UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation	Docket No. RD23-1-000

MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to Rule 213(a)(3) of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure,[1] the American Public Power Association (APPA) and the Transmission Access Policy Study Group ("TAPS") submit this Answer to the December 8, 2022 comments filed by the Electric Power Supply Association and the PJM Power Providers Group (jointly, "EPSA");[2] and the New England Power Generators Association, Inc. ("NEPGA")[3] (collectively, "Generators") on NERC's Petition for Approval of Proposed Reliability Standards EOP-011-3 and EOP-012-1.[4]

APPA filed a motion to intervene in this proceeding on December 5, 2022. TAPS filed a motion to intervene and comments on December 1, 2022. TAPS's initial

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[1] 18 C.F.R. § 385.213(a)(3). To the extent necessary, APPA and TAPS move for leave to answer pursuant to Rule 212 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.212.

[2] Comments of the Electric Power Supply Association and the PJM Power Providers Group (Dec. 8, 2022), eLibrary No. 20221208-5221 ("EPSA Comments").

[3] Motion to Intervene and Comments of the New England Power Generators Association, Inc. (Dec. 8, 2022), eLibrary No. 20221208-5131 ("NEPGA Comments").

[4] NERC, Petition for Approval of Proposed Reliability Standards (Oct. 28, 2022), eLibrary No. 20221028-5393 ("Petition").

comments address EOP-012-1[5] and support NERC's request for Commission approval of the proposed standards.[6]

The Generators raise a number of arguments in response to the Petition, including voicing concerns regarding recovery of the costs of complying with EOP-012-1. As described below, the Commission should not attempt to address cost recovery on a generic basis in this proceeding, which is focused on whether the proposed reliability standards should be approved.[7]

I. THE COMMISSION SHOULD NOT ACT IN THIS PROCEEDING TO PROVIDE COMPETITIVE GENERATORS A MECHANISM TO RECOVER COLD WEATHER STANDARD COMPLIANCE COSTS

As a threshold matter, the Commission should simply decline to address recovery of Reliability Standard compliance costs in this docket. Such cost recovery questions are beyond the scope of this proceeding, which relates to whether NERC's Petition meets the statutory requirements for Commission approval under FPA section 215. Nothing in FPA section 215 requires this Commission to ensure that market-based rate generators separately recover compliance costs. If the Commission does choose to address cost recovery in this docket, it should reject the Generators' requests for assurance of cost recovery.

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[5] Petition, Ex. A-2, Proposed Reliability Standard EOP-012-1 ("EOP-012-1" or "Cold Weather Standard").

[6] Motion to Intervene and Comments of Transmission Access Policy Study Group (Dec. 1, 2022), eLibrary No. 20221201-5182.

[7] *See* Petition at 10-11. NERC has also addressed Generators' jurisdictional argument.

The proposed Cold Weather Standard would apply to all Bulk Electric System generators that meet the proposed standard's broad applicability criteria.[8] As EPSA recognizes, "vertically integrated generators are able to pass [reliability standards compliance costs] directly to their captive ratepayers."[9] The same can be said of any rate-regulated generator that either chooses or is required to use cost-based rates. The use of cost-based rates is also intended to limit the *over-recovery* of costs (including a reasonable cost of capital). Competitive generators, on the other hand, by definition set their own prices and have the opportunity to collect revenues in excess of their costs.[10] Competitive generators operating in a competitive market do not need a "mechanism" to pass reliability standards compliance costs, or any other costs, "directly" to ratepayers, because the market produces just and reasonable rates which may at times even exceed the costs of particular generators. These generators are not obligated to credit back to customers market revenues in excess of their costs, and the Commission should not provide them an opportunity to earn an additional revenue stream for complying with the proposed standard on top of their market-based rates.

A. The FPA does not mandate special cost recovery mechanisms for competitive generators' section 215 compliance costs.

As noted above, nothing in FPA section 215 requires the Commission to provide market-based rate generators with a separate cost-based mechanism to recover

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[8] EOP-012-1, § 4.2.

[9] EPSA Comments at 10.

[10] To the extent that market rules limit the range of a competitive generator's potential bids based on its costs, *prudently-incurred* reliability standards compliance costs should of course be factored in like any other cost. But although EPSA (*id.* at 11) urges the Commission to "allow competitive generators to make capacity market offers that take into account reasonable costs incurred in implementing the Proposed Standard," it does not explain how any existing capacity market would prevent generators from doing so.

compliance expenses. Section 215, in fact, does not say anything at all about cost recovery.

Generators rely heavily on section 219(b)(4)(A) of the Federal Power Act[11] for the proposition that the Commission is obligated to ensure that every registered entity recovers its prudently-incurred costs of complying with every reliability standard.[12] But section 219 is focused on transmission; it directs the Commission to "establish, by rule, incentive-based (including performance-based) rate treatments for the *transmission of electric energy in interstate commerce* by public utilities for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by *reducing transmission congestion*."[13] The transmission incentives rule was required to, among other things, "allow recovery of . . . all prudently incurred costs necessary to comply with mandatory reliability standards issued pursuant to [section 215]."[14] The Commission issued the required rule in 2006, adding section 35.35 ("transmission infrastructure investment") to its regulations.[15] In its 2020 Notice of Proposed Rulemaking proposing revisions to section 35.35, the Commission noted that "*[t]ransmission projects* required to comply with [mandatory reliability] standards are assured recovery of all prudently

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[11] 16 U.S.C. § 824s(b)(4)(A).

[12] *See*, *e.g.*, EPSA Comments at 11-13 & n.30; NEGPA Comments at 4.

[13] 16 U.S.C. § 824s(a) (emphasis added).

[14] 16 U.S.C. § 824s(b)(4).

[15] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), clarified, 119 FERC ¶ 61,062 (2007). Accordingly, section 35.35 "establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion." 18 C.F.R. § 35.35(a).

incurred costs pursuant to FPA section 219(b)(4)(A)."[16] Further, in discussing the implementation of section 219(b)(4)(A) in Order No. 679, the Commission stated: "We take this opportunity to clarify that we are simply codifying our long standing regulatory policy that allows utilities the opportunity to recover all prudently incurred costs associated with the provision of transmission service in interstate commerce."[17]

Even if FPA section 219(b)(4)(A) and the Commission's implementing regulations might be read to extend beyond *transmission*-related expenses, there is nothing in Order No. 679 or other Commission precedent to suggest that they must be applied outside the context of cost-based rate recovery (such as transmission rates), and certainly not in a manner that would allow merchant generators to separately recover NERC compliance costs while simultaneously collecting market-based energy and capacity revenues. Indeed, such a "best of both worlds" approach would be fundamentally inconsistent with the Commission's market-based rate framework for energy and capacity sales and, as discussed below, could result in unjust and unreasonable rates in contravention of the requirements of FPA sections 205 and 206, which explicitly apply to compensation under section 219.[18]

Had Congress intended to mandate full section 215 compliance cost recovery for generators, including competitive generators, it would have done so, as it did in section

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[16] *Elec. Transmission Incentives Pol'y under Section 219 of the Federal Power* Act, 170 FERC ¶ 61,204 P 64 (emphasis added), *order corrected*, 171 FERC ¶ 61,072 (2020).

[17] Order No. 679, P 344.

[18] 16 U.S.C. § 824s(d) (providing that "[a]ll rates approved under the rules adopted pursuant to this section . . . are subject to the requirements of sections 205 and 206 that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.").

215A of the Federal Power Act (with restrictions to prevent double recovery) with respect to costs to comply with grid security emergency orders:[19]

> If the Commission determines that owners, operators, or users of critical electric infrastructure have incurred substantial costs to comply with an order for emergency measures issued under this subsection and that such costs were prudently incurred and *cannot reasonably be recovered through regulated rates or market prices for the electric energy or services sold by such owners, operators, or users*, the Commission shall, consistent with the requirements of section 824d of this title, after notice and an opportunity for comment, establish a mechanism that permits such owners, operators, or users to recover such costs.

The absence of any FPA requirement that the Commission, in considering a proposed reliability standard, generically ensure cost recovery for competitive generators is not altered by EPSA's citation[20] of *ISO New England, Inc*., 171 FERC ¶ 61,160 (2020) ("CIP-IROL Order").[21] In that case, the Commission accepted ISO-New England's section 205 filing (which drew no protests) to provide a mechanism for generators and merchant transmission facilities that the ISO designates as "critical to the derivation of IROLs ('IROL-Critical Facilities')"[22] to recover their resulting heightened CIP compliance costs. According to ISO-NE, this *additional* compliance burden places that "limited subset of the resources in the region – specifically, . . . 27 generation units at 15 plant locations and . . . one merchant transmission facility. . . under an externally imposed

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[19] 16 U.S.C. § 824o-1(b)(6) (emphasis added).

[20] EPSA Comments at 12.

[21] *Reh'g denied*, 172 FERC ¶ 62,046, *modified*, 172 FERC ¶ 61,251 (2020).

[22] ISO-NE, Cost Recovery Mechanism for Facilities Designated Critical to the Derivation of Interconnection Reliability Operating Limits, Transmittal Letter at 2, No. ER20-739-000, eLibrary No. 20200106-5127 ("ISO-NE Transmittal").

financial disadvantage relative to other, similar resources with which they compete in the New England wholesale markets."[23] Thus, the proposal focused on a transmission-related concern—the critical status of a merchant transmission facility and generators that ISO New England "has found, through system modeling and analysis, to be impactful to IROLs under certain conditions"[24]—that imposed additional costs on a relatively small number of generators. The Commission's acceptance of the filing is appropriately regarded as a decision to help ensure a properly functioning competitive market by addressing a discrete situation in which a small set of ISO-New England generators and other facilities might be placed at a competitive disadvantage by having to incur significant compliance costs for mandatory reliability requirements that are not applicable to other resources or facilities.

Here, in contrast, EOP-012-1 is focused entirely on generation, and the proposed standard applies to all generators that meet the standard's broad applicability criteria; unlike the IROL-Critical Facilities designations, EOP-012-1 will not distort competitive markets. As described in Part B below, however, granting all competitive generators the right to a separate Cold Weather Standard cost recovery mechanism would likely do so, and would risk charging consumers a second time for costs that may be recovered through market-based rates. It is also noteworthy that the Commission did not require other RTOs to adopt a mechanism for recovery of competitive generator IROL-related CIP compliance costs, and none have done so.

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[23] ISO-NE Transmittal at 2.

[24] ISO-NE Transmittal at 5.

B. The Commission should not undercut competitive markets by guaranteeing recovery of EOP-012-1 costs

As explained above, adopting a separate cost-recovery mechanism for competitive generators' reliability compliance costs would be inconsistent with the Commission's market-based rate framework. Providing competitive generators a cost-based revenue stream on top of market based rates risks distorting the markets and could lead to recoveries in excess of the just and reasonable rate, as established by the competitive market. Indeed, the Commission cannot grant market-based rates absent "empirical proof" that "existing competition would ensure that the actual price is just and reasonable."[25]

Competitive generators are not guaranteed recovery of any of their costs, including reliability compliance costs:[26]

> [A]s in all markets, regardless of what "investment-backed expectations" a resource may have had at the time that it chose to enter the ISO-NE markets, each market entrant was aware of the possibility that at some times, it might earn substantially more than a traditional cost-based rate, but that at other times, it might earn less than its costs.[182] . . . In a competitive market, the Commission is responsible only for assuring that a resource is provided the opportunity to recover its costs, not a guarantee of cost recovery.
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> > [182] If we were to allow a rate that recovered more than a traditional cost-based rate when the market rate exceeded that traditional cost-based rate, but then allowed a traditional cost-based rate when the market rate dropped below that traditional cost-

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[25] *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, at 1510.

[26] *ISO New England Inc.*, 135 FERC ¶ 61,029, P 254 & n.182 (2011) (internal quotations and citations omitted); *see also*, *e.g.*, *CXA La Paloma, LLC v. CAISO*, 165 FERC ¶ 61,148, P 71 ("The Commission has been clear that suppliers in competitive wholesale electricity markets are not guaranteed full cost recovery, but only the opportunity to recover their costs").

> based rate, such a "higher of cost or market" regime would inevitably produce a rate that not only would guarantee cost recovery (not just the opportunity for cost recovery), but likely would guarantee more than cost recovery. Such a rate would be unjust and unreasonable.

Guaranteeing competitive generators' recovery of EOP-012 costs would, moreover, remove the beneficial incentive provided by competition. Contrary to EPSA's unexplained assertion,[27] the technology-neutral requirements of EOP-012-1 present significant opportunities for competition to spur innovation in improving generators' winter readiness.

CONCLUSION

The Commission should decline to address recovery of Reliability Standard compliance costs as outside the scope of this docket. If the Commission chooses to address cost recovery at all, it should reject the Generators' requests for assurance of cost recovery. Competitive generators are free to seek to include EOP-012-1 compliance costs in any cost-mitigated offers through appropriate mechanisms, and ISOs are free to propose such mechanisms for consideration under FPA section 205. But the Commission should not provide for such a mechanism in this proceeding. Nor should it allow generators to impose a cost-based surcharge on top of their market-based rates. Doing so is not required by statute, would be inconsistent with Commission precedent, and would lead to unjust and unreasonable rates.

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[27] EPSA Comments at 10 ("Given the prescriptive nature of these costs, there is a limited ability to harness the power of competitive markets which incent finding innovative solutions or investments to lower operating costs").

Respectfully submitted,

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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 list compiled by the Secretary in this proceeding.

Dated on this 23rd day of December, 2022.

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