UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.	Docket No. AD17-11-000

POST-TECHNICAL CONFERENCE COMMENTS OF TAPS

The Transmission Access Policy Study Group ("TAPS") appreciates the opportunity to provide follow-up comments on the May 1-2, 2017 technical conference. The discussion at the conference demonstrated that ISO-NE, NYISO, and PJM (collectively, "eastern RTOs") are each facing and, in some cases, already addressing issues of varying degrees of urgency regarding the interplay between state policies and RTO capacity markets.[1] This range highlights the wisdom of allowing regional flexibility, versus Commission imposition of a prescriptive, one-size-fits-all "solution."

The over-arching message that emerged is that RTO capacity markets must respect state and local policy goals. Such an approach is necessitated by the Federal Power Act's ("FPA") recognition of the important role played by state and local policies, as well as the basic tenet that competitive markets (whether bilateral or organized) achieve efficiency by responding to, not dictating, customer choices. It is also the only durable solution that will not trigger an exodus from RTOs and their markets.

[1] Although the conference focused on eastern RTO capacity markets, energy markets were discussed in passing. *See, e.g.*, Tr. at 260-65 (Ott). The Commission should be wary of making changes that could disrupt RTO energy markets, which generally work well. Negative energy prices (largely a product of federal policy) and zero-marginal-cost renewables may pose long-term challenges, but the record does not support substantial changes beyond those already under consideration in the Commission's price formation efforts.

To be consistent with the FPA's lowest possible reasonable rate mandate,[2] any path forward should avoid punishing consumers by making them pay twice—once to support their load-serving entity's ("LSE") ownership of, or long-term bilateral commitment to, a capacity resource, and a second time to buy capacity from the RTO's short-term market if the RTO's minimum offer price rules ("MOPRs") prevent the LSE's capacity from clearing the RTO's auction. TAPS urges use of principles proposed by Old Dominion Electric Cooperative and National Rural Electric Cooperative Association ("NRECA") as guideposts for working through these challenging issues.[3] Based on those principles, Path 1 and certain Path 2 approaches are most promising, although Path 4 could be feasible if all states within an RTO agree.

Finally, TAPS strongly urges the Commission not to export the eastern RTO capacity market construct to other RTOs where it is not currently in place.

I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities ("TDUs") (whether municipal, cooperative, or investor-owned utilities) in more than 35 states, promoting open and non-discriminatory transmission access.[4] Representing LSEs entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS has long supported Commission initiatives to form independent RTOs to provide

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[2] *FERC v. EPSA*, 136 S. Ct. 760, 781-82 (2016) (finding FERC has statutory duty to hold down prices and the FPA "aims to protect 'against excessive prices' and ensure effective transmission of electric power"); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) (requiring natural gas be sold "at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest").

[3] Michael Cocco, Pre-Technical Conference Statement at 2-3 (Apr. 25, 2017) ("Cocco Statement").

[4] David Geschwind, Southern Minnesota Municipal Power Agency, chairs TAPS's Board, and Jane Cirrincione, Northern California Power Agency, is Vice Chair. John Twitty is TAPS Executive Director.

non-discriminatory access and foster the robust generation competition needed to enable LSEs to meet their load-serving obligations reliably and affordably.

TAPS members span the continent, serving load in the eastern RTOs, other RTOs, and in non-RTO regions. They own or have long-term bilateral contracts for the full range of resources, including coal, nuclear, gas, hydro, wind, and solar, reflecting commitments made over decades in accordance with local and state laws and policies. TAPS member municipal and cooperative utilities, as a matter of state policy, retain an obligation to serve—even in states that eliminated that obligation for investor-owned utilities. TAPS members have an interest in ensuring that RTO markets respect their traditional, state-authorized business model by recognizing the resource adequacy contribution of self-supply commitments as well as other state policies.

II. COMMUNICATIONS

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III. COMMENTS

A. *Foundational Concepts and Lessons Learned*

1. The FPA Leaves Generation Choices to the States

The FPA preserves state authority to regulate generation facilities, "integrated resource planning and utility buy-side" decisions, and "utility generation and resource

portfolios."[5] States may do so through a variety of means—they may "forbid new entrants," "require retirement of existing generators," "limit new construction to . . . environmentally-friendly units, or . . . take any other action in their role as regulators of generation facilities," although those choices "affect the pool of bidders" in wholesale electricity markets and, "in turn[,] affect[] the market clearing price."[6]

Hughes v. Talen Energy Marketing, LLC[7] did not disturb state authority over generation. The Supreme Court held that Maryland had impermissibly "set[] an interstate wholesale rate" by "requir[ing] [the developer of state-sponsored units] to participate in the PJM capacity auction" and "guarantee[ing] [the developer] a rate distinct from the clearing price for its interstate sales of capacity to PJM."[8] The Court made clear, however, that it was not cutting into state authority over generation, stating that "[n]othing in [its] opinion should be read to foreclose" other state measures to "encourage development of new or clean generation," so long as such measures "do not condition payment of funds on capacity clearing the [RTO] auction."[9]

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[5] *New York v. FERC*, 535 U.S. 1, 24 (2002).

[6] *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

[7] 136 S. Ct. 1288 (2016) ("*Hughes*").

[8] *Id*. at 1297.

[9] *Id*. at 1298-99.

The Commission has repeatedly recognized the legitimacy of state efforts to encourage particular types of generation,[10] and should respect such state policies. To do otherwise would continually pit the Commission against states, frustrating the federalism principles at the core of the FPA. From a practical perspective, if wholesale capacity markets fail to respect state policies, they may not exist for long. There was broad agreement at the conference that states may require utilities to exit RTOs if participation requires states to forego their ability to shape the resource mix used to serve their citizens, or obligates their citizens to pay twice to meet the same capacity need—once for the state's preferred resource, and again for auction purchases if that resource fails to clear when offered at a MOPR-elevated price.[11]

2. Bilateral Contracts are Central to Market Participants' Ability to Make Long-Term Decisions

Long-term bilateral power supply arrangements are at the core of the electric industry and the FPA. "The regulatory system created by the [FPA] is premised on

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[10] Brief for the United States as *Amicus Curiae* at 33, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (No. 14-614), https://perma.cc/4ELB-QKCU ("States are free to require procurement of new generation resources," and presumably to support the retention of existing ones, "even if the price signals in the regional wholesale capacity market indicate that no [such] resources are needed."); *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108, at 61,490 (2013) (LaFleur, Comm'r, concurring) ("[S]tates have the unquestioned right to make policy choices through the subsidization of capacity."), *reh'g denied*, 151 FERC ¶ 61,056 (2015). *See also ISO New England Inc.*, 155 FERC ¶ 61,023, P 23 (exempting certain renewable resources favored by state policy from the MOPR balances multiple concerns, including "accommodat[ing] the ability of states to pursue their policy goals"); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 143 (acknowledging state rights "to pursue legitimate policy interests"), *clarified*, 137 FERC ¶ 61,145, P 3 (2011) ("[S]tates and localities have their own policies and objectives," with which FERC intends not to "unreasonably interfere.") (additional subsequent history omitted).

[11] *See, e.g.*, Tr. at 408 (Sheahan), 409 (Vannoy), 476-77 (Stoddard).

contractual agreements voluntarily devised by the regulated companies."[12] FPA § 217 reflects Congress' recognition of the importance of, and support for, long-term bilaterals.

Long-term bilaterals are also crucial to the ability of market participants to make long-term decisions and to achieving resource adequacy. Investments in long-lived, capital-intensive generation cannot be made on the basis of a one-year cost recovery; they need stable, long-term revenue streams.[13] Long-term bilaterals deliver those revenue streams, giving generators access to the lowest-cost financing,[14] while allowing customers to select the diverse products they want at a stable, predictable price.

At the conference, there was widespread recognition of the benefits of long-term bilaterals. American Electric Power Company's panelist identified them as a crucial tool for integrating state policies, while preventing the costs of such policies from being shifted to adjoining states.[15] Other panelists emphasized the importance of long-term

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[12] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). *See also* 16 U.S.C. §§ 824d(c), 824d(d); *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956) (FPA "expressly recognizes that rates to particular customers may be set by individual contracts."); *id.* at 344 ("By preserving the integrity of contracts, [the Act] permits the stability of supply arrangements which all agree is essential to the health of the . . . industry."); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 551 (2008) ("The FPA recognizes that contract stability ultimately benefits consumers.").

[13] TAPS, Post-Technical Conference Comments at 7-8 (Jan. 8, 2014), Docket No. AD13-7-000 ("TAPS comments") (citation omitted) ("Decisions to build new power plants are based upon long-term analysis of revenue and cost, and do not hinge upon the outcome of an auction that determines only a capacity payment for a single year."); *see also NYPSC v. NYISO*, 153 FERC ¶ 61,022, P 64 (2015) (long-term investment and purchases from short-term capacity markets are not perfect substitutes), *reh'g denied*, 154 FERC ¶ 61,088 (2016), *appeal docketed*.

[14] Cliff Hamal, Pre-Conference Comments at 2 (May 3, 2017) ("Hamal Comments"):

> It bothers me greatly that this industry has adopted a market mechanism that goes out of its way to drive away the lowest cost financing options. Cheap money is the one thing that should have universal appeal. The one element than can help everyone is compromised through the adoption of a market mechanism that produces a volatile, fickle and frail price mechanism that relies more on regulatory nurturing than the fundamentals of supply and demand. This drives up costs for everyone, relative to a system that allows for long-term contracting as needed.

[15] Tr. at 242-44, 276-77 (Sundararajan).

bilaterals as an alternative to the uniform short-term product offered by eastern RTO capacity markets.[16]

The industry experts panel also acknowledged the ability of bilaterals to support new renewable projects (which panelists generally agreed need bilaterals) and other resources.[17] And to the extent some industry expert panelists suggested bilaterals were a second-best alternative for achieving resource adequacy, their preferred alternatives—e.g., incorporating carbon pricing or other environmental attributes into RTO markets, or a hypothetical world in which markets have stable rules and government subsidies do not exist[18]—will take years to achieve, if feasible at all.

3. Short-Term Capacity Markets are Ill-Suited to Deliver the Stable Revenues Needed to Support Generation

Eastern RTO capacity auction results have been volatile and unpredictable.[19] This is attributable in part to unstable market rules,[20] which make it difficult for market

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[16] Tr. at 282-83 (Chen), 316-18 (McAlister), 269-70 (Cocco); *see also* Comments of the Maryland Public Service Commission at 4 (May 1, 2017).

[17] Tr. at 496-513; *id.* at 499 (Shanker) (bilateral contracts "probably are the only way you could form capital" for new generation if capacity market design is unstable, markets can be manipulated, or states can take actions that affect supply); *id*. at 501-02 (Tierney) (plants that do not receive substantial energy revenues, due to penetration of zero-marginal-cost renewables, will eventually need long-term contracts to stay online); *id*. at 512-13 (Hamal) (a framework based on bilaterals is superior to attempting to incorporate carbon and environmental attributes into RTO market algorithms).

[18] *See*, *e.g.*, Tr. at 500 (Shanker), 506-07 (Makovich), 508-10 (Hogan). While Mr. Shanker highlighted the elimination of *state* subsidies as necessary to incent sufficient new generation (Tr. at 499), the same disruption would occur from any federal subsidy to generators. *See also* Tr. at 281-82 (Chen) (subsidies are everywhere, and they are hidden).

[19] In the 2020/2021 PJM Base Residual Auction, the RTO Zone cleared at $76.53/MW-day—well below analyst estimates that had spanned $90/MW-day to $125/MW-day. Amanda Luhavalja, *Latest PJM Capacity Auction Price for RTO Clears 24% Lower at $76.53/MW-Day*, SNL Energy, May 23, 2017.

[20] For example, there have been 27 revisions to PJM's Reliability Pricing Model since 2010. American Municipal Power, Inc., Pre-Conference Statement of Lisa McAlister at 2 n.2 (Apr. 25, 2017) ("McAlister Statement").

participants to plan and are detrimental to investment decisions.[21] But even if their rules were not constantly in flux, there would still be significant price volatility in those markets. Especially given the rapid industry changes underway—changing consumption patterns, deployment of distributed generation and other new technologies, aging central station plants, the shift from fossil fuels to renewables, etc.—short-term imbalances between supply and demand are inevitable and will cause prices to fluctuate year to year.[22] Generation additions are lumpy, long-lived, and take time to construct. Shortages and surpluses will inevitably result from business cycles, construction lags, and market over-reaction to price changes that cause supply to overshoot equilibrium. Even a dramatically expanded MOPR cannot eliminate these sources of price volatility.

4. Markets Should Facilitate Choice, Not Restrict It

It is inconsistent with the FPA's reliability mandate and rational energy policy for RTO market rules to penalize those willing, able, and in many cases required to bring adequate resources to the grid. Competitive markets are premised on voluntary transactions between willing buyers and sellers: buyers signal which products they want through consumption decisions; sellers improve the products they offer to meet that

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[21] As explained by Lisa McAlister, the uncertainty surrounding the PJM MOPR discourages LSEs from making long-term commitments; and the existing pattern of repeated RTO and Commission intervention to prop up capacity prices may well discourage generators from entering into long-term, bilateral arrangements in hopes that prices set by future administrative actions will be more lucrative. Tr. at 373-74. *See also* David Patton, *Resource Adequacy in Wholesale Electric Markets: Principles and Lessons Learned* at 10, Docket No. AD13-7-000 (Sept. 25, 2013).

[22] PJM, for example, had a reserve margin of 29% this year—far above the 16.6% target. PJM, News Release (May 8, 2017), http://www.pjm.com/~/media/about-pjm/newsroom/2017-releases/20170508-pjm-ready-to-meet-summer-demand.ashx. Under these conditions, capacity market prices *should* drop; and a construct that props up prices, incenting the construction of more new generation, makes no sense. Volatile prices, however, may be unable to support existing baseload generation, let alone new construction. *See, e.g.*, Darren Sweeney, *FirstEnergy Calls PJM Results 'Unsustainable' to Support Baseload Generation*, SNL Energy, (June 1, 2017).

demand. A market construct that fails to reflect and account for the preferences of buyers and their states in addition to ensuring lowest reasonable costs to consumers is broken. If the Commission cannot find a path that enables eastern RTO capacity markets to respect buyer preferences and state policies, that construct is a failure and should be abandoned.

B. Principles to Guide Selection of a Path Forward

Based on these foundational concepts and lessons learned, TAPS urges adoption of the NRECA Principles to guide the selection of a path forward:[23]

> *A. Maintain a focus on reliable service at just and reasonable rates for end-use customers.*
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> *B. Ensure that LSEs' long-term investments in generation are honored and encouraged.*
>
> *C. Avoid the volatility of repeated, reactionary revisions to market designs.*
>
> *D. Adopt wholesale market policies which encourage resource diversity and accommodate legitimate state policy objectives.*
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> *E. Allow regional flexibility.*

C. Paths Forward

The May 23 Notice Inviting Post-Technical Conference Comments outlines five paths. Applying the NRECA Principles, Path 1 and certain Path 2 approaches are most promising. Path 4 could be feasible if all states in the RTO agree.

1. Paths 3 and 5 are Unsustainable and Unworkable

TAPS agrees with most panelists that Path 3—the status quo, relying on case-by-case litigation to determine whether resources benefited by particular state actions should be subject to the MOPR—is unsustainable. As Acting Chairman LaFleur observed, if

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[23] Cocco Statement at 2-3 (describing the NRECA Principles in more detail).

MOPRs re-price resources that a state has chosen to subsidize for policy reasons, the result is "neither accommodating [of state policies] nor will it lead to harmony."[24] Path 3 creates the risk that consumers will be forced to pay twice to meet the same capacity need, inappropriately punishing them in the name of buyer-side market power mitigation, and increases economic uncertainty for developers, thereby raising their financing costs.

To date, Path 3 approaches have failed to adequately respect LSEs' long-term generation commitments (NRECA Principle B). MOPR relief has been limited and piecemeal, even where the Commission has recognized that certain resources or certain market participants have limited incentive and ability to exercise market power.[25] Other RTO mechanisms are too restrictive to be a viable alternative for most TDUs. PJM's Fixed Resource Requirement ("FRR") requires an LSE to be sure, three years in advance, that it will have a long capacity position for five years thereafter; bars it from securing additional capacity from the auction; subjects it to stiff penalties if it is deficient; and limits its ability to sell excess capacity.[26] Even if it reasonably expects to be long, events

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[24] Tr. at 565 (LaFleur).

[25] *See, e.g.*, *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, PP 107-08 (2013), *reh'g denied*, 153 FERC ¶ 61,066 (2015), *appeal pending, NRG Power Mktg., LLC v. FERC*, Nos. 15-1452 and 15-1454 (Consolidated) (D.C. Cir. filed Dec. 14, 2015) (approving, *inter alia*, limited self-supply exemption); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, *reh'g denied*, 154 FERC ¶ 61,088 (2016), *appeal docketed* (directing development of limited exemption for certain self-supplied resources and renewable energy resources); *ISO New England Inc.*, 147 FERC ¶ 61,173 (2014), *on reh'g*, 150 FERC ¶ 61,065 (2015), *remanded*, *NextEra Energy Resources, LLC v. FERC*, 2015 U.S. App. LEXIS 23050 (Dec. 1, 2015), *on remand*, 155 FERC ¶ 61,023 (2016), *on reh'g*, 158 FERC ¶ 61,138 (2017), *appeal docketed* (approving limited MOPR exemption for renewable resources); *cf.* ISO-NE Tariff § III.13 (applying bid floor to nearly all new resources, including LSE self-supply).

[26] An FRR entity is not permitted to purchase capacity from the PJM auction, and through application of the Reliability Assurance Agreement ("RAA") and RAA Schedule 8.1.E.2, is subject to the equivalent of an extra reserve margin that restricts its sales into the auction. RAA Schedule 8.1.E.2 imposes a cap on sales of excess capacity.

not within its control—including market rule changes[27]—can cause the LSE to become deficient, exposing it to severe penalties.

TAPS also agrees with panelists who pushed back against Path 5 as too extreme.[28] Path 5 aggravates Path 3's problems by expanding the MOPR to existing generators, dramatically increasing economic uncertainty and upsetting LSEs' reasonable investment-backed expectations, which typically are supported by long-term bonds. Path 5 directly interferes with the long-standing business model of utilities that retain their obligation to serve; and it will increase litigation, not decrease it.

Path 5 is also unworkable.[29] All state actions that affect electric supply or generator costs have an impact on wholesale markets, and such actions are ubiquitous. The MOPR envisioned by Path 5 would require that the price effects of state actions benefiting every new and existing resource be quantified, and that administratively-determined minimum prices be calculated and enforced for all. By the same reasoning, federal subsidies—that often have much larger effects than state policies—should also be subject to a MOPR. Not only would the cost of administering such a system be astronomical, it bears no resemblance to a well-functioning competitive market.

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[27] *See, e.g.*, *Ill. Mun. Elec. Agency*, 147 FERC ¶ 61,090, PP 14-20 (2014), *reh'g denied*, 150 FERC ¶ 61,040 (2015) (granting one-year waiver of rule restricting use of resource to meet PJM FRR when PJM rules changed after FRR commitments made, making some IMEA resources ineligible); *Ill. Mun. Elec. Agency*, 150 FERC ¶ 61,179 (2015) (denying extension of waiver for an additional year); *Ill. Mun. Elec. Agency*, 151 FERC ¶ 61,019, P 25 (2015) (granting limited waiver to permit alternate of use of resources unable to be used in FRR as a result of rule changes).

[28] *See, e.g.*, Tr. at 316-17, 412-13 (McAllister), 407-08 (Sheahan).

[29] *ISO New England Inc.*, 158 FERC ¶ 61,138, at 61,892 (2017) (Bay, Comm'r, concurring) (A MOPR that seeks to unwind the effects of all state support puts FERC "in direct and recurring conflict with the states, ignores the pervasiveness of state and federal policies that support resources in one fashion or another, and represents a significant intervention in the market that raises costs to consumers."); *see also NYPSC v. NYISO*, 158 FERC ¶ 61,137, at 61,864 (2017) (Bay, Comm'r, concurring) (same).

2. The Commission Should Not Impose Path 4

While some conference participants viewed Path 4 as a long-term goal, TAPS cautions the Commission against forcing an "all in" approach, particularly in multi-state RTOs where achieving agreement among the states on the policies that should be integrated into RTO market algorithms is more challenging. The Commission should leave the decision of whether to pursue Path 4 to the RTOs, participating states, and other stakeholders, and fulfill its obligation by reviewing any resulting proposals under FPA § 205 in light of the NRECA Principles.

3. Path 1 and Certain Path 2 Approaches are Potentially Viable

Consistent with the NRECA Principles, the way forward must permit wholesale markets to operate in harmony with state policies. To that end, Path 1 and certain Path 2 approaches are the most promising options.

There is nothing "extreme" about Path 1.[30] It is the resource adequacy approach of much of the country and is designed to recognize—rather than penalize—the resource adequacy contributions being made by states and LSEs. What is truly not viable is a capacity market construct that cannot deliver the products buyers want, and is so fragile it needs constant administrative intervention.

Certain Path 2 approaches might work, although the devil is in the details. Path 2 encompasses a wide range of possible price adjustments whose reasonableness will

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[30] Several panelists endorsed a relaxed or "no MOPR" solution. *See* Tr. at 471-72 (Hamal) (advocating a bilateral market); Tr. at 421-22 (McAlister) (same); *see also* Cocco Statement at 4 ("[T]he Commission should look to the individual RTOs to develop specific, non-MOPR market design revisions that will protect the integrity of the market without causing adverse consequences on consumers."); Hamal Comments at 2 ("[A] better system would involve reliance on bilateral contracting in a competitive market to provide the resources needed, when they are needed, and with the capabilities that are desired."); McAlister Statement at 4 (advocating a residual market approach).

depend on their scope, magnitude, and frequency. Case-by-case Commission review, including evaluation of whether a specific Path 2 proposal is consistent with the NRECA Principles (e.g., encouraging and honoring long-term commitments), will be needed.

Either Path 1 or 2 can support a residual capacity market that entities use to meet resource adequacy obligations not otherwise satisfied through self-supply.[31] Such a market would respect the long-term bilaterals needed to support major infrastructure investments and maintain resource adequacy, and enable achievement of federal, state, and local policy goals. In contrast, Paths 3 and 5 do neither.

In some eastern RTOs, it may take time to transition to such a system. TAPS understands the Commission's concern that there must be some mechanism to assure resource adequacy in regions where states have deregulated retail service in a manner that may limit or discourage retail providers from entering into long-term commitments. But the answer is not a strict MOPR that harms states and undermines their policies. The Commission should work with states to address resource adequacy challenges. Even if a state's current laws do not include provisions for resource adequacy,[32] laws can evolve. Michigan—one of only two MISO states with retail choice—passed legislation earlier this year creating a new state mechanism to assure adequate resources for retail choice load.[33] California's Community Choice Aggregators—which are required to provide their fair share of resource adequacy, including flexible resources capable of providing ramp—

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[31] *See, e.g.*, Hamal Comments at 5; APPA, *Missing Money Revisited* (Sept. 2016), https://perma.cc/E7TB-23PT; Cliff Hamal, Comments at 11-13, Docket No. AD13-7-000; TAPS Comments at 6-7.

[32] During the conference only one of the states represented, New York, indicated that it might be in the position to take responsibility for resource adequacy for its citizens. Tr. at 125-26 (Weiner).

[33] Mich. Pub. Act No. 341 (2016), http://www.legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0341.pdf.

also illustrate how states can implement retail customer choice while assuring resource adequacy.[34]

States have a strong incentive to act to support resource adequacy if there is a real threat to reliability: their citizens will hold them responsible if the lights go out.[35] Illinois, New York, and Ohio have recently taken steps to retain baseload resources.[36] And Maryland was so concerned by PJM adequacy projections that it established a program—albeit one subsequently pre-empted in *Hughes*—to support new baseload generation.[37]

Working with states will take time, and solutions will require Commission flexibility.[38] But the alternative—trying to solve resource adequacy without the assistance of states—is likely to be frustrating and counter-productive, with consumers saddled by excessive rates, states exiting RTOs, and market rule churn that violates NRECA Principle C.

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[34] *See* Cal. Pub. Util. Code §§ 366.2, 380 (establishing a Community Choice Aggregator program; defining Resource Adequacy requirements for California LSEs); CAISO Tariff Appendix A (defining "CPUC Load Serving Entity" to include Community Choice Aggregators).

[35] Tr. at 205-06 (Erwin), 273-74 (Sundararajan).

[36] *See, e.g.*, Illinois Future Energy Jobs Act, Ill. P.A. 099-0906 (2016), http://www.ilga.gov/legislation/publicacts/99/PDF/099-0906.pdf; *Re: Large Scale Renewable Program & a Clean Energy Standard*, 331 P.U.R. 4th 357 (N.Y. Pub. Serv. Comm'n 2016) (creating "Zero Emissions Credits" to compensate qualifying nuclear plants for their carbon-free attributes); Op. and Order, Case No. 14-1297-EL-SSO (Ohio P.U.C. Mar. 31, 2016) (Opinion approves power purchase agreements for certain coal-fired and nuclear plants owned by American Electric Power and FirstEnergy. The utilities reformulated the arrangement after the Commission rescinded their affiliate sales waivers.).

[37] *In The Matter Of Whether New Generating Facilities Are Needed To Meet Long-Term Demand For Standard Offer Service*, Order No. 84,815, 297 P.U.R. 4th 336 (Md. Pub. Serv. Comm'n 2012).

[38] As a first step, the Commission might consider convening joint boards on a regional basis pursuant to FPA § 209, 16 U.S.C. § 824h, to consider these issues.

D. Eastern Capacity Market Constructs Should Not be Exported to Other Regions

This proceeding is confined to eastern RTOs. However, the experience of TAPS members in Eastern RTOs makes those in other RTOs fearful that the capacity market constructs will migrate west. Those constructs were developed for regions that have largely deregulated their retail markets and discontinued state resource planning requirements for most LSEs. They should not be exported to regions that have largely retained the obligation to serve, or implemented other mechanisms to assure sufficient capacity.[39]

Respectfully submitted,

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[39] Less than 10% of MISO allows retail choice. The remaining 90%+ is traditionally regulated, and LSEs retain retail service obligations and the associated ability to make long-term capacity commitments. LSEs in SPP also retain the obligation to serve. In CAISO, LSEs are required to secure sufficient capacity to meet load-serving obligations, which reflects California's strong preference to procure capacity needs through a bilateral market that can include LSE generation. CAISO Tariff Appendix A and § 40; *see also* Cal. Pub. Util. Code § 380.