

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

Refinements to Horizontal Market Power	)	
Analysis for Sellers in Certain Regional	)	
Transmission Organization and Independent	)	Docket No. RM19-2-000
System Operator Markets	)	

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION  
AND INDEPENDENT ENERGY PRODUCERS ASSOCIATION**

The Electric Power Supply Association (“EPSA”)<sup>1</sup> and the Independent Energy Producers Association (“IEPA”)<sup>2</sup>, herein after “Competitive Suppliers”, hereby submit these comments in response to the Commission’s December 20, 2018 Notice of Proposed Rulemaking (“NOPR”) which proposes to revise its regulations regarding the horizontal market power analysis requirements for market-based rate sellers seeking to obtain or retain market-based rate authority in certain Regional Transmission Organization (“RTO”) or Independent System Operator (“ISO”) markets and submarkets therein. The proposed modification would relieve such sellers of the obligation to

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<sup>1</sup> Launched over 20 years ago, 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. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> The Independent Energy Producers Association is California’s oldest and leading trade association representing both the interests of developers and operators of independent energy facilities and independent power marketers. Independent energy producers include producers of renewable products derived from biomass, geothermal, small hydro, solar, and wind; producers of highly efficient cogeneration; and owners/operators of gas-fired merchant facilities. IEP’s primary goals are to safeguard the interests of operating independent energy projects and ensure that California remains a healthy market for development in the independent energy industry.

submit indicative screens when seeking to obtain or retain market-based rate authority except for those RTO/ISO markets that lack an RTO/ISO-administered capacity market subject to Commission-approved monitoring and mitigation. Competitive Suppliers strongly support the changes as to those markets with centrally organized and administered capacity markets. However, the Commission should modify its proposed approach for the California Independent System Operator (“CAISO”) markets. As discussed below, Competitive Suppliers believe that an approach for CAISO can be developed to ensure that an entity cannot exercise horizontal market power in sales of capacity based on existing market rules and mechanisms.

## **I. OVERVIEW AND SUMMARY**

On December 20, 2018, the Commission issued a NOPR proposing to revise its regulations regarding the horizontal market power analysis required for market-based rate sellers by relieving such sellers of the obligation to submit indicative screens when seeking to obtain or retain market-based rate authority. The Commission would continue to require the submission of indicative screens in any RTO/ISO market that lacks an RTO/ISO-administered capacity market subject to Commission-approved RTO/ISO monitoring and mitigation—namely, CAISO and SPP. Competitive Suppliers believe that these proposed changes will result in a more efficient, transparent, and reasonable regulatory program and commend the Commission for its action herein to increase the efficiency and efficacy of its requirements for market participants and the Commission. In this vein, Competitive Suppliers respectfully submit that the Commission consider modifying its proposed approach with respect to providers of capacity within the CAISO footprint. Competitive Suppliers believe that preserving the

status quo would be less disruptive to capacity sales than the approach proposed in the NOPR. Alternatively, should the Commission feel changes are in order, a number of alternative solutions are outlined in these comments.

## **II. COMMENTS**

### **A. The Commission Should Implement the Proposed Revisions for Markets with FERC-Approved Centrally Administered Capacity Markets**

As the Commission points out in the NOPR, ISO-NE, NYISO, PJM and MISO all currently operate capacity markets with Commission-approved market power mitigation for a standardized capacity product that specifies a particular delivery year and capacity supply obligation. Capacity sales in these centrally administered markets also are subject to system-wide offer caps. If a seller wants to offer its unit at a price higher than the cap, it must submit its costs to the market monitor and have a reference level developed based on its going-forward cost, which becomes its maximum offer.<sup>3</sup>

The existence of such extensive mitigation measures ensures that these RTOs/ISOs are sufficiently protected from potential seller market power. Additionally, the submission of the indicative screens yields little practical benefit when compared to the associated burden on industry and the Commission. As the Commission itself notes, “This burden is not trivial.”<sup>4</sup> Per the NOPR, over the three-year period 2015-2018, market-based rate sellers in RTOs/ISOs that administer capacity market subject to Commission-approved RTO/ISO monitoring and mitigation filed approximately 110 indicative screens in updated market power studies for RTOs/ISOs on average per year.<sup>5</sup> And in those cases in which an applicant has failed the indicative screens, the

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<sup>3</sup> NOPR at P. 27

<sup>4</sup> NOPR at P. 31

<sup>5</sup> *Id.*

Commission has granted the sellers market-based rate authority because they have relied on Commission-approved RTO/ISO monitoring and mitigation,<sup>6</sup> yielding the need for the indicative screens moot and therefore an unnecessary burden.

Competitive Suppliers agree with the Commission that the rebuttable presumption was sound when adopted in Order No. 697-A and continues to be sound today. In response to those that would argue that the Commission should review existing market power mitigation rules for “completeness and effectiveness,”<sup>7</sup> Competitive Suppliers urge the Commission to avoid holding market power mitigation to an unreasonable standard. As the Commission noted in the NOPR, the existing market power mitigation protocols are better suited to prevent the exercise of market power than static indicative screens.<sup>8</sup> The Commission has articulated the appropriate standard – “better suited to prevent the exercise of market power.” Market power mitigation protocols will necessarily evolve with experience and changes in market fundamentals. Any market power mitigation protocol that prevents every possibility to exercise market power will likely over-mitigate other instances when a resource does not have market power – replacing the resource’s judgment of its own costs with a mechanical measure of the resource’s competitive offer. The Commission should not delay its proposal to relieve sellers of the burden to file indicative screens while it waits for the mitigation protocols to cross the elusive finish line represented by the standard that market power mitigation is “complete.”

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<sup>6</sup> NOPR at P. 30.

<sup>7</sup> NOPR at P 14, citing Potomac Economics comments in Docket No. RM14-14-000.

<sup>8</sup> NOPR at P 28.

Removing the requirement to file indicative screens in these markets eliminates duplicative regulatory burdens on market participants while still preserving the Commission's interest in protecting against seller market power. Competitive Suppliers commend the Commission for proposing these changes and is supportive of this portion of the NOPR.

**B. The Commission Should Consider Modifying its Proposed Approach for CAISO**

With respect to the application of the NOPR's proposed revisions to CAISO, the Commission's proposal based on the presumption that there are no protections built into the capacity construct in California could result in the loss of market-based rate authority ("MBRA") for some sellers of capacity who do not have horizontal market power. As the Commission noted, there is a robust market for Resource Adequacy ("RA") capacity administered by the California Public Utility Commission ("CPUC"). To date, sellers of RA capacity in CAISO have been able to rely on market-based rate authority when making such sales. If the proposed revisions are included in a final rule, it is possible that some sellers may fail the indicative screens and based on that be unable to rebut the presumption of market power for sales of capacity. Such sellers would then need to establish a cost-based rate in order to make sales of RA in California, outside of a Reliability Must Run ("RMR") designation which mandates operation of units facing retirement and thus requires cost-of-service rates which include a return of and on capital. To default to cost-of-service rates for indicative screen failures creates an unnecessary and considerable administrative burden. To the extent sellers wish to make sales from new resources, establishing a cost-based rate may be challenging as the resource in question will be under development. Further, the

requirement to establish a cost-based rate prior to a solicitation may reveal commercially sensitive information to other competitors. At worst, the Commission's proposal could reduce the universe of resources willing to offer to sell RA capacity, undermining the Commission's goal to enhance competitiveness.

Given the unique environment in which CAISO operates, Competitive Suppliers believe it is important that the Commission preserve the current practice to reference CAISO's Capacity Procurement Mechanism ("CPM") to support the rebuttable presumption that MBR Sellers cannot exert horizontal market power. Specifically, Competitive Suppliers believe that California already has sufficient market power mitigation. Currently, CAISO and the local regulatory authorities within its balancing authority jointly administer a resource adequacy program. Under this program, load-serving entities ("LSEs") are required to procure capacity to meet specified local, system, and flexible resource adequacy capacity requirements. CAISO relies on its backstop capacity procurement mechanism to address deficiencies in LSEs' annual resource adequacy showings. In addition, CAISO relies on RMR contracts if the forward bilateral contract model supplemented by the CPM mechanism proves inadequate to retain resources. Between CPM to address capacity deficiency issues when they arise, and the RMR process to mandate service from units that would otherwise retire, CAISO has backstop mechanisms that cap prices – initially at a representation of going forward fixed costs in the case of CPM, and ultimately at full cost-of-service with RMR.<sup>9</sup>

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<sup>9</sup> Ameren Rehearing Order, 153 FERC ¶ 61,062, P 35, ([W]e affirm the decision in the Ameren Complaint Order that "the Tariff is unjust, unreasonable, and unduly discriminatory or preferential because...the Tariff does not allow SSR Units compensation for the fixed costs of existing plant, which are recovered as depreciation expense, return on rate base, and associated taxes." [148 FERC ¶ 61,057

Therefore, retaining the current practice would be significantly less disruptive to California's capacity sales and purchases while protecting against the exercise of market power. Relying on these mechanisms is important as the unnecessary loss of MBRA could impact what resources are able to sell capacity in California; inadvertently harm the execution of capacity procurement in certain instances; and, thereby increase reliance on CAISO's backstop capacity procurement authorities than would otherwise occur.

Take for example the following hypothetical: Generators X and Y intend to respond to a solicitation for a storage project that would satisfy Local Resource Adequacy requirements. Generator X, a new project, fails an indicative screen and now must file cost-based rates in advance of bidding into this solicitation. Generator Y has MBRA and will now get a window into the cost of their competitor's project before execution of the procurement process. With this knowledge in hand, Generator Y now knows details about Generator X cost structure and may have less incentive to bid aggressively to win the solicitation.

Under this capacity procurement model, protections against the exercise of market power are embedded in the forward, bilateral negotiations between Buyer and Sellers overseen by the CPUC for resource adequacy products, supplemented by the authority granted to CAISO to procure capacity either through the auspices of the CPM or the application of an RMR contract.

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at P 83] Because MISO has the ability to force a generator that wishes to retire to continue to provide utility service to meet reliability needs, even though it may be uneconomic for the generator to do so, a generator would effectively be denied the opportunity to recover its fixed costs if it were only permitted to recover going-forward costs. Therefore, when a generator in the MISO region is forced to continue to operate for reliability reasons under the Tariff, even though it has made a business decision to suspend or retire due to economic or other reasons, the generator should be provided an opportunity to recover its fixed costs through a full cost-of-service rate.)

On top of mitigating measures that exist in California's current capacity construct, California is presently engaged in a discussion about potential changes that could significantly alter how the Resource Adequacy construct operates going forward. Indeed, the CPUC recently adopted a multi-year RA framework for its jurisdictional LSEs in which each is obligated to show that it has procured 100%, 100%, and 50% of their forward annual local RA obligations over three years (as determined by the CAISO).<sup>10</sup> In addition, the Commission has indicated an intent in its current, ongoing RA proceeding to evaluate the role of a central procurement entity ("CPE") to procure all or residual amounts of RA capacity.

Thus, *it is possible that California will ultimately install a new construct that contains even more extensive mitigation measures.* Due to the fluidity of this effort, Competitive Suppliers believe that the Commission should consider allowing this process to reach its conclusion expected in the 2019/2020 timeframe before approving and directing the changes proposed in the instant NOPR to CAISO.

Should the Commission feel that it needs to differentiate the horizontal market power requirements in CAISO, Competitive Suppliers suggest that the Commission could extend its ruling in Order 784 to the sales of capacity. In Order 784, the Commission allowed applicants to engage in sales to a public utility that is purchasing ancillary services to satisfy its Open Access Transmission Tariff requirements to offer ancillary services to its own customers where the sale is made pursuant to a competitive solicitation that meets the following guidelines: (1) transparency – the competitive solicitation process should be open and fair; (2) definition – the product or

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<sup>10</sup> See Decision Refining the Resource Adequacy Program (D. 19-02-022). Issued March 4, 2019.

products sought through the competitive solicitation should be precisely defined; (3) evaluation – evaluation criteria should be standardized and applied equally to all bids and bidders; (4) oversight – an independent third-party should design the solicitation, administer bidding, and evaluate bids prior to the company’s selection; and (5) competitiveness – adequate seller interest to ensure competitiveness.<sup>11</sup> As noted in Order 784, “The Commission has relied on the use of competitive solicitations to mitigate affiliate abuse concerns when affiliates seek to enter into transactions pursuant to market-based rate authority.”<sup>12</sup> In the Instant NOPR, the Commission could opt to allow capacity sales that satisfied the same or similar criteria to rely on that process as sufficient to alleviate any market power concerns. The Commission’s rationale in Order No. 784 applies equally to sales of capacity. Specifically, a solicitation that meets the criteria defined above can reasonably be deemed to produce competitive prices that are just and reasonable.

As in Order No. 784,<sup>13</sup> the seller should be required to demonstrate through a filing under section 205 of the Federal Power Act, submitted to the Commission prior to commencement of service, that the sale of capacity results from a competitive solicitation that meets the above criteria. The seller would need to submit both the actual sales agreement and a narrative description of how the buyer’s competitive solicitation meets the requirements articulated above. In judging solicitations for new capacity, Competitive Suppliers suggest that the Commission start with the presumption that the solicitation is competitive. Given sufficient advanced procurement, there are

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<sup>11</sup> See Generally: 144 FERC ¶ 61,056

<sup>12</sup> *Id. at p. 64.*

<sup>13</sup> Order No. 784 at P 101.

typically few barriers to entry for new resources. Thus, solicitations for new resources are inherently competitive because each new resource is competing with many potential other new resources.

A primary aim of the Commission in this NOPR is to streamline and reduce regulatory burdens on both FERC staff and the market participants it regulates while protecting against the exercise of horizontal market power. Should the Commission choose to adopt Competitive Suppliers' suggestions in CAISO, these changes would further the Commission's goals of reducing regulatory burdens while ensuring that FERC continues to protect against the exercise of market power in CAISO's capacity construct.

### **III. CONCLUSION**

For the reasons outlined above, Competitive Suppliers support the revisions proposed in the instant NOPR with respect to those organized wholesale power markets with RTO/ISO-administered capacity markets subject to Commission-approved RTO/ISO monitoring and mitigation. Additionally, Competitive Suppliers respectfully request that FERC preserve the current reliance on state procurement processes in CAISO as protection against horizontal market concerns. Alternatively, should the Commission believe changes are in order, Competitive Suppliers respectfully request that the Commission adopt the modifications outlined in these comments. Such action is in keeping with the intent of the NOPR while maintaining the Commission's interest in protecting against seller market power, allowing the Commission to minimize disruption to capacity procurement in CAISO while reducing unnecessary burdens on its own resources and the entities it regulates.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the comments via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., March 18, 2019.

*Bill Zuretti*

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Bill Zuretti, Director, Regulatory Affairs and Counsel