where carbon pricing is the only state policy that avoids mitigation will tend to steer states and local governments away from tools that can achieve decarbonization while also addressing persistent inequities in the energy system.¹⁵

¹³ See, e.g., Matto Mildenerger and Leah C. Stokes, *The Trouble with Carbon Pricing* (September 2020). Boston Review. Available at <http://bostonreview.net/science-nature-politics/matto-mildenerger-leah-c-stokes-trouble-carbon-pricing>. See also, Jeffery Ball, *Why Carbon Pricing Isn't Working* (July/August 2018). Foreign Affairs. Available at <https://www.foreignaffairs.com/articles/world/2018-06-14/why-carbon-pricing-isnt-working>. See also Rosenbloom et. al., *Opinion: Why carbon pricing is not sufficient to mitigate climate change--and how "sustainability transition policy" can help* (September 2020) Proceedings of the National Academy of Sciences of the United States of America.

¹⁴ See, e.g., New York State Climate Leadership and Community Protection Act, ch. 106; Massachusetts H.B. 4912; 2020 Va. Acts ch. 1193 and ch. 1194 <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1526>.

¹⁵ It would be particularly inappropriate for the Commission to adopt any binding policy regarding carbon price as the favored state policy without soliciting input from affected environmental justice communities in a more meaningful way than has thus far been provided. The very limited time provided by the Commission to offer comments on this Notice is insufficient to allow for input by under-resourced community members and

PIOs remain concerned that should the Commission act to encourage one type of state policy tool so closely on the heels of neutralizing another, it would be merely acting to substitute its policy preferences for states' in matters over which Congress has granted states exclusive authority.

III. Considerations for evaluating proposed tariffs that incorporate emissions pricing.

We note Commissioner Danly's concerns that the Final Policy Statement risks becoming little more than a reiteration of established Section 205 rights.¹⁶ We suggest that outcome can be avoided by narrowly focusing the Final Policy Statement on the few issues related to emissions pricing that both fall under FERC's authority and remain unresolved.

A. Existing precedent suffices for emission prices imposed on in-state generation.

The Notice explains that longstanding policy is to permit generating resources to include environmental costs in wholesale market rates.¹⁷ From the record to date, this appears to be a matter of general consensus. We believe the only open question on this issue is whether an RTO/ISO tariff that does not allow recovery of state-imposed environmental costs could be just and reasonable. Beyond clarifying that RTO/ISO tariffs may not prevent generators from recovering those costs, there appears to be little work for the Commission here.

B. State authority to impose emission prices on out-of-state supply can be clarified.

Leakage is a concern for states that are within a multi-state RTO/ISO and implement emissions pricing. The Commission has approved at least one tariff imposing a state emission price on out-of-state resources dispatched to serve in-state load.¹⁸ Such an arrangement

organizations, particularly when these communities are already under disproportionate strain due to the pandemic and economic downturn.

¹⁶ Danly Dissent at 5.

¹⁷ Notice at 5.

¹⁸ Notice at 6.

necessarily involves matters under both state and FERC jurisdiction, and so is ripe for clarification in the Final Policy Statement. In particular, the Commission may consider providing guidance both on the criteria for evaluating an RTO/ISO tariff that addresses leakage and for under what circumstances failing to incorporate state pricing regimes in an RTO/ISO tariff rises to the level of unjust or unreasonable.

C. The Commission should clarify the interaction between emissions pricing and offer mitigation.

In several recent orders, the Commission has found that state subsidies unreasonably distort markets, and ordered compensating mechanisms to mitigate this impact. Resources that receive state subsidies are subject to a variety of limitations on their participation in FERC jurisdictional markets. The Final Policy Statement should clarify how those provisions apply to resources benefiting from state emissions pricing.

In PJM, the Commission has defined a state subsidy as:

a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.

In a later order, the Commission clarified that any policy meeting condition (1) above along with any of conditions (2), (3), or (4) is considered as receiving a state subsidy.

Emissions pricing regimes appear to meet this definition. By design, they convey indirect financial benefit that supports the construction, development, and operation of

low-emissions resources.¹⁹ It could hardly be otherwise: if a policy did not support operation or development of desired resources, it would serve no purpose.

In response to these concerns, the Commission specifically ruled that one specific emission pricing regime, the Regional Greenhouse Gas Initiative (“RGGI”), is not a subsidy because it does not provide payments to resources.²⁰ The Commission declined to address carbon pricing programs generally. The Commission also declined to articulate criteria for determining when price inflation due to state policy constitutes an indirect financial benefit. However, the Commission has determined that there is no threshold below which a state subsidy is regarded as having a *de minimis* impact on markets.

In a later order on the Minimum Offer Price Rule (MOPR),²¹ the Commission declined to implement a mechanism for parties to obtain clarity as to if a particular policy constitutes a state subsidy. Instead, the commission approved tariff rules that rely on sellers’ “good faith determination” as to whether they are receiving a state subsidy.²²

This combination of rulings creates unresolvable uncertainty for policymakers and market participants. The Commission should use the Final Policy Statement to clarify several questions:

- What are the conditions for a price increase resulting from emissions pricing to not constitute an “indirect financial benefit”? Is such a finding resource-specific, in that some resources benefit while others suffer under an emission pricing regime?

¹⁹ See 169 FERC ¶ 61,239, Glick Dissent at 22-24.

²⁰ 171 FERC ¶ 61,035 at 390.

²¹ 173 FERC ¶ 61,061 at 320-325.

²² *Id.* at 323.

- Emission pricing can result in the operation of a resource that would not otherwise be dispatched. What is the criteria for distinguishing this from other “indirect financial benefits that support the operation of an existing resource”?

III. Conclusion

For the foregoing reasons, PIOs support a Final Policy Statement that supports wholesale market rates that incorporate and facility state emissions prices, especially in regard to preventing interstate leakage. We emphasize the importance of the Commission limiting its inquiry to matters within its jurisdiction, and implore the Commission to resist using market rules to intrude upon or influence matters left to the states.

Respectfully submitted this November 16, 2020,

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Certificate of Service

I hereby certify that I have this day or the next served the foregoing document upon each person designated on the official service list compiled by the secretary in this proceeding.

November 16, 2020

/s/ Ashley Leung
Natural Resources Defense Council