UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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| Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities | Docket No. RM14-14-000 |

**REQUEST FOR REHEARING AND CLARIFICATION OF THE TRANSMISSION ACCESS POLICY STUDY GROUP**

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Transmission Access Policy Study Group ("TAPS") seeks rehearing and clarification of Order No. 816, the Commission's October 16, 2015 Final Rule on Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities.[1]

Consistent with our comments[2] on the NOPR,[3] TAPS largely supports and appreciates the Commission's determinations in Order No. 816, particularly that the Final Rule does not eliminate the submission of indicative screen information for purposes of assessing horizontal market power in RTO regions. TAPS seeks rehearing or

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[1] Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 816, 80 Fed. Reg. 67,056 (Oct. 30, 2015), 153 FERC ¶ 61,065 (2015).

[2] TAPS, Comments of the Transmission Access Policy Study Group, Docket No. RM14-14-000 (Sept. 23, 2014), eLibrary No. 20140923-5126.

[3] Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 79 Fed. Reg. 43,536 (proposed July 25, 2014), FERC Stats. & Regs. ¶ 32,702 (proposed 2014) ("NOPR").

clarification of Order No. 816 on two specific issues, both of which depart from the NOPR.

First, TAPS seeks a determination on rehearing that, contrary to the holding of the Final Rule, capacity in first-tier market areas should be included for determining changes in the 100-MW net capacity threshold that triggers a seller's obligation to file a notice of change of status. Second, TAPS seeks clarification, or in the alternative, a determination on rehearing, that "behind-the-meter" generation that is available to make wholesale sales and is not reflected as a reduction in load reported in Form No. 714 must be included in seller reporting obligations, including the 100-MW change-in-status threshold, the indicative screens, the asset appendices, and the category screens. To the extent the Commission continues to maintain its exemption for "behind-the-meter" generation, it should take steps to ensure that that exemption does not constitute a blind spot of undefined proportions in its market power monitoring and assessment regimen

The Commission has stated that Order No. 816 is intended, in part, to "improve transparency in the market-based rate program." Order No. 816, P 10. The clarification and modifications requested here by TAPS are aimed at ensuring that the total amount of relevant generation owned and controlled by sellers with market-based rate authority is transparent to stakeholders and especially to the Commission. This is essential to accurately reflect market realities, protect against anticompetitive conduct and the exercise of seller market power, and ensure just and reasonable and not unduly discriminatory rates under sections 205 and 206 of the Federal Power Act. This is also fundamental to ensuring that the Commission has acted in accordance with the law; the courts have made clear that the "reporting requirements [are] an integral part of a market-

based tariff that [can] pass legal muster." *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015 (9th Cir. 2004). *See also Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 0032009); *Mont. Consumer Council v. FERC*, 659 F.3d 910, 918 & n.3 (9th Cir. 2011).

## SPECIFICATION OF ERRORS

In accordance with Rule 713(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(1), TAPS presents the following specification of error.

1. The Commission erred by issuing a Final Rule that holds that seller capacity in market areas that are first tier to the study area is not cumulative with seller study area generation and cannot trigger change-in-status reporting, even when there is transmission available to import that capacity into the study area. Order No. 816, P 230. This approach is inconsistent with market realities and cannot be reconciled with the Commission's treatment of first-tier seller generation for indicative screen analyses. It is not supported by substantial evidence, is arbitrary and capricious, and is contrary to the purpose of the reporting obligations and the Commission's duty to effectively monitor seller market-based rate authority.
2. The Commission erred by issuing a Final Rule that excludes all "behind-the-meter" generation, vaguely defined, from seller reporting obligations and indicative and category screens, including generation available to sell in wholesale markets that is not reflected in load reported on Form No. 714. Order No. 816, P 252. This approach is inconsistent with market realities, not supported by substantial evidence, is arbitrary and capricious, and is contrary to the purpose of the reporting obligations and the Commission's duty to effectively assess and monitor seller market-based rate authority.

## STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(2), TAPS presents the following specification of error.

1. Whether the Commission erred by issuing a Final Rule that holds that seller capacity in market areas that are first tier to the study area is not cumulative with seller study area generation and cannot trigger change-in-status reporting, even when there is transmission available to import that capacity into the study area. Order No. 816, P 230. *See* Order No. 816, P 41; Order No. 697, P 373[4];

[4] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 FERC ¶ 61,260 (2007), *on reh'g*, Order No. 697-A, 73

*Universal Camera Corp. v NLRB*, 340 U.S. 474 (1951); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Mont. Consumer Council v. FERC*, 659 F.3d 910 (9th Cir. 2011); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009).

2. Whether the Commission erred by issuing a Final Rule that excludes all "behind-the-meter" generation, vaguely defined, from seller reporting obligations and indicative and category screens, including generation available to sell in wholesale markets that is not reflected in load reported on Form No. 714. Order No. 816, P 252. *See Universal Camera Corp. v NLRB*, 340 U.S. 474 (1951); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Mont. Consumer Council v. FERC*, 659 F.3d 910 (9th Cir. 2011); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009).

## ARGUMENT

### I. THE COMMISSION SHOULD INCLUDE AVAILABLE CAPACITY IN FIRST-TIER MARKETS IN THE 100-MW THRESHOLD FOR TRIGGERING A NOTICE OF CHANGE IN STATUS.

The Commission's regulations specify that a seller that acquires generation that would cause a cumulative net increase of 100 MW or more in any relevant geographic market must file a notice of change in status with the Commission. 18 C.F.R. § 35.42(a)(1). In the NOPR, the Commission proposed to clarify that the "relevant geographic market" for purposes of that trigger included capacity that could be imported from first-tier markets. NOPR P 96.

In Order No. 816, the Commission addressed concerns about transmission availability and "recognize[d] that 100 MW located outside of the study area is only equivalent to 100 MW inside when there is a long-term firm transmission reservation to

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Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305, *clarified*, 131 FERC ¶ 61,021 (2010).

import the 100 MW." Order No. 816, P 229. The Commission then reversed the NOPR proposal, stating that it would "exclude markets and balancing authority areas that are first-tier to the seller's study area." *Id.* P 230. Under the Final Rule, "a seller need not consider its and its affiliates new generation, including generation from long-term purchase agreements, in first-tier areas in determining whether it has reached the 100 MW threshold." *Id.*

The Commission erred in failing to include any capacity in a market first-tier to the relevant geographic market in the 100-MW threshold for triggering a notice in change of status, even when there is available transmission capacity or firm, long-term transmission reservations associated with the capacity to import the capacity into the study zone. On rehearing, the Commission should grant rehearing to: (1) include first-tier capacity when there is a long-term transmission reservation associated with the capacity; and (2) include all other first-tier capacity either in its entirety or, in the alternative, on a pro rata basis consistent with the inclusion of such generation in market power screens.

TAPS recognizes that transmission import limitations might impair the ability of a seller to import first-tier generation capacity into the study area. However, the Commission's solution—to exclude first-tier market seller capacity entirely from change-in-status reporting—goes too far to be consistent with its statutory obligation to ensure just and reasonable market-based rates.[5]

First, the Commission recognized in Order No. 816 that first-tier capacity with a firm long-term transmission reservation is equivalent to capacity within the study area.

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[5] *See* Order No. 697, PP 943-45; *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

Order No. 816, P 229. Therefore, to be consistent with the Commission's own findings, as well as the Commission's treatment of first-tier capacity in its indicative and category screens,[6] such seller capacity should be counted on a one-to-one basis in determining whether the 100-MW threshold is met. The Commission has given no sound reason to exclude such capacity from the 100-MW threshold for triggering a notice of change-in-status, and there is none.

Second, even where no long-term firm transmission reservation is associated with capacity in a first-tier market area, that capacity is not equivalent to zero MWs within the study area—which is the value accorded it by the Final Rule. When conducting the indicative screens, the Commission has a long-standing practice for dealing with this market reality: it allocates simultaneous import capability pro rata to uncommitted first-tier capacity in order to determine how much uncommitted first-tier capacity can enter the study area. Order No. 816, P 41; Order No. 697, P 373. That allows the Commission to better assess a seller's actual available generation resources within the study area and more accurately reflects conditions bearing on seller market power, which the Commission has a statutory mandate to assess and monitor.[7] Excluding such first-tier resources from the change-in-status threshold is not supported by substantial evidence, is arbitrary and capricious, and is not consistent with the Federal Power Act.

Thus, the Commission should revise its Final Rule to include generation in first-tier market areas for purposes of change-in-status reporting, whether or not it is supported by a firm long-term transmission reservation. TAPS believes that the NOPR's proposal

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[6] *See* Order No. 816, P 41; Order No. 697, P 373.

[7] *See, e.g., California ex rel. Lockyer*, 383 F.3d 1006 (9th Cir. 2004); *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009).

to include first-tier capacity is both simple and adequate. While it may trigger additional reporting, sellers may state in their notice what percent, if any, of their 100-MW net increase consists of capacity in a first-tier market area and describe applicable transmission constraints. The Commission and the public are then adequately and properly informed of conditions that constitute a material change in the conditions the Commission relied upon when granting market-based rate authority, and which may lead the Commission to reassess whether that authority continues to be just and reasonable.

Alternatively, the Commission could allow sellers, with appropriate support, to prorate generation in markets first-tier to the study area in the same way capacity is assigned pro rata for indicative screen analyses (assuming there are no firm transmission reservations associated with the first tier capacity, in which case it should be accorded its full MW value). This approach would be consistent with the methodology used in the indicative screens,[8] but would require more analysis than would requiring reporting of all first-tier capacity for change-in-statue reporting.

Either of these approaches to inclusion of first-tier capacity would comport with the Commission's statutory obligations to assess market power. Order No. 816's determination to ignore such capacity for purposes of change-of-status reports fails to do so.

[8] Order No. 816, P 41; Order No. 697, P 373.

## II. THE COMMISSION SHOULD NOT EXCLUDE "BEHIND-THE-METER" GENERATION THAT IS AVAILABLE TO SELL INTO WHOLESALE MARKETS FROM ALL SELLER REPORTING OBLIGATIONS AND SCREENS.

In the NOPR, the Commission proposed clarifying that "behind-the-meter" generation should be included for purposes of the 100-MW change-in-status threshold and 500-MW Category 1 seller status threshold, as well as in asset appendices and indicative screens. NOPR PP 107-08. It also "propose[d] to allow sellers to aggregate their behind-the-meter generation by balancing authority area or market into one line on the list of generation assets." *Id.* P 107.

In the Final Rule, the Commission reversed course, stating that "behind-the-meter" generation would not be included as part of seller reporting obligations or in indicative or category screens. Order No. 816, P 252. Instead, the Commission found, "behind-the-meter generation should be reflected in the load data reported in the FERC Form No. 714" as that form "reflects the fact that the load is lower than it otherwise would be if a portion of the load were not served by behind-the-meter generation." *Id.* P 253. While it then "clarif[ied] that behind-the-meter generation that is consumed on-site by the host load and not sold into the wholesale market, or is not synchronized to the transmission grid, is not relevant to the Commission's horizontal market power analysis," *id.*, the Commission did not exclude from market-based rate reporting and screens only the "behind-the-meter" generation that it deemed "not relevant" by applying these qualifications. Rather, the Commission excluded *all* "behind-the-meter" generation, except that owned by a qualifying facility that has market-based rates. *Id.* PP 252, 254, 255.

The Commission erred in departing from its proposal in the NOPR regarding "behind-the-meter" generation. By excluding *all* "behind-the-meter" generation from seller reporting obligations and market power screens, even when that generation is available for sale into the wholesale markets, the Commission is limiting its own ability to evaluate market power, and is doing so in an arbitrary and ill-defined manner. This exclusion is not supported by the El Paso Electric comments[9] on which the Commission relies, violates its statutory obligations to ensure that market-based rates are just and reasonable, and will create additional ambiguity and gaps as to what must be included in reporting and in market power screens.

The Final Rule is not justified by the comments of El Paso Electric, which is the sole rationale the Commission proffers in support of its decision. Order No. 816, P 253. As a threshold matter, "El Paso recognize[d] the increasing role of behind-the-meter generators in wholesale power markets and does not oppose the Commission's inclusion of behind-the-meter generation in the indicative screens." *Id.* P 249 (footnote omitted). El Paso is correct. The Commission's statement that "behind-the-meter generation that is consumed on-site by the host load and not sold into the wholesale market, or is not synchronized to the transmission grid, is not relevant to the Commission's horizontal market power analysis," *id.* P 253, implicitly acknowledges that some "behind-the-meter" generation—generation that does not fit those qualifications—*is* available for sale into the wholesale markets, and, in fact, is actually sold into those markets.[10]

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[9] El Paso Elec. Co., Comments of El Paso Electric Company, Inc., Docket No. RM14-14-000 (Sept. 23, 2014), eLibrary No. 20140923-5128 ("El Paso Comments").

[10] *See, e.g.*, PJM OATT § 36.1.A.5 (providing for treatment of "behind-the-meter" generation that a utility "seeks to utilize, directly, or indirectly, in Wholesale Transactions); NYISO, Participation of Behind the Meter Net Generation in NYISO Markets (Sept. 19, 2014).

Instead of advocating exclusion of all "behind-the-meter" generation, El Paso "caution[ed]" that the NOPR's approach could result in a double count because "for some systems, the output of these generators will have already have been reflected in the net load reported in the FERC Form No. 714." El Paso Comments, pt. B (paraphrased in Order 816, P 249). As a result, it requested that the Commission "refine its reporting directive to instruct [sellers] to include behind-the-meter generation in [their] indicative screens to the extent such generation is not already netted against load for purposes of [their] FERC Form No. 714 reporting." *Id.*

El Paso's comments do not support the Commission's decision in Order No. 816 to exclude all "behind-the-meter" generation from market-based rate reporting and screens. The fact that *some* "behind-the-meter" generation is reflected in a decrease in load on Form No. 714 does not justify the categorical exclusion of *all "*behind-the-meter" generation from seller change-in-status reports and category and indicative screens. That exclusion is not supported by substantial evidence, is arbitrary and capricious, and is at odds with market realities; by doing so, the Commission is closing its eyes to generation that contributes to market power, and violating its statutory obligations to ensure that market-based rates are just and reasonable. The exclusion of all "behind-the-meter" generation from market-based rate screens (which are essential to ensuring wholesale markets are competitive) is hard to square with the Commission's reliance on its

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http://www.nyiso.com/public/webdocs/markets_operations/committees/bic_miwg/meeting_materials/2014-09-19/agenda_02_BTMNG_Sept%2018%20final.pdf (describing a 2015 market design project that enables behind-the-meter generator participation in NYISO markets).

jurisdiction over wholesale sales to establish interconnection rules for small generators seeking to make wholesale sales.[11]

The Commission should clarify or rehear its determination that "behind-the-meter" generation that is available for sale in the wholesale markets should be excluded from market power reporting and screens. Specifically, it should make clear that "behind-the-meter" generation that is not consumed on-site by the host load and reflected in Form No. 714 load data must, consistent with FERC's duty to assess market power, be included in seller reporting obligations and indicative and category screens. Generation that participates in the wholesale markets influences a seller's market power regardless of whether it may be termed "behind-the-meter."

Even if it were otherwise permissible, Order No. 816's "behind-the-meter" exclusion would be arbitrary and capricious. Because Order No. 816 fails to limit the scope of the "behind-the-meter" exclusion to that included in load reported in Form No. 714 or not synchronized to the grid (in accordance with the Commission's clarification at Order No. 816, P 253), and provides no definition of "behind-the-meter" generation, sellers are left to their own devices to determine what is meant by "behind-the-meter" generation and then to exclude those resources for purposes of seller reporting under Order No. 816. At best, this could lead to subjective reporting by sellers—precisely what

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[11] *See* Small Generator Interconnection Agreements and Procedures, Order No. 692, 78 Fed. Reg. 73,240 PP 244, 246, 248 (Dec. 5, 2015), 145 FERC ¶ 61,159 (2013) ("Order No. 692") (the Commission's small generator interconnection rules apply to interconnections to distribution facilities subject to an OATT at the time of the request and that will be used for wholesale sales). Order No. 692 was issued to fulfill the Commission's statutory obligation to ensure that rates, terms, and conditions for Commission jurisdictional services for interconnection of facilities no larger than 20 MW are just, reasonable, and not unduly discriminatory under sections 205 and 206. *Id*. P 3.

Order No. 816 is intended to curb and redress.[12] The gap created by the Commission's failure to align its "behind-the-meter" exclusion with its P 253 clarification likely guarantees that some generation under the control of and available to wholesale sellers will be reported neither as generation or a reduction to load, contrary to Order No. 816's stated objective of reducing under-reporting.[13]

At worst, the ambiguity in the scope of excludable "behind-the-meter" generation is an invitation for individual sellers to game the system and mask seller market power by not reporting "behind-the-meter" generation that is available for sale into the wholesale market. Screens that camouflage, rather than provide an accurate picture of, a seller's market power are plainly insufficient to enable the Commission to do its job.

Indeed, the ambiguity in the Final Rule means that the Commission itself cannot be sure how much generation it is excluding. And the problem is likely to get worse: as small solar, combined heat and power, and other distributed energy resources continue to come on-line, "behind-the-meter" generation will play an increasing role in the wholesale markets.[14] The Final Rule's apparent categorical exclusion of undefined "behind-the-meter" generation resources from screens and reporting obligations goes in the wrong

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[12] NOPR P 104 (noting that some sellers are unsure whether they should include behind-the-meter generation).

[13] *See, e.g.*, Order No. 816, PP 112, 130 (requiring applicants to report all of their long-term firm purchases of energy and/or capacity regardless of whether the applicant has operational control of the generation capacity supplying the purchased power because it will "eliminate the unrealistic results (e.g. negative market shares) caused by the under-reporting of generation" and "improve the accuracy of the indicative screens.")

[14] *See, e.g.*, Order No. 692, PP 21-26 (reforms justified by increases in small generator interconnection requests driven by state renewable portfolio standards and the need to prevent inhibition of continued growth). *See also* Order No. 692, P 17 (summarizing comments that reforming the SGIP and SGIA is essential to support the continued growth of the wholesale market for solar and other distributed resources).

direction for purposes of assessing and monitoring seller market power at a time of industry transformation.

In short, the Final Rule's exclusion of "behind-the-meter" generation is contrary to the Commission's ability to accurately assess generation in indicative and category screens, and to have generation accurately reported to it by sellers. And that ability is essential to the Commission's market-based rate regimen under the Federal Power Act, which requires that market-based rates, like all rates subject to the Commission's jurisdiction, be just and reasonable.[15] Thus, the Commission should clarify that its categorical exclusion of "behind-the-meter" generation was intended to be restricted by its clarification at P 253—that only generation that is reported in Form No. 714 or not synchronized would be excludable from generation from market-based rate reporting and screens. Alternatively, it should rehear its "behind-the-meter" generation exclusion and (i) adopt its NOPR proposal to include "behind-the-meter" generation, with El Paso's clarification—"behind-the-meter" generation that is not reflected as a decrease in load on Form No. 714 should be included in seller reporting obligations and all market power screens, or (ii) otherwise avoid creating a "behind-the-meter" generation blind spot of undefined proportions in its market power monitoring and assessment regimen.

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[15] Order No. 697, PP 943-45; *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

## CONCLUSION

For the foregoing reasons, the Commission should correct the errors in Order No. 816 by granting rehearing or, in the alternative, clarification as requested above.

Respectfully submitted,

*/s/ Cynthia S. Bogorad*

Cynthia S. Bogorad
Peter J. Hopkins
Katharine M. Mapes

Attorneys for
the Transmission Access Policy
Study Group

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated on this 16th day of November, 2015.

*/s/ Katharine M. Mapes*
Katharine M. Mapes

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000