

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	Docket No. ER09-1048-000
Midwest Independent Transmission System Operator, Inc.	Docket No. ER09-1049-000
Southwest Power Pool, Inc.	Docket No. ER09-1050-000 Docket No. ER09-1192-000
ISO New England, Inc. and New England Power Pool	Docket No. ER09-1051-000
PJM Interconnection, LLC	Docket No. ER09-1063-000
New York Independent System Operator, Inc.	Docket No. ER09-1142-000

Post-Conference Comments of the
Electricity Consumers Resource Council
(ELCON)

The Electricity Consumers Resource Council (ELCON) commends the Commission for recognizing that there are significant problems with the responsiveness of ISOs and RTOs to consumer concerns and for hosting the February 4th Technical Conference. We believe that based on the presentations and discussions at the Conference, there clearly is a growing consensus that the ISOs/RTOs need to become more responsive. As discussed in greater detail below, ELCON urges FERC to commence a new rulemaking that would mandate:

1. Processes that the ISOs/RTOs must adopt to promote full participation;
2. Governance structures that will lead to sound and balanced decision making;
3. Effective recourse to FERC, and ultimately the courts, that will ensure accountability;

4. Clear and definitive metrics that will allow consumers to both demonstrate that ISOs and RTOs are providing net benefits to consumers that exceed their costs and demonstrate that improvements are being made that increase these benefits.

Introduction

The stated purpose of the Conference was to explore the responsiveness of the Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs) to their customers and other stakeholders. In the Notice announcing the Conference, FERC specifically referenced recommendations of the National Association of State Utility Consumer Advocates (NASUCA) including: “(1) the decision making process is complicated, (2) the decision making process is time intensive, and (3) most consumers and their advocates lack the resources required to meaningfully monitor and influence the stakeholder process.”¹ ELCON agrees with both the FERC notice and NASUCA’s stated concerns.

The establishment of ISOs and RTOs began more than a decade ago. While in theory they seemed to have been a great idea, the practical application has been questioned by consumers, both large and small, for many years. FERC has recognized the consumer concerns over the years, but not implemented changes that fixed the problems.

As examples, in 2007 and 2008 FERC conducted three public conferences, and issued an Advanced Notice of Proposed Rulemaking (ANOPR) and then a Notice of Proposed Rulemaking (NOPR), with the stated objective of ensuring that customers receive the benefits they deserve from restructured markets. These activities were followed by Order 719, which required compliance filings from each ISO/RTO. Further, the Government Accountability Office (GAO) issued a report in September 2008 clearly pointing out that consumer concerns are serious and continuing.² ELCON participated in each of these FERC actions and contributed to the GAO Report. Unfortunately, the problems remain.

The Order 719 compliance filings, which were largely supported by supply side interests show that absent further Commission intervention there would be no change in the status quo. ELCON believes that although Order 719 establishes a set of sound principles, the compliance filings and the years of experience in dealing with the ISOs/RTOs show that aspiration is insufficient motivation; rather, explicit directives are needed. Virtually all possible permutations of procedures and structures already have been presented to FERC by ELCON and other “demand side” consumer interests.

¹ Notice Providing Agenda for Technical Conference on RTO/ISO Responsiveness, January 8, 2010, at 2.

² Electricity Restructuring: FERC Could Take Additional Steps to Analyze Regional Transmission Organizations’ Benefits and Performance, United States Government Accountability Office Report to the Committee on Homeland Security and Governmental Affairs, U.S. Senate, GAO-08-987, September 2008.

Order 719 Responsiveness Criteria are Necessary but Not Sufficient

The four responsiveness criteria established in Order 719 – inclusiveness, fairness in balancing diverse interests, representation of minority positions, and ongoing responsiveness – are necessary, but not sufficient, conditions. As was expected, in their Order 719 compliance filings the six ISOs/RTOs uniformly took the position that they were already meeting these criteria in most respects.

ELCON recognizes that ISOs/RTOs have a difficult job. They have a mix of utility (providing non discriminatory transmission service and running the power and ancillary services markets) and regulatory or quasi-regulatory (ensuring reliability, enforcement, regional transmission planning) functions. Yet they are voluntary, so dissatisfied supply side participants have some ability to walk, and there inevitably will be strong motivation to keep them satisfied. From a consumer perspective, the cost of doing so may not be justified by the benefits.

There are two structural issues that make ISO/RTO responsiveness and accountability difficult. First, the ISOs/RTOs are large non-profits, bureaucratic and nearly immune to sanctions that would positively influence their decision making and behavior. Second, the supply-side interests – generation owners and transmission owners – are more concentrated and have far greater resources than demand side interests. And a number of ISO/RTO board members are former supply-side employees.

ELCON is not the only group focused on these structural issues that need to be overcome if the ISOs/RTOs are to become more effective. The Federal Trade Commission (FTC) also commented in the wholesale markets rulemaking proceeding that increasing access to the ISO/RTO board would not itself be enough. Rather, FTC said that the problem is more systemic -- that the ISOs/RTOs are not-for-profit entities and need strong incentives if they are to act in accordance with customer interests. And the GAO Report noted that the high burden of proof and difficulty of obtaining information are challenges to obtaining review of ISO/RTO decisions.

For these reasons, it is not surprising that FERC's well-intentioned efforts in establishing general principles to guide the ISOs/RTOs have not yet achieved the needed reforms. Given the public trust that has been delegated to the ISOs/RTOs, FERC is obligated to do more. In a long line of cases, the D.C. Circuit has ruled that an agency must not subdelegate its ultimate regulatory authority without specifying objective criteria to guide the private entity. The court noted in particular the need to retain "an important democratic check on government decision making" and to project against "the risk of policy drift inherent in any principal-agency relationship."

Need for Definitive Action

There is little new in the content of these recommendations – with the starting point that the ISOs/RTOs will remain in place, virtually every possible structure and procedure

has already been raised. However, given the failure of the Order 719 compliance filings to trigger reform, it is now time for FERC to take definitive action.

ELCON recommends that FERC commence a new rulemaking with the objective of establishing a minimum set of explicit, focused directives, addressing four topics:

1. Processes that the ISOs/RTOs must adopt to promote full participation;
2. Governance structures that will lead to sound and balanced decision making;
3. Effective recourse to FERC, and ultimately the courts, that will ensure accountability;
4. Clear and definitive metrics that will allow consumers to both demonstrate that ISOs and RTOs are providing net benefits to consumers that exceed their costs and demonstrate that improvements are being made that increase these benefits.

1. Process Reform

FERC should impose specific requirements that give stakeholders full rights to participation in the most essential ISO/RTO processes. Among the requirements that ELCON seeks include:³

- Establishing Mission and Vision statements that clearly direct the ISOs and RTOs to work in the best interest of consumers.
- Open board meetings, with agendas published in advance and opportunity for stakeholder input on agenda items.
- Accessibility to Board and key management meetings for stakeholders without the resources to attend in person (web or teleconference).
- Written comments and appeals.
- Minimum of one annual meeting by board/management with each stakeholder group.

³ NASUCA also recommends, as specifically quoted in the Notice for this Technical Conference, "...the creation of a funding mechanism, via RTO/ISO fees, which would provide resources for public representatives of consumers to support consumer positions at all levels of the stakeholder process." (NOTICE, January 8, 2010, page 2. ELCON agrees with NASUCA that most consumers and their advocates lack the resources required to meaningfully monitor and influence the stakeholder process. (Ibid.) In this regard, ELCON suggests that FERC initiate an inquiry into how such funding mechanism might operate. As a starting point, ELCON recommends that FERC initiate a proceeding to consider the establishment of a mechanism similar to the one presently in existence in Ontario (The Ontario Energy Board's "Practice Direction on Cost Awards," details available at:

http://www.oeb.gov.on.ca/OEB/Documents/Regulatory/Practice_Direction_on_Cost_Awards.pdf).

This process allows consumers to file with the OEB for reimbursement of intervention costs with substantial checks and balances to be sure that the costs are warranted and legitimate.

- Formal cost / benefit review of any significant actions, analogous to what is required for agency rules, subject to FERC review.

2. Structural Reforms

To provide effective access, direct involvement in the decision making process is needed. In Order 719, the Commission made it clear that it favored two structural approaches to increase responsiveness: (1) a board advisory committee; or (2) a hybrid board. At that time, the Commission decided not to mandate either option. However, the ISO/RTO compliance filings show that none plan to implement meaningful structural reforms that would make improvements over past practices.

- **Hybrid Board Requirement** – ELCON recommends that the Commission reconsider this issue and impose a specific requirement that the ISOs/RTOs adopt hybrid boards as the best long-term solution for ensuring ISO/RTO accountability to shareholders. In such event, to preserve the necessary independence of a board of directors, non-independent stakeholder members of a hybrid board should represent less than half of the total board, however, those board members representing supply-side and demand-side (consumer) interests should have equal representation.
- **Eliminate Self-Perpetuating Boards** – ELCON also recommends that FERC eliminate self-perpetuating ISO/RTO boards. For example, board members could be required to be nominated by a Nominating Committee and elected and subject to removal by Advisory Committee, each with specified stakeholder participation. An alternative would be to promote a shared governance process that could draw on components of NYISO's structure (but with improvements to its procedures respecting openness and board selection).

3. Accountability and FERC Review

Ultimately the issue raised by ISO/RTO responsiveness is the placement of so many important responsibilities under the control of a large, not-for-profit entity that, by its nature, is unaccountable. Despite their critical regulatory or quasi-regulatory responsibilities, they cannot be penalized for bad or unfair decision-making. Accordingly, reform is needed not only to make the ISOs/RTOs responsive, but also to make them accountable.

- **De Novo Treatment of ISO/RTO Compliance Filings** – Some improvement in external accountability would be achieved if FERC were to review ISO/RTO filings on a *de novo* basis. That is, the ISOs/RTOs should not be accorded deference on the basis that they have resulted from stakeholder processes, when there is no assurance that such processes involved full and meaningful participation or sound decision making.

- **ISO/RTO Audits** – Another possibility would be for FERC proactively to conduct a detailed investigation or audit of the effectiveness of each ISO/RTO on a regular schedule. (For example, FERC might conduct reviews of two of the ISOs/RTOs each year on a staggered schedule, so that each was subject to a review every three years.) Responsiveness to stakeholders and balanced decision-making could be a key focus of such reviews.

4. Metrics

It is not self-evident that the creation of ISOs and RTOs delivered net benefits to consumers. GAO raised the same observation:

[I]n the absence of measures for evaluating the success of the decision to encourage the creation of RTOs, FERC may be missing opportunities to facilitate improvements in RTO operations and markets and is not as strongly positioned as it could be to evaluate the success of its decision to encourage the creation of RTOs and determine whether to encourage further RTO development.⁴

A significant problem in resolving the differences of opinion between consumers and suppliers regarding the benefits of ISOs and RTOs is the difficulty (or inability) to accurately and convincingly measure the performance of the ISOs and RTOs. Many attempts have been made to use analytical tools to conduct such analyses, only to find that the raw data simply are not available.⁵ Thus, consumers continue to assert that net benefits are insufficient to justify the costs while suppliers (and FERC) assert that the benefits exceed the costs.⁶

⁴ GAO Report at 59.

⁵ For example, the National Rural Electric Cooperative Association (NRECA) attempted to develop their “RTO Report Cards” but was hampered by a lack of data. Additionally, the American Public Power Association through its Electric Market Reform Initiative retained consultants to assess the benefits of ISOs and RTOs. They found that the lack of clear metrics made definitive findings difficult. As a specific example, William Dunn in his [Concept Paper “Data Required for Market Oversight”](#) stated: “In essence, the operation of the [ISO/RTO] markets is a black box on which those paying the bills are required to place full confidence.”

⁶ The GAO concluded:

“Many agree that RTOs have improved the management of the transmission grid and improved generator access to it; however, there is no consensus about whether RTO markets provide benefits to consumers or how they have influenced consumer electricity prices. FERC officials believe RTOs have resulted in benefits, however, FERC has not conducted an empirical analysis of RTO performance or developed a comprehensive set of publicly available, standardized measures to evaluate such performance.” (What GAO Found, inside cover)

ELCON is pleased that FERC has initiated a process in Docket No. AD09-10 to develop standardized measures that track the performance of RTO operations and markets, as GAO recommended. ELCON, together with the American Public Power Association, has submitted detailed comments seeking expeditious revision and issuance of metrics, which are attached as an exhibit here. As discussed in detail in those comments, the metrics as currently proposed would neither satisfy the recommendations of the GAO nor generate the information required to assess whether rates are “just and reasonable” under the Federal Power Act. The proposed metrics must be expanded so as to enable specific calculations of prices and actual costs in each ISO and RTO as well as to provide data adequate to evaluate whether the short-term focus of market participants is harming the long-term viability of supply. The data must allow analysts to derive trend analyses for each metric going forward and, to the extent data are available, a comparison of recent past years.

It is very important that FERC take a fresh look at the currently proposed metrics, as to date this process appears to have been unduly dominated by the ISOs and RTOs. As the GAO stated, FERC should “...work with RTOs, stakeholders, and other experts to develop standardized measures that track the performance of RTO operations and markets.”⁷ ELCON looks forward to working with FERC in the development of such metrics and urges FERC to proceed promptly so that data can be collected and reported beginning with calendar year 2011.

⁷ The GAO Report, *op.cit.*, Recommendations for Executive Action, at 59.

Notices and Communications

Notices and communications with regard to these proceedings should be addressed to:

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Dated: March 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: March 8, 2010

/s/ W. RICHARD BIDSTRUP
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EXHIBIT

Comments of ELCON and the American Public Power Association
in Docket No. AD09-10

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

RTO/ISO Performance Metrics

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Docket No. AD10-5-000

**INITIAL COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION AND
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL**

The American Public Power Association (“APPA”) and the Electricity Consumers Resource Council (“ELCON”) (together, “APPA/ELCON”) submit these initial comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) “Notice Requesting Comments on RTO/ISO Performance Metrics” (“Notice”), issued on February 3, 2010, in the above noted docket.¹

I.

INTEREST OF THE PARTIES

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve 45 million people, doing business in every state except Hawaii. Public power systems participate in wholesale power markets throughout the country and therefore have a keen interest in how well these markets work.

APPA utility members are not-for-profit load-serving entities (“LSEs”). Their primary goal is to provide customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This

¹ 75 Fed. Reg. 7,581 (February 22, 2010).

orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities.

Many APPA members obtain wholesale power supplies and bulk transmission services from Commission-regulated “public utilities” under rate schedules and tariffs on file with this Commission. In many regions of the country, these service providers are now Regional Transmission Organizations (“RTOs”) or Independent System Operators (“ISOs”) (together, “RTOs”). APPA has therefore had a substantial interest in recent years in the rates, terms and conditions of the transmission and power supply services that RTOs provide. It has participated actively in numerous dockets concerning the provision of RTO services. As this Commission knows, APPA members in RTO regions have been concerned for quite some time that the markets RTOs/ISOs operate are not providing sufficient benefits to consumers. APPA therefore welcomes the opportunity to file comments in this docket.

ELCON is the association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate major manufacturing facilities in all ISOs and RTOs, and in regions not served by an ISO or RTO.

II.

COMMUNICATIONS

APPA/ELCON request that service in this proceeding be made upon, and communications directed to, the following:

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III.

COMMENTS

Development of a comprehensive set of metrics to measure whether the wholesale electricity markets that RTOs administer provide benefits to end-use consumers is an essential and long overdue component of adequate FERC oversight and regulation of these markets. The Commission has overseen the creation of centralized RTO-operated markets over the past 15 years, but has never attempted to determine whether these changes have produced net benefits to end-use consumers.

As the Commission states in its Notice in this docket, in September 2008, the Government Accountability Office (“GAO”) issued a report entitled “Electricity Restructuring—FERC Could Take Additional Steps to Analyze Regional Transmission Organizations’ Benefits

and Performance.”² At the request of Senators Joseph Lieberman and Susan Collins, the GAO in its Report undertook a detailed analysis of RTOs, their costs and the controversy surrounding their provision of benefits.³ The GAO Report found that FERC had conducted no empirical analysis to support its position that RTO markets have provided demonstrable benefits:

FERC officials also believe that RTOs have resulted in net benefits to the economy, such as new efficiencies in operating the regional transmission grid; however, FERC has not conducted an empirical analysis of whether RTOs achieved the benefits expected of them or developed a comprehensive set of publicly available, standardized measures to help evaluate such performance. GAO’s Standards for Internal Control identify the value to organizations of comparing actual performance to planned or expected results; however, according to FERC, neither an empirical analysis nor performance measures are necessary parts of FERC oversight of RTOs and both would be methodologically challenging to develop.

Id. at 7–8 (footnote omitted).

The GAO also concluded that the Commission’s regulation of RTOs needed further evaluation:

It has been over 10 years since major federal electricity restructuring was introduced and some of the first RTOs were developed to facilitate it, yet there is little agreement about whether restructuring and RTOs have been good for consumers, how they have affected electricity prices, and whether they have produced the benefits FERC envisioned. Compounding this, rising electricity prices and diverse regional interests complicate an unbiased discussion of the merits of RTOs and restructuring. Although there are challenges to answering questions about the benefits of RTOs, a more structured and formalized approach to RTO oversight would be beneficial.

FERC’s initial approach to allow a diverse range of RTO types, governance structures, and rate recovery mechanisms provided a means for regions to quickly build upon existing institutions like power pools and past participant experience working together. However, much has changed since the first RTOs came into

² Report No. GAO-08-987 (September 2008), available at <http://www.gao.gov/new.items/d08987.pdf> (“GAO Report”).

³ The GAO in Appendix VIII to its report even laid out a summary of various experts’ studies analyzing the benefits of restructuring and RTOs, which summary included two studies that APPA had commissioned regarding this subject.

existence, and it has become clear that FERC's efforts to regulate RTOs as it does utilities may no longer be sufficient. . . .

Finally, while FERC believes RTOs have produced numerous benefits, the fact that it has not developed a comprehensive set of publicly available standardized measures to track RTO performance contributes to uncertainty about what those benefits have been and their magnitude. We acknowledge that FERC's review of RTO decisions that affect electricity prices and consideration of stakeholder comments and complaints sometimes results in new rules designed to improve the ability of RTOs to deliver benefits to their regions. However, in the absence of measures for evaluating the success of the decision to encourage the creation of RTOs, FERC may be missing opportunities to facilitate improvements in RTO operations and markets and is not as strongly positioned as it could be to evaluate the success of its decision to encourage the creation of RTOs and determine whether to encourage further RTO development.

Id. at 58–59. While the GAO Report was politely phrased, its import was clear: the Commission has not done the necessary analyses to support its assertions that RTO markets provide demonstrable benefits to wholesale customers and consumers, and the Commission is therefore not well positioned to evaluate the success of RTOs.

While APPA/ELCON greatly appreciate the opportunity to comment on the proposed metrics, we are disappointed by both the process used to date to develop these metrics and the limited scope and “off-the-shelf” nature of the proposed metrics themselves. Each of these concerns is addressed in greater detail in these comments. The following section identifies problems to date in the process of developing the metrics, the second addresses deficiencies in the proposed metrics, and the third presents alternative metrics proposed by APPA/ELCON. APPA/ELCON urge FERC expeditiously to devote sufficient resources to this effort so that the metrics can be redrafted and implemented promptly.

Proposed Metrics Development Process

In its report, GAO recommended that FERC “work with RTOs, stakeholders, and other experts to develop standardized measures that track the performance of RTO operations and

markets.” *Id.* at 59. However, rather than working with RTOs, other stakeholders and experts simultaneously in a transparent process to develop an initial set of metrics, APPA/ELCON understand that FERC approached the RTOs in September 2009 and asked them to develop a set of metrics, with FERC Staff providing “input” into this process. When this work was complete, FERC Staff then contacted trade associations such as APPA/ELCON in late December 2009⁴ to invite them to meetings regarding the proposed metrics.⁵ APPA/ELCON were given their first opportunity to comment on the metrics in a meeting with FERC Staff held on January 15, 2010, which was also attended by the National Rural Electric Cooperative Association. At that meeting, a representative of the PJM Interconnection, LLC presented the proposed metrics, at the request of FERC Staff. APPA and ELCON each communicated to FERC staff their beliefs that the proposed metrics were inadequate, and that the procedures used up until that time to develop them did not comport with due process principles. APPA and ELCON also provided specific recommendations for RTO performance metrics, which are described in detail later in these comments.

It also appears that in developing the metrics, the RTOs themselves provided little opportunity for significant stakeholder input. To APPA/ELCON’s knowledge, PJM was the only RTO to have provided any opportunity for input. At a November 19, 2009 PJM Members

⁴ APPA/ELCON note that only a limited group of associations were invited to such meetings; for example, we understand that the National Association of State Utility Consumer Advocates (“NASUCA”) was not contacted.

⁵ In its Notice in this docket, FERC describes the process used as follows: “As recommended by GAO, Commission staff has worked *with a team comprised of staff from all the jurisdictional ISOs/RTOs* to develop a set of performance metrics that the ISOs/RTOs will use to report annually to the Commission. Commission staff and representatives from the ISOs/RTOs have also met with interested stakeholders to solicit their perspectives and comments on the proposed performance metrics.” (Emphasis added.)

Committee meeting, a presentation on “Potential ISO/RTO Metrics” was given.⁶ It is unclear how much time and attention was devoted to this presentation, and no contact information for feedback is on the PowerPoint posted on PJM’s web site. An update on the metrics, containing FERC Staff’s then-extant proposal, was also given to the PJM Members Committee on January 28, 2010.⁷

A review of the November 2009 through January 2010 ISO New England Participants Committee and NY ISO Management Committee meetings indicates that these RTOs simply reported that they were working with FERC Staff to develop metrics.⁸ NY ISO’s Management Committee did present FERC’s proposed metrics on January 20, 2010, after the metrics had been finalized to the satisfaction of the RTOs and FERC Staff.⁹ Searches on the web sites of the Midwest Independent System Operator, Southwest Power Pool, and California Independent System Operator (“CAISO”) found no items posted regarding FERC’s metrics development.

While APPA/ELCON very much appreciate that the Commission has now decided to notice the proposed RTO performance metrics and take comments on them, they note that the first two pages of proposed metrics attached to the Notice are virtually the exact same metrics presented

⁶ FERC Metrics Reporting Initiative – Potential ISO/RTO Metrics, PJM Members Committee, November 19, 2010, <http://www.pjm.com/~media/committees-groups/committees/mc/20091119/20091119-item-07f-iso-rto-metrics-report.ashx>

⁷ FERC ISO/RTO Metrics Initiative Update, PJM Members Committee, January 28, 2010, <http://www.pjm.com/~media/committees-groups/state-commissions/private-state/20100208/20100208-ferc-rto-metrics-report.ashx>

⁸ ISO, New England Participants Committee minutes, December 11, 2009, http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/prtcpnts/mins/2009/npc_2009_1211.pdf, and January 8, 2010, http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/prtcpnts/mins/2010/npc_2010_0108.pdf; Report of ISO Chief Executive Officer at February 5, 2010 NEPOOL Participants Committee Meeting On ISO Board Matters, http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/prtcpnts/mins/2010/draft_ceo_report.pdf

⁹ NY ISO Management Committee meeting on January 20, 2010, http://www.nyiso.com/public/webdocs/committees/mc/meeting_materials/2010-01-20/Agenda_06_012010_ISO_Metrics_Presentation_for_MC.pdf

to them at the January 15 meeting by the PJM representative. While certain “additional information” is set out at pages 3–5, that information apparently would not be considered “indicative of measuring ISO/RTO performance.” *Id.* at 3. Only on page 6 are “additional suggestions” from other sources briefly listed. It is stated in this section that “[t]he items below . . . are under review to identify a potential subset [of metrics] that might be included.”

For all of these reasons, APPA/ELCON believe that the Commission must give full and fair consideration to the comments filed by parties other than RTOs in this docket. The RTOs have in effect already had their say (and more) regarding these metrics, since they had a large hand in developing them. To ensure due process, the Commission must allow all interested parties an equivalent opportunity to participate in the development of these metrics.

Finally, APPA/ELCON believe that the Commission’s proposed timeline for achieving full reporting and evaluation of metrics (as shown in FERC’s 2009–2014 Strategic Plan),¹⁰ is completely inadequate. The Strategic Plan states as follows:

Annual Performance Targets	
FY 2010	Explore and develop appropriate operational and financial metrics for ISOs/RTOs
FY 2011	Explore and develop appropriate operational and financial metrics for non-ISO/RTO regions
FY 2012	Establish appropriate common metrics between ISOs/RTOs and non-ISOs/RTOs
FY 2013	Monitor implementation and performance
FY 2014	Evaluate performance and seek changes as necessary

Under this schedule, “evaluate performance and seek changes as necessary” does not occur until FY 2014. Given that the GAO issued its recommendations in 2008, the proposed timeline would represent an unacceptable delay in agency action. Working with all stakeholders, FERC should

¹⁰ *The Strategic Plan, FY 2009–2014*, Federal Energy Regulatory Commission, p. 13, <http://www.ferc.gov/about/strat-docs/FY-09-14-strat-plan-print.pdf>.

revise and finalize the metrics during the next several months, so that they can be placed in effect no later than January 1, 2011, with initial tracking and reporting during calendar year 2011.

Response to Proposed Metrics

In Section 1 of its attachment to the Notice, FERC proposes “fourteen common performance metric topics on which all ISOs/RTOs will report.” Although APPA/ ELCON provided detailed metrics recommendations to FERC Staff in January, as noted above, the Performance Metrics presented in Section 1 are essentially the same as those distributed by FERC staff prior to the January 15 meeting.

The proposed Performance Metrics address three categories: Reliability, Markets, and Organizational Effectiveness. These comments focus on the metrics in the Markets category. This is because in APPA/ELCON’s views, whether or not RTOs provide net benefits to consumers remains the crucial, unanswered question. The GAO similarly focused its recommendation on the question of whether there are benefits to consumers from the RTO-operated markets, and not on other RTO duties such as transmission grid management, or generator access. As stated in the GAO Report:

Many agree that RTOs have improved the management of the transmission grid and improved generator access to it; however, there is no consensus about whether RTO markets provide benefits to consumers or how they have influenced consumer electricity prices. FERC officials believe RTOs have resulted in benefits; however, FERC has not conducted an empirical analysis of RTO performance or developed a comprehensive set of publicly available, standardized measures to evaluate such performance. [11]

Despite the centrality of consumer impacts and electricity prices in GAO’s finding noted above, the metrics proposed under the category of “Markets” are of very limited use and are generally duplicative of data that are already available. The three metrics in the sub-category of

¹¹ GAO Report, inside front cover.

Market Pricing (Load-Weighted Locational Marginal Prices (“LMPs”), Components of Total Power Costs, and Load-Weighted Fuel-Adjusted LMPs) shed little light on whether such prices are just and reasonable and reflect levels that would be produced in a truly competitive market. For example, if LMPs fall, as they did in 2009, this is not necessarily indicative of the performance of RTO markets and could simply be a reflection of declining fuel costs, reduced demand due to adverse economic conditions, and other factors. The question remains as to whether prices fell to the extent that would be expected in a competitive market. LMPs and LMP components do not reveal anything about behavior of market participants and possible exercise of market power that could raise prices above competitive levels. As the economist Ken Rose wrote in a recent article in *Public Utilities Fortnightly*, “Observing electricity price changes and their correlation with fuel costs and demand aren’t a substitute for careful analysis of market performance.”¹²

LMP data also do not paint a complete picture of the impact on consumers because they do not reflect all of the factors contributing to retail prices. Sources of costs to consumers other than LMPs, such as capacity payments, ancillary services and marginal losses, are a major component of prices. For example, the PJM State of the Market Report for the first three quarters of 2009 notes that capacity payments increased by 25 percent compared to the same period in 2008, offsetting the decline in LMP prices for combined cycle and combustion turbine units in some zones.¹³

¹² *Not So Fast: Proving Market Performance Requires Detailed Analysis*, by Kenneth Rose, *Public Utilities Fortnightly*, January 2010, available at: http://www.fortnightly.com/pdf.cfm?id=01012010_EnergyRisk2.pdf, Subscription required.

¹³ *2009 Quarterly State of the Market Report for PJM: January through September*, Section 3, Monitoring Analytics, pp. 50–53, available at: http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2009/2009q3-som-pjm-sec3.pdf

The remaining metrics provide very basic data on congestion costs, generator availability, demand response and renewable energy. All are important measures and APPA/ELCON support consistent reporting of such data across RTOs. But without an assessment of whether these measures are attributable to RTO market structure or to other exogenous factors (state renewable portfolio policies, federal incentives to install smart grid facilities that support demand response, individual state public utility commission and utility programs, *etc.*), their usefulness in evaluating the performance of RTO markets is limited.

FERC supplements the Section 1 Performance Metrics with a Section 2 category titled “Additional Information.” This is described as “eight additional topics on which all ISOs/RTOs will report, if applicable, and will be designated as information that might be useful in understanding ISO/RTO operations but not as indicative of measuring ISO/RTO performance.” This description is vague and gives little insight as to how these measures will be used by FERC. There are, however, useful metrics in this category.

The first such metric is system lambda, which is defined in FERC Form 714¹⁴ as the “single incremental cost of energy.” (Emphasis supplied.) But in this Notice, FERC defines system lambda as the “unconstrained energy portion of locational marginal price.” In other words, what should be a measure of cost is redefined as a component of price. It is the actual cost of the marginal unit that is relevant, such that a comparison can be made to LMPs to determine the cost-price discrepancy. System lambdas, as correctly defined, can be a useful tool. The economist Robert McCullough reviewed system lambdas (costs of the marginal unit) reported by the Los Angeles Department of Water and Power (“LADWP”) and found these to be lower than the CAISO’s real-time prices. As Mr. McCullough concluded, if the ISO was truly

¹⁴ FERC Form No. 714, Part II, Schedule 6 states “This single incremental cost of energy is the system lambda.” <http://www.ferc.gov/docs-filing/forms/form-714/sample-form.pdf>

competitive, LADWP system lambdas might instead be higher than the corresponding CAISO real-time price.¹⁵

A second useful category of metrics included in “Additional Information” is fuel diversity. APPA and ELCON believe that fuel diversity measurements should be included in the primary category of Performance Metrics because such measures address the success of RTOs in providing long-term market stability.

As noted above, FERC also included an “Additional Suggestions” category in its attachment to the Notice. This category, shown on page 6 of the attachment, is described as items from suggestions recently given to FERC that “are under review to identify a potential subset that might be included.” APPA/ELCON commend FERC for including several metrics they had proposed in the Section 2 “Additional Information” and the “Additional Suggestions” categories, but are concerned that the metric they believe to be of the greatest importance was not included in either list. This metric, discussed further below, compares actual revenues earned and costs incurred by generators selling power into RTO markets.

Recommended Standardized Measures

In this section, APPA/ELCON provide their minimum recommended measures of RTO performance, the rationale for collecting these measures, and the accompanying specific metrics.

For each of these metrics, APPA/ELCON recommend the following:

1. Each RTO provide a trend analysis of changes in the metric going forward and to the extent data are available, a comparison of recent past years.
2. Both the reporting RTO and FERC should provide all data on their web sites.
3. FERC should analyze the data across RTOs, over time for each RTO, and in comparison to non-RTO markets, to the extent feasible.

¹⁵ “The High Cost of Restructuring,” Robert McCullough, Berne Martin Howard, and Michael Deen, Public Utilities Fortnightly, February 2008, p. 56, <http://www.mresearch.com/pdfs/338.pdf>.

APPA/ELCON believe that all of the metrics presented in this section are required to obtain an accurate picture of the true benefits and costs of these markets. In addition, these recommendations were developed with an understanding of existing available data. For this reason, basic existing measures such as average LMPs, which are presented, for example, in market monitoring reports, are not repeated here. Rather, this list presents the most critical data needed to obtain an accurate picture of the benefits and costs of the RTO-operated markets.

A. Generator Revenues and Costs

A fundamental argument underlying restructuring of wholesale electricity markets is that competition will be more effective than cost-based price regulation in achieving just and reasonable prices and benefits for consumers. The degree to which there is a divergence between actual costs and revenues received from consumers is necessary to determine the benefits of moving from cost-of-service regulation (where utilities are allowed to recover prudently incurred costs through rates) to a deregulated market. As John Anderson of ELCON pointed out at a recent Commission technical conference, “in a competitive industry, when there are inframarginal revenues equivalent to making profits, then there’s an attraction of new entrants. And new entrants come and drive the costs, the prices down to where they’re once again equal to costs.”¹⁶

In other words, a primary measure of the efficacy of competition in a market is whether the price of a good, through competition, is driven down to the marginal cost of producing that good. Reports prepared by some RTO market monitors attempt to measure this through the

¹⁶ Technical Conference on RTO Responsiveness to address issues raised in the Order No. 719 compliance proceedings, February 4, 2010, Docket Nos. ER09-1048-000, *et al.* (“February 4 Technical Conference”). While the subjects of the conference were RTO governance and stakeholder processes, some speakers, including Mr. Anderson, noted in their remarks the need for generator-specific metrics. No court reporter was present at the conference, so there is no official transcript. This transcription was prepared by reviewing the posted video file of the conference.

Price-Cost Markup (PJM) or a Lerner Index (ISO-NE and MISO). These indices, however, present an incomplete picture of the price-cost relationship. They do not provide underlying cost data, look only at the price-cost relationship of the marginal unit and are only reported for the energy market. The metrics that APPA/ELCON recommend are more comprehensive and are therefore more accurate indicators of the actual relationship between cost and price. This relationship can only be accurately evaluated by determining all components of generators' revenue earned from wholesale electricity markets and all components of actual costs.

1. For each individual generating plant selling into the RTO's centralized markets, the following data should be provided for each year:
 - a. Revenue from all wholesale markets and payments, including, at a minimum: energy, capacity, ancillary services, reliability-must-run contracts, uplift payments, bilateral contract payments and other sources of revenue. The data should also indicate whether the plant made offers in any markets that were mitigated by the RTO or its market monitor, presenting both pre and post-mitigation offer data.
 - b. Actual operating, maintenance and fuel costs.
 - c. Contributions to capital cost in that year, including annual depreciation, and the net profit after coverage of debt cost; or an allocation of total company annualized capital costs to the plant.
 - d. A subtraction of the costs (b and c) from the revenue (a) to reveal the net income earned by the plant.
 - e. The inframarginal revenue. Inframarginal revenue is equal to the difference between the revenue received from the energy market, collected as part of (a), minus the actual operating, maintenance and fuel costs under part (b).
 - f. An assessment of the improvements or declines in the efficiency of the market as measured by the trend in the inframarginal revenue calculated in (e) above for each plant and for the RTO in total.
2. An aggregation of all data calculated in (a) through (d) above by the plant owner.
3. The actual variable cost of the marginal price-setting unit for each hour, a comparison of this cost to the actual LMP for that hour, and an average of this differential for on and off-peak hours for each month, and each pricing zone.

APPA/ELCON are concerned that these proposed metrics will be dismissed without adequate consideration, given Chairman Wellinghoff's statements at the February 4 Technical Conference. In response to Mr. Anderson's statement that "[w]e need generator-specific data to show whether entities are making the billions that some people say that they're making,"

Chairman Wellinghoff responded:

Well, it's, it goes into the metrics proceeding, which I'm going to actually venture into, I guess taking the chairman's prerogative a little bit, because I am interested in that proceeding. However, I have some problems with what you're requesting and that's why I want to explore it with you a bit, John.

I can't see how us getting the metric of what the costs and profits are of the generators is a metric that helps anybody, and here's why. Because what if they're making billions of dollars, but yet the consumers are still better off by them making the billions of dollars than some alternative. I mean, we have nothing to compare it against, unless you've got something else to tell me how to do it. I don't think that's the metrics we need to go after personally.

Now my colleagues may differ with me, but I will tell you today personally that I don't think that metric is one that I'm going to be advocating for unless you can somehow compellingly convince me that it is, and right now, today, I'm not convinced.

As a general matter, measurement of the revenues and production costs of the generators selling power into RTO markets is directly pertinent to the questions the GAO posed in its Report (at 58), *i.e.*, whether "RTOs have been good for consumers, how they have affected electricity prices, and whether they have produced the benefits FERC envisioned." But even more important, this information—which is essential to assessing the rates of return enjoyed by generation and transmission providers—is legally required for the Commission to carry out its statutory mission under Sections 205 and 206 of the Federal Power Act ("FPA"): to ensure that "public utilities" (including both the selling generators and the RTOs themselves) charge "just and reasonable" rates.

The Commission has the flexibility to depart from traditional cost-of-service regulation of “sales for resale” of electric power, in favor of a market-based rate regime, and it has done so. However, it still has the legal obligation to ensure that the resulting rates are “just and reasonable,” which obligation includes (but is not necessarily limited to) ensuring that consumers are not subjected to the exercise of market power. As the United States Court of Appeals for the Ninth Circuit stated in *Lockyer ex rel State of California v. FERC*, 383 F.3d 1006, 1012–13 (9th Cir. 2004) (emphasis supplied):

The use of market-based tariffs was first approved in the natural gas context, *see Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993), then as to wholesale sellers of electricity, *see Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). However, approval of such tariffs was conditioned on the existence of a competitive market. *Id.* Thus, market-based applications were approved only if FERC made a finding that “the seller and its affiliates [did] not have, or adequately [had] mitigated, market power.” *Id.* [Footnote omitted.] The principle justifying this approach as “just and reasonable” was that “[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment.” *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

The RTO metrics discussed immediately above that APPA/ELCON ask this Commission to develop go to this very issue: whether the prices that the generators obtain in RTO-run centralized markets are close to their marginal costs, such that they make only a normal return on their investment. If RTO-run centralized markets are not sufficiently disciplining prices, and generators are making supra-competitive profits from their sales into these markets or as a result of the existence of these markets, then this calls into serious question whether consumers are benefiting from them.

We therefore urge the Commission to fully consider the value of this and the remaining recommended metrics set out in these comments, and to include such metrics in the final set of metrics developed in this docket.

B. Long-Run Market Outlook

In addition to price, the Commission should be measuring the extent to which the short-term focus of market participants is harming the long-term viability of supply, as this is an important indicator of the benefits (or harm) of these markets. This measure includes the success of RTO markets in spurring the development of a portfolio of generation and demand-side resources that minimizes price volatility, supports renewable and other low-carbon resources, and ensures adequate resources to meet demand. RTO markets need to encourage competition by allowing for market entry, and providing a reliable and diverse universe of supply, including demand-side resources.

An additional indicator of long-run market health is the extent to which hedge funds, investment banks and other financial entities are participating in RTO markets for speculative purposes. These entities, which do not provide generation or demand response and do not serve load, are earning revenue in the electricity markets solely through arbitrage opportunities (*e.g.*, the difference between real-time and day-ahead prices or positions in Financial Transmission Rights (“FTRs”) and system flows). While such activities have been allowed on the rationale that these entities “add liquidity” to the market, these same activities can potentially increase costs to consumers.

Each RTO should provide annually the following data for the prior year:

1. For each generation plant completed and put into service in the prior year:
 - a. Generating technology, fuel and heat rate.
 - b. Capacity factor.
 - c. Nameplate capacity (MW).
 - d. Name and category of owner (independent power producer, affiliate of investor-owned utility, public power, investor-owned utility, electric cooperative, or other), and whether plant output will be sold under market-based or cost-based rates.

2. A list and percentage breakdown of all data in part 1 for all generation plants retired in the past year.
3. An assessment of how these additions and retirements affect the fuel diversity as demonstrated by the percentage of total capacity attributable to each fuel.
4. The capacity and generation technology for each generation plant currently in the interconnection queue.
5. The capacity and generation technology for each generation plant previously in the queue but removed in the past year.
6. LMP and ancillary service price volatility for each month, season and for the entire year, calculated as the minimum and maximum prices, range and standard deviation of these prices.
7. For the RTO as a whole and for each constrained zone, the average, minimum and maximum Herfindahl-Hirschman Index (HHI) for off and on-peak hours, for baseload, intermediate and peaking plants in the energy, capacity and ancillary services markets.
8. For each generation unit receiving payments from the capacity market (if relevant for the RTO), the annual capacity factor, total number and duration of unscheduled outages, and number of hours that bids were submitted that exceeded the clearing price.
9. For each Demand Response resource receiving capacity market payments (if relevant for the RTO), the number of times and hours the resource was called upon and the number of times and total hours demand was reduced in response.
10. For virtual transactions, the identities of virtual traders participating in each RTO-run centralized market, the percentage of revenue in each such market flowing to virtual trades, and the average monthly earnings from such virtual purchases and sales between the day-ahead and real time markets.
11. The identities of financial institutions and other entities that do not own/control generation or serve load that participate in FTR auctions/allocations, the percentage of congestion revenues in the relevant period(s) paid out to such entities on their FTR holdings, and the revenues paid by them to secure such FTRs.

C. Market Monitoring and Mitigation

Market monitoring and mitigation are critical to protect consumers in the absence of cost-based regulation. But if the mitigation is widespread and frequent, this may be a sign that insufficient competition exists to warrant reliance on competitive forces to discipline price.

To assess the extent of the needed mitigation, the following data should be gathered annually from each RTO's market monitor:

1. The number of offers into all RTO markets that were mitigated by the RTO in total, by generation plant, and by owner.
2. The pre- and post-mitigated amount of each mitigated offer, and averages for all offers, broken down by off-peak and peak hours, and for each zone and month.

D. Congestion

Transmission congestion can be a substantial barrier to achieving the benefits of dispatching plants over a wide geographic region. One of the expected outcomes of locational marginal pricing was the incenting of construction of generation and transmission facilities where needed to reduce substantial and continuing congestion. Measures of whether congestion has improved in RTO regions would provide needed data on whether this outcome has been achieved.

1. For each RTO, calculate the following on an annual and monthly basis:
 - a. The difference between the maximum and minimum LMPs for each hour in the RTO region.
 - b. The total, average and maximum difference calculated in a. for each month and the year in total for the RTO.
 - c. The change from year-to-year in the annual and monthly differentials calculated in b.
2. Amount of new transmission facilities (i) approved and (ii) constructed within the last year, broken down by: constructing transmission owner; miles of line; kV of facilities constructed; reason for construction (reliability, economics, both or other).

IV.

CONCLUSION

APPA/ELCON strongly recommend that this comment period not be the only opportunity for input from consumer and load-side representatives on metrics to measure RTO performance. They urge FERC to engage in an ongoing, but expeditious, dialogue with all stakeholders to determine optimal comprehensive measures and metrics. The revised metrics should be in place by the end of this year so that implementation and reporting can occur for calendar year 2011.

Moreover, FERC should not let the determination of metrics serve as an end in and of itself. Simply reporting the metrics without a timely follow-up determination of where reforms may be needed to ensure that consumers are paying just and reasonable rates would serve no benefit. In contrast to the timetable set forth in FERC's Strategic Plan, consumers should not have to wait years for such reforms.

WHEREFORE, APPA/ELCON submit these initial comments for the Commission's consideration in this docket.

Respectfully submitted,

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March 5, 2010