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Discussion Draft on Accountability and Department of Energy Perspectives on Title IV: Energy Efficiency and Accountability; Subtitle B--Accountability

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The American Public Power Association (APPA) is the national service organization for the more than 2,000 not-for-profit, community-owned electric utilities in the U.S. Collectively, these utilities serve more than 48 million Americans in 49 states (all but Hawaii). APPA appreciates the opportunity to provide the following testimony for the House Energy and Commerce Committee's Subcommittee on Energy and Power hearing on the accountability subtitle of the Title IV Discussion Draft.

APPA was created in 1940 as a nonprofit, non-partisan organization to advance the public policy interests of its members and their customers. We assist our members in providing reliable electric service at a reasonable price with appropriate environmental stewardship. Most public power utilities are owned by municipalities, with others owned by counties, public utility districts, and states. APPA members also include joint action agencies (state and regional entities formed by public power utilities to provide them wholesale power supply and other services) and state, regional, and local associations that have purposes similar to APPA.

Collectively, public power utilities deliver electricity to one of every seven electricity consumers. We serve some of the nation's largest cities, including Los Angeles, CA; San Antonio, TX; Austin, TX; Jacksonville, FL; and Memphis, TN. However, most public power utilities serve small communities of 10,000 people or less.

In terms of public power's generation portfolio, in 2013 these utilities generated 169.6 million megawatt-hours (MWhs) of electricity from coal; 76.9 million MWhs from natural gas; 62.78 MWhs million from nuclear; 69.8 million MWhs from hydropower; and 8 million MWhs from other sources such as non-hydropower renewable energy like wind, solar, and geothermal. It is important to note, however, that public power utilities supply approximately 15 percent of electricity to end-users in the United States, but only produce 10 percent of the megawatt-hours generated. To make up the difference, public power utilities purchase power at wholesale from other entities such as investor-owned utilities, independent power producers, rural electric cooperatives, federal power marketing administrations, and the Tennessee Valley Authority.

Introduction

In this testimony, I will discuss APPA's views on several issues relating to Subtitle B, "Accountability," of Title IV of your discussion draft. Specifically, APPA very much appreciates the attention given in the discussion draft to evaluating and improving wholesale electricity markets. We have expressed concerns over the past 10 years about the restructured wholesale electricity markets operated by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs) (referred to collectively as "RTOs"). Many of APPA's members must face the day-to-day complexity and costs of operating in these markets. Adding to APPA's concerns are the time-consuming and resource intensive stakeholder processes, and the lack of transparency in the governance processes of some of the RTOs.

Public power utilities operating in these markets are located within the boundaries of the RTOs' footprints. They are usually embedded in the transmission systems of larger investor-owned utilities that have made the choice to participate in a particular RTO (and even sometimes to change RTOs). Hence, while public power utilities' participation in these markets may in theory be "voluntary," in practice it is not. With their participation effectively mandated and the RTO stakeholder processes in most regions heavily skewed toward the interests of large transmission and generation asset owners, many public power utilities' only choice is to work closely with Congress and FERC to seek needed reforms. APPA looks forward to working with the Subcommittee and other stakeholders on this important issue.

Discussion Draft Sections 4211– FERC Office of Compliance Assistance

Overview

Section 4211 of the draft bill would add a new section 320 to Title III of the Federal Power Act and establish a new Office of Compliance Assistance at the Federal Energy Regulatory Commission (FERC or Commission). This new Office is to be staffed with at least 10 employees drawn from other offices at the Commission "if possible." The Office would be headed by a Director selected by, and reporting directly to, the Commission. No new funding authorization is provided.

The Director's duties would be to "promote improved compliance with Commission rules and orders" by making recommendations to the Commission on specified subjects, providing Commission-regulated entities "the opportunity to obtain timely, including real-time compliance guidance," and "providing information to the Commission and Congress to inform policy with respect to energy issues" under the Commission's jurisdiction. The bill specifies that the Director is to make recommendations to the Commission regarding three subjects: "the protection of consumers;" "market integrity and support for the development of responsible market behavior;" and "the application of Commission rules and orders in a manner that ensures markets are not impaired and consumers are not damaged by inconsistent application."

The Director is charged with issuing "appropriate" reports and guidance to the Commission and regulated entities "identifying and monitoring market practices, proposing initiatives, and addressing potential improvements to both industry and Commission practices," and with promoting improved compliance "through outreach, publications, and, where appropriate, direct communication" with regulated entities.

APPA Comments/Recommendations

APPA supports efforts to ensure stronger compliance with the Commission's regulations by regulated entities. APPA, however, is not sure that mandating the creation of another Commission office, with the additional bureaucracy and employees such an office would entail, is the best way to accomplish that goal.

According to its website (http://www.ferc.gov/careers/careers.asp), the Commission already has approximately 1,300 employees working at the Commission's Washington, D.C., headquarters and at regional offices in Atlanta, Chicago, New York, Portland, and San Francisco. The existing Commission staff can and does make recommendations to the Commission about energy policy-related matters, including compliance matters, and provides information to the Commission, Congress, regulated entities, and the public. The Commission currently has an Office of External Affairs which deals with the public regularly, and within that office has a unit of three employees dedicated to congressional affairs (http://www.ferc.gov/media/cong-affairs.asp).

Moreover, the Commission already has several mechanisms for providing compliance guidance to regulated entities: formal Commission orders, regulations, and policy statements; no-action letters, legal opinions, and accounting letters by Commission staff; information on its extensive website; an enforcement hotline and an online compliance help-desk (http://www.ferc.gov/contact-us/compliance-help-desk.asp) via which entities can seek compliance advice from Commission staff; and the availability of in-person meetings and telephone discussions with Commission staff. In fact, the Commission staff has for many years made itself available to regulated entities intending to make filings with the Commission through "pre-filing conferences." At these conferences, regulated entities can obtain informal staff feedback on the content of their draft applications before they file them. From time to time, interested third parties have questioned this practice, but the fact remains that regulated entities can and regularly do obtain such Commission compliance guidance.

It might, however, be appropriate for the Commission to review its current processes and procedures to ensure that regulated entities can obtain meaningful and timely compliance guidance. APPA understands that a representative of the Commission will be testifying at this hearing, and looks forward with interest to the views of the Commission on this proposed section.

Discussion Draft Section 4212 – Improving Transparency in FERC Investigations

<u>Overview</u>

Section 4212 of the draft bill directs the Commission to revise, in several particular respects, its procedural rules and practices governing "any investigation, or any proceeding in which the Commission may assess a civil penalty."

<u>APPA Comments/Recommendations</u>

Proposed Section 4212 would provide additional procedural rights to entities that are the subject of Commission investigations. In the absence of a compelling reason for Congress to step in, APPA believes that the Commission is generally best positioned to set out the procedures and processes applicable to its own internal investigations.

As a general matter, APPA notes that the subjects of enforcement proceedings at the Commission, especially in wholesale market manipulation cases, are often large corporations, investment banks or other financial entities with substantial resources. They can and do hire major corporate law firms with experienced enforcement practices to litigate each and every aspect of such an enforcement proceeding. In civil penalty cases, the Federal Power Act allows entities to elect either an evidentiary hearing before a

Commission administrative law judge or a trial *de novo* in a federal district court. On the other hand, electric consumers who may have been victimized by market manipulation or other deceptive practices have no representation in Commission investigations, other than through the Commission's enforcement staff. In fact, consumers and the public generally do not even know that an investigation is ongoing until it is settled or a notice to show cause is issued, unless the regulated entity itself decides to disclose the fact publicly or the Commission decides to issue what is known as a Staff's Notice of Alleged Violations. This procedure is laid out in *Enforcement of Statutes, Regulations, and Orders*, Docket No. PL10-2-000, "Order Authorizing Secretary to Issue Staff's Notice of Alleged Violations," 129 FERC ¶ 61,247 (2009), *clarified and reh'g denied*, 134 FERC ¶ 61,054 (2011) available at http://www.ferc.gov/enforcement/alleged-violation.asp

Even if the Commission does issue such a preliminary notice, and the public is therefore aware of an investigation, members of the public have no rights to intervene in the case or to otherwise participate in it. Hence, the public must rely on the Commission's Enforcement Staff to protect their interests as electricity consumers. Given that this is the case, any additional due process protections Congress might decide to give subjects of enforcement investigations must not adversely affect the ability of FERC's enforcement staff to protect the public from market manipulation.

Moreover, very complex RTO market rules and tariff provisions give market participants more opportunities to engage in at best, questionable, and at worst, unscrupulous, behavior. Clearer and simpler market regimes that rely less on centralized administrative constructs, with their complicated rules, and more on bilateral market transactions and activities of individual market participants could reduce opportunities for market manipulation in the first instance.

Discussion Draft Section 4221 – Evaluating and Improving Wholesale Electricity Markets

Overview

Many of the wholesale electricity markets that the Commission has authorized are not in fact markets as that term is popularly used. Rather, they are highly complex administrative constructs with a myriad of applicable rules, which change with alarming frequency. APPA's concerns about RTO-operated markets include: extensive and frequently changing rules; volatile prices, which can rise to very high levels; and limited data transparency. Adding to APPA's concerns are the complex, time-consuming and resource intensive stakeholder processes and the lack of transparency in the governance processes of some of the RTOs. We also are concerned about FERC's apparent failure to consider the cumulative impact of RTO market outcomes, stakeholder processes, and governance on consumers.

The most problematic of the RTO-operated markets are the capacity markets, and specifically the mandatory capacity markets that are operated by the RTOs in the East (the PJM Interconnection, ISO New England and parts of the New York ISO). These administrative constructs account for a substantial share of the total electricity costs consumers and businesses in these regions pay. Unfortunately for electric consumers, these mechanisms have not demonstrated that they can fully support a reliable and diverse supply of power and incent the building of new generation resources where they are most needed. Instead, these constructs have required consumers to pay billions of dollars in costs, with little concomitant benefit.

Section 4221 would require FERC to direct each "regional transmission entity" to develop, in consultation with its stakeholders, a plan describing how its current market rules, practices and structures either currently meet a set of criteria or will be revised to meet such criteria. .

APPA very much appreciates the Subcommittee's interest in this issue, as evidenced by the Discussion Draft. But APPA must note the irony inherent in mandating the development of such a plan through a stakeholder process. In certain RTOs, the stakeholder process is part of the problem that electric consumers and their representatives face. For-profit owners of substantial generation and transmission assets exercise substantial influence in some RTOs' stakeholder processes. These asset owners can, and in some cases have, shifted control of their assets from one RTO region to another (for example, leaving the Midcontinent Independent System Operator and joining the PJM Interconnection LLC) to maximize their financial returns on those assets. This threat has the practical effect of making RTOs very responsive to these entities' concerns. Other RTO participants, including smaller utilities embedded in the transmission systems of these large asset owners, have little ability to make good on such a threat.

Moreover, large asset owners simply have more people and resources to devote to the stakeholder processes. Given the large number of work groups, task forces, and committees that each RTO sponsors, it is simply harder for customer-side representatives to attend and participate in all relevant meetings, and to evaluate and understand the impacts of the proposals being made.

Turning to the criteria listed in section 4221(b), application of a number of them could no doubt improve these markets, but others are more problematic. Additionally, these criteria represent a mix of individual goals that may not fit together well as a comprehensive whole. For example, the section 4221(b)(2) criterion that RTOs "properly value" generation that can provide electricity on a continuous basis may contradict the section 4221(b)(3) and section 4221(b)(4) criteria addressing resource diversity and the equitable treatment of different resources and business models. Below is a more detailed discussion of the specific criteria.

<u>APPA Recommendations on Specific Criteria</u>

"(1) result in just and reasonable rates for ratepayers;"

APPA strongly agrees that this is a fundamental standard that any wholesale market rule must meet; in fact, it is required under the Federal Power Act. FERC to date has attempted to rely on competitive forces in the RTO-operated markets to ensure this statutory standard is met. Lack of sufficient competition, however, has led to substantial mitigation of bids and offers, with nonetheless questionable results. The Commission has been reluctant to closely examine the impacts on consumers as a key factor when approving RTO market rule changes. As a result, the Commission's Office of Enforcement has prosecuted several high profile market manipulation cases in RTO regions and required a number of market participants to disgorge revenues arising from their manipulation of RTO market rules and exploitation of RTO tariff loopholes. APPA commends the Commission for these activities, but notes that, to date, and as mentioned above, the Commission has not seen fit to undertake any broader investigation of whether consumers in these market regions are sufficiently protected by RTO market regimes. FERC has held a number of "technical conferences" to focus on discrete market issues, yet the fundamental questions of whether consumers are in fact benefitting from these markets and whether the markets are truly competitive has not been addressed.

"(2) properly value generation facilities that have reliability attributes that include:

> *"(A) operational characteristics that enable the generation of electric energy on a continuous basis for an extended period of time per day over a period of not less than 10 days;*
>
> *"(B) operational characteristics that enable the generation of electric energy during emergency and severe weather conditions; and*
>
> *"(C) essential reliability services, including frequency support and voltage support, to maintain reliability of the bulk-power system;"*

APPA agrees there needs to be a certain level of base-load generation (*i.e.*, power generation that can be available at full output for an extended period as needed by the system operator to ensure reliable operations). It is also important that system operators have sufficient resources that can generate power during emergencies and provide necessary support to the system, such as frequency and voltage support. But it is important to ensure that "properly valuing" such resources does not equate to imposing unnecessarily high costs on consumers by over-compensating such resources. In recent years, both the ISO New England and the PJM Interconnection have proposed increasingly costly rule changes in the name of enhancing and assuring reliability. Ironically, these increased costs have been proposed to address the problem that capacity providers have not always been available during system peak times; *i.e.*, despite having been paid in advance to provide capacity (in effect, for their promise to generate power at the command of the system operator), certain generators were unable to provide power when it was most needed. APPA agrees that such performance issues need to be addressed, but not with the costly and extensive rule changes these RTOs have proposed. Stakeholders recently sent Members of Congress in the PJM region a letter addressing one such proposal—PJM's capacity performance proposal. The letter was signed by 14 public power utilities and associations (including APPA members), electric cooperatives, a group of large industrial customers, state commissions and consumer advocates. The letter explains that PJM's capacity performance proposal "would dramatically increase electric costs without providing meaningful and necessary improvements in system reliability."

Moreover, there is value in having a diverse fleet of resources, as enumerated in later criteria. To the extent that RTO market rules over-compensate resources that can meet the criteria of providing continuous operation, such rules will discourage hydropower, non-hydropower renewables, and demand response. Yet those resources are valuable components of an electricity resource portfolio, especially if electric utilities are going to be required by the EPA to reduce the carbon emissions associated with their power supplies.

"(3) Facilitate fuel diversity, resource adequacy, and reliability, including the cost-effective retention and development of needed generation;"

Such criteria are essential measures of any resource adequacy construct, and APPA supports their inclusion in the draft. The current mandatory capacity markets, however, are not the optimal means to achieve such goals. With regard to fuel diversity, mandatory capacity market mechanisms to date have not distinguished between technology types or between existing and new units. As noted above, certain proposed rule changes promise to tilt the scales in favor of base-load generation units. Therefore critical needs may not be addressed, including: adequate flexible ramping capability (an operational requirement needed to match the variability of some renewable resources that come online when the sun is shining or wind is blowing, and go offline when they are not); reliability needs created by new environmental regulations and retiring coal plants; and the coordination of natural gas pipeline infrastructure needs with the increasing electricity generation from natural gas.

"(4) Promote the equitable integration and treatment of generation resources, business models, and advanced grid technologies;"

It is not clear what is meant by "equitable … treatment of generation resources." As noted above, treating each megawatt as equal to every other megawatt in the capacity markets does not produce an optimal mix of resources, such as a diverse array of fuel types and technologies. Load serving entities (LSEs, which are entities, including public power utilities and rural electric cooperatives, directly serving end-use customers), states, and local regulatory bodies have policy reasons to support development of specific types of resources. Such choices need to be respected in the wholesale markets. Therefore, a market that treats each megawatt "equally" would be inequitable if it did not respect state and local resource policies and preferences.

The eastern mandatory capacity markets, with their current restrictions on self-supply, are a threat to the public power business model. Such restrictions involve what is known as "minimum offer price rules"

(MOPRs) or "buyer-side mitigation" (BSM). While tariffs regarding MOPRs or BSM differ slightly in the details among the three Eastern RTOs, the basic concept is to replace lower price offers to sell new capacity with administratively determined higher price offers, making it more difficult for these new plants to "clear" the relevant capacity auctions. Because the capacity markets are mandatory, utilities that construct or contract for generation to meet their own customers' power needs still must offer their self-supply capacity into the annual or sub-annual capacity market auctions. If that capacity does not clear the auction, the utility nevertheless would be required to purchase capacity from the market to meet its capacity obligation—thus paying twice for capacity: once for its own power plant/supply arrangement and again for the capacity obtained from the "market." The original capacity market rules in PJM and ISO-NE contained provisions ensuring that self-supply units would clear the auctions, avoiding this double-collection dilemma. But the Commission eliminated these exceptions for self-supplied generation through subsequent rule changes. The revised capacity market rules now threaten a cornerstone of the business model for public power and cooperative utilities—their ability to self-supply their own customers.

"(5) Identify and address regulatory barriers to entry, market-distorting incentives, and artificial constraints on competition;"

As explained in the discussion above of the criteria in paragraph (4), the current MOPR and BSM rules constitute regulatory barriers to entry and artificial constraints on competition. APPA has concerns, however, about the term "market-distorting incentives," which has been used by merchant generation interests to disparage state-sponsored generation resource development. The impetus for RTOs to create new buyer-side mitigation rules and to make existing buyer-side mitigation rules more stringent resulted from merchant generator complaints. Those complaints followed state actions to procure new generation resources to address projected shortfalls, through competitive procurements for new generation. For example, in 2011, New Jersey Gov. Chris Christie signed legislation requiring bilateral generation contract procurements for the state's investor-owned utilities, and the Maryland Public Service Commission (MD PSC) issued an order requiring the state's utilities to issue an RFP to procure long-term contracts with developers of new natural gas-fired units. The New Jersey Board of Public Utilities found that "New Jersey's reliance on the Reliability Pricing Model capacity market, however, has been a disappointing experience which can impact the state's economic health and its prospects for recovery from a severe and lengthy recession.'' Similarly, the MD PSC concluded that ''PJM's Reliability Pricing Model has been unsuccessful in attracting appreciable new generation to the State since its inception in 2007….''

These procurements were conducted only after the states experienced a lack of needed new power generation despite billions of dollars being spent on capacity payments. Opponents of such efforts were, in reality, concerned about the resulting reduction in price, but used the rhetoric of "artificial subsidies" or "distortions of the markets" when describing these state procurements and resulting contracts. Yet such contracts are often needed to fill in gaps that the markets do not address and are, therefore, a healthy response rather than a distortion. As a result, APPA would propose striking the term "market-distorting incentives" from paragraph (5), because it has been so broadly and incorrectly used.

"(6) Provide accurate price formation in energy markets, including by—

"(A) reflecting the real value and marginal cost of providing electric energy;

"(B) observing the principles of dispatch-based pricing;

"(C) minimizing out-of-market actions and payments;

"(D) improving transparency regarding dispatch decisions, including the need for out-of-market actions and payments; and

"(E) ensuring accurate day-ahead unit commitments;"

While in theory these criteria appear on their face to be desirable goals of an energy market, some of the underlying propositions are problematic. Many of these criteria were the basis for proposals made by merchant generation owners in three workshops and filings in FERC Docket No. AD14-14-000, *Price Formation in Energy and Ancillary Services Markets Operated by RTOs and ISOs*. APPA believes these proposals presage the energy market changes that could result if the paragraph (6) criteria were applied.

"Minimizing out-of-market actions and payments" would not result in cost minimization. Instead, it refers to moving "out-of-market" payments into the locational marginal price (LMP) established in the RTO markets, which is paid hourly to *all* megawatt-hours of generation. For example, an out-of-market payment may be made to a unit that is dispatched by an RTO a day ahead, but is no longer needed in real time. That unit still incurs costs such as fuel procurement or start-up costs to stand ready to generate in real time, even though it is not called upon. Or a unit may be dispatched in only one hour, but must operate for the prior three more hours because it must ramp up to provide service in that one hour. That unit also incurs costs for those three hours. These units may be "made whole" by the RTO and compensated for their unique costs. These types of payments are known as "uplift" payments. They are made directly to the unit owner in question and are not included in the LMP paid to all electricity generated. It is fair to ensure individual generators do not lose money by following market rules, but would be very costly to have those costs included in the price that is paid to all generators. Moreover, such generator-specific and short-term costs are unlikely to drive future investment decisions.

Likewise, the Electric Power Supply Association (EPSA) submitted a paper to FERC on "dispatch-based pricing." The paper's author recommended that the current approach of basing energy market prices on short-run variable costs be replaced by a system that would adjust those prices after-the-fact to reflect the actual dispatch of the system, including operator actions outside of the regular cost-based dispatch. How this would work in practice is unclear. APPA recommends that dispatch-based pricing and its potential impacts be better understood prior to considering it as a possible statutory criteria. Certainly, making after-the-fact adjustments to clearing prices long after the market has cleared would introduce significant additional degrees of complexity and price volatility into the markets.

APPA agrees that "improving transparency" to better understand operator actions would be beneficial, so long as any potential risks of market power or gaming resulting from the release of such information are assessed and addressed. For example, improvements in the timing of the release of information on operator actions to address system constraints could provide market participants a better idea of as to how they could contribute to solving constraints.

APPA has long supported greater transparency with regard to the offers to sell power into the wholesale markets as a means to mitigate market power, which proposals have often been opposed by the merchant generators. We noted in our comments in the FERC docket on price formation, made jointly with the National Rural Electric Cooperative Association (NRECA), that:

> Curiously, some of the suppliers in this docket who seek greater transparency regarding system conditions and operator-actions regarding unit commitment and dispatch have long argued against greater transparency in real-time posting of their energy offers. APPA and NRECA suggest greater transparency in the posting of energy offer data would be at least equally beneficial as a means facilitating public oversight of the markets as greater transparency regarding system constraints and unit commitment and dispatch decisions. More sunlight should provide added insurance against the exercise of market power or other forms of price malformation.

Ensuring "accurate day-ahead commitments" is a desirable goal. RTOs, however, need the flexibility to adjust real-time dispatch for reliability purposes as unforeseen events arise. For example, not all voltage constraints can be accurately modeled in the day-ahead market. Should a voltage constraint arise, the

RTO operator may need to dispatch resources not committed in the day-ahead market, with their costs recovered though uplift. Such operator actions to ensure reliability are likely always going to be a part of the RTO functions. APPA supports improving accurate day-ahead commitments through better modeling and forecasting, but not through putting the uplift associated with such fact-specific operator actions into the LMP, as discussed previously.

Finally, all RTOs are, or have been, in the process of reforming their energy and ancillary services markets' pricing mechanisms. A federal requirement that such price formation meet specific criteria would represent a one-size-fits-all approach that would interfere with those RTO-specific efforts.

In short, there are substantial risks of unintended consequences, including increased prices and opportunities to exercise market power, which could result from changes to the energy markets to meet these criteria. Moreover, the Commission is already considering many of these issues in its proceeding in Docket No. AD14-14-000. APPA therefore recommends that paragraph (6) be struck from Discussion Draft section 4221(b).

"(7) ensure fairness and improved transparency in governance structures and stakeholder processes, including meaningful participation by both voting and non-voting stakeholder representatives;"

APPA agrees with the inclusion of this criterion, so far as it goes. As I previously noted, the governance structure of certain RTOs does not always ensure adequate representation of the views of all entities affected by RTO policies. RTO stakeholders include large for-profit generation and transmission owners, distribution utilities, including public power and cooperative utilities, industrial customers and other end users, and state consumer advocates. (State commissions participate in meetings, but generally do not have voting rights.) Smaller stakeholders often do not have the staff or resources to participate fully in numerous and lengthy stakeholder meetings. Stakeholders' positions often break down accordingly to economic interests, preventing a clear consensus. And at times, RTO governing boards have directed RTO managements to submit tariff or market rule changes to FERC without the majority support of the RTO's stakeholders.

One example of an RTO regulatory filing without stakeholder support was ISO-NE's request and receipt of FERC approval for a controversial proposal to establish pay-for-performance incentives and penalties for generators. The proposal was supported by just 10 percent of the membership.

Given the inequalities inherent in the stakeholder processes of some RTOs, however, it does not make sense to leave evaluation of this criterion to those very RTO stakeholder processes. This was actually attempted in FERC Order No. 719, issued in *Wholesale Competition in Regions with Organized Electric Markets*, Docket Nos. RM07-19-000 and AD07-7-000, 125 FERC ¶ 61,071, 73 Fed. Reg. 64,100 (October 28, 2008). Rather than requiring the RTOs to undertake specific reforms to their stakeholder and governance processes, FERC in Order No. 719 found that any reforms would be "best developed through the collaborative efforts of each RTO or ISO and their respective customers and other stakeholders." *Id.* at Paragraph No. 515. The results were predictable. The RTOs asserted that in their subsequent compliance filings that their processes needed little reform, and little changed as a result. APPA therefore recommends that the subcommittee hold further hearings or take other steps to examine RTO stakeholder processes and discern best practices, or require the Commission to do so.

"(8) facilitate the development of necessary natural gas and electric transmission infrastructure;"

APPA recognizes the need for new natural gas and electric transmission infrastructure, but adding this criterion may be duplicative in one respect and beyond the scope of an RTO in another. RTOs already undertake extensive regional transmission planning processes. Natural gas pipelines, on the other hand, are outside of the purview of the RTOs. A better approach would be to improve long-term planning and contracting for natural gas-fired generation resources, which would allow entities developing those resources to contract for the necessary pipeline capacity, including new capacity. The absence of adequate long-term planning and over-reliance on short-term market signals has led to an increasingly heavy reliance on natural gas for both generation and heating in some regions, such as New England, but without adequate development of supporting natural gas infrastructure. Moreover, there are other steps that can be taken to improve infrastructure development, such as easing permitting and streamlining transmission and gas pipeline siting.

"(9) consider, as appropriate, State and local resource planning;"

State and local resource planning should be the primary tool to determine needed supply and demand-side resources, rather than reliance on the "markets." For example, implementation of the Environmental Protection Agency's "Clean Power Plan" will necessarily rely on such state resource planning, given the statutory framework of Section 111(d) of the Clean Air Act. The RTO markets should remove barriers to the procurement of resources required to carry out such plans. Such barriers include the buyer-side mitigation rules discussed previously. Likewise, state and local resource planning should not be secondary to other considerations. APPA therefore proposes striking the phrase "as appropriate" from paragraph (9).

"(10) mitigate, to the extent practicable, any disruptive effects of tariff revisions on the economic decision-making of market participants."

Were fundamental reforms to be undertaken to RTO market rules and tariff provisions to make them better conform to the realities of the electric utility industry, the current need to continually revisit and tweak them would be greatly reduced.

APPA has long recommended that the Eastern RTOs' mandatory capacity constructs be phased out and replaced with voluntary, residual capacity markets, with primary resource procurement achieved through a portfolio of long-, medium- and short-term contracts and a diverse resource mix. In the event such an overhaul is not undertaken, APPA would propose the following interim steps:

> A) RTOs that have not yet implemented a *mandatory* capacity market should not move to do so without unanimous support by the states in the region.
>
> B) RTOs that have already adopted a mandatory capacity market should not impair (through rates, or rules, regulations, or practices affecting rates) the ability of a load-serving entity to meet its capacity obligations through a resource it owns, builds, controls, or for which it has a contract for capacity.

These reforms would go far in accomplishing many of the criteria that APPA supports here – including just and reasonable rates to consumers, diverse resources, reliability, improved governance, and due consideration of state and local resource decisions.

Discussion Draft Section 4231 – PURPA Modernization

<u>Overview</u>

Section 210(m) was added to the Public Utility Regulatory Policies Act (PURPA) by the Energy Policy Act of 2005. It amended the policy earlier laid out in Section 210 that required any electric utility to purchase electric energy from a qualifying facility (QF), if the Commission finds that the QF has nondiscriminatory access to one of three categories of wholesale energy and capacity markets that are defined in subparagraphs 210(m)(1)(A), (B), or (C). Now if a QF has such access, an electric utility is not required to enter into a new contract with that QF to purchase its power. An electric utility can also apply to FERC for relief from the mandatory purchase obligation on a service territory-wide basis, which becomes effective if FERC finds the statutory conditions are met.

In FERC Order Nos. 688 and 688-A, which implemented Section 210(m), the Commission adopted three rebuttable presumptions as to when QFs either have or do not have nondiscriminatory access to markets. Section 4231 of the discussion draft would amend Section 210(m) to override FERC's presumption that QFs with a net capacity no greater than 20 megawatts (MW) do not have nondiscriminatory access to any market, notwithstanding the availability of open-access transmission service or their location within a "Day 2" market. Specifically, the discussion draft would establish a statutory presumption that a QF of any size has nondiscriminatory access to the wholesale markets described in subparagraphs 210(m)(1)(A), (B), and (C) if the QF in the relevant market is eligible for service under "a Commission-approved open access transmission tariff or a Commission-filed reciprocity tariff" and "Commission-approved interconnection rules," and is "eligible to participate in competitive solicitations overseen by a state regulatory authority."

APPA Comments/Recommendations

APPA is supportive of the goals of Section 4231, but cannot support it in its current form. As drafted, the section would preclude many public power utilities from being able to use this new presumption in seeking service territory-wide relief under subsection 210(m)(3). Consistent with Commission policy, most public power utilities satisfy their reciprocity obligation without filing a transmission tariff or interconnection rules with the Commission. And most public power utilities are not subject to competitive solicitation requirements by state regulators. Hence, as drafted, the new presumption added in Section 4231 would only benefit a subset of electric utilities (those with Commission-filed tariffs and interconnection rules and subject to state-level regulation) and could leave a state's remaining electric utilities at a competitive disadvantage, because they would remain subject to the obligation to purchase from the same QFs.

APPA respectfully urges the Subcommittee to amend the discussion draft text in section (8)(A) to read "is eligible for service under a Commission-approved open access transmission tariff and interconnection rules or service meeting an entity's reciprocity obligation under such tariff"; and in section (8)(B) by adding the words "or undertaken by a non-regulated electric utility" after the phrase "overseen by a State regulatory authority" on lines 14-15 of page 9. (The term "nonregulated utility" or "non-regulated utility" is used in section 210 of PURPA (16 U.S.C. § 824a-3(f), (g), (h), (m)(6)), to mean electric utilities such as not-for-profit public power utilities that are regulated by their governing bodies rather than by a State regulatory authority.) The addition of such language would maintain PURPA's comparable treatment of state-regulated electric utilities and other electric utilities and substantially improve this provision of the discussion draft.

APPA therefore cannot support Section 4231 in its current form. APPA looks forward to working with the Subcommittee regarding this proposed section.

Conclusion

Thank you again for the opportunity to testify before the Subcommittee. I hope that the views expressed in my testimony will be fully considered by the Subcommittee and the full Committee as they continue to develop the elements of an energy bill. APPA commends Chairman Whitfield, Ranking Member Rush, the other Subcommittee members and their staff for being fully committed to working together and finding a solution to our nation's 21st century energy challenges. APPA and its members look forward to working with you in the days ahead.