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

Carbon Pricing in FERC-Jurisdictional)
Organized Regional Wholesale Electric) Docket No. AD20-14-000
Energy Markets)

INITIAL COMMENTS OF AMERICA'S POWER

I. INTRODUCTION AND SUMMARY

America's Power¹ provides its Initial Comments on the Commission's Proposed Policy Statement on Carbon Pricing in Organized Wholesale Electricity Markets.² According to the Commission, the Proposed Policy Statement (1) clarifies the Commission's jurisdiction over regional transmission organization (RTO) and independent system operator (ISO) market rules that incorporate a state-determined carbon price, and (2) encourages RTOs/ISOs to "explore and consider"³ the benefits of proposals under Federal Power Act (FPA) section 205⁴ to establish such rules.⁵ The Proposed Policy Statement requests comment on information and considerations the Commission should take into account in order to determine

¹ Formerly known as American Coalition for Clean Coal Electricity, or ACCCE.

² *Carbon Pricing in Organized Wholesale Electricity Markets*, 173 FERC ¶ 61,062 (2020)("Proposed Policy Statement").

³ Proposed Policy Statement at P 1.

⁴ 16 U.S.C. § 824d.

⁵ Proposed Policy Statement at P 1.

whether section 205 proposals to incorporate state-determined carbon prices in wholesale markets are just, reasonable, and not unduly discriminatory or preferential.⁶

America's Power urges the Commission to withdraw the Proposed Policy Statement and terminate this docket. The broad assertion of the Commission's jurisdiction over wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets is not appropriate for a Policy Statement. More importantly, the Commission's "clarification" in the Proposed Policy Statement, regarding its jurisdiction over such proposals, is likely to cause misunderstanding and confusion that will discourage or prevent the "cooperative federalism" the Commission notes in the Proposed Policy Statement.⁷ By encouraging RTOs/ISOs to establish wholesale market rules that incorporate state-determined carbon prices, the Commission might be deemed to impermissibly seek to do indirectly what it cannot do directly, which is to influence states to adopt carbon pricing. Quite simply, the Proposed Policy Statement does far more harm than good in this respect, and the Commission should withdraw the Proposed Policy Statement on those grounds alone.

If the Commission decides to move forward with the Proposed Policy Statement, then the Commission should clarify that (1) the Proposed Policy

⁶ Proposed Policy Statement at P 16.

⁷ Proposed Policy Statement at P 13.

Statement is merely a “framework”⁸ for the Commission’s exercise of its jurisdiction and is not a final determination; and (2) the determination will be made in each proceeding as to whether specific RTO/ISO proposals to incorporate state-determined carbon prices in wholesale markets are within the Commission’s jurisdiction and are just and reasonable.

America’s Power also urges the Commission not to address on a generic basis any “encouragement” for RTOs/ISOs to establish wholesale market rules that incorporate state-determined carbon prices in their markets. If the Commission does not withdraw the Proposed Policy Statement, then in order to avoid intruding into matters reserved to the states, the Commission should at least specifically state and clarify that (1) any “encouragement” by the Commission is limited to encouraging RTOs/ISOs to incorporate state-determined carbon prices into wholesale markets *only if states choose to adopt explicit carbon prices*; and (2) the Commission is not mandating, directing, or encouraging any policies that would require or even encourage states to adopt carbon pricing.

Finally, if the Commission does not withdraw the Proposed Policy Statement, America’s Power provides additional considerations the Commission should take into account in its review of section 205 proposals by RTOs/ISOs to incorporate state-determined carbon prices in wholesale markets.

⁸ *Id.* at P 8.

II. INTERESTS OF AMERICA'S POWER

America's Power⁹ is a national trade organization that advocates at the federal and state levels on behalf of coal-fueled electricity and the nation's coal fleet. Its membership is comprised of major industries — electricity generators, coal producers, railroads, barge operators, and equipment manufacturers — involved in generating electricity from coal.¹⁰ The coal fleet is a critical part of the nation's electricity supply because it is a reliable, resilient, and fuel-secure source of 24/7 baseload power; it contributes to fuel diversity; it produces affordable electricity; and it serves as an insurance policy when other fuels are too expensive or not available. The coal fleet was responsible for supplying roughly 20 percent of U.S. electricity needs last year.

Despite these valuable attributes, almost 800 coal-fired electric generating units in 42 states — totaling 173,100 megawatts (MW) — have retired or announced plans to retire. Such retirements now exceed more than half of the coal fleet that was operating ten years ago. Of this nationwide total, more than 110,000 MW will have retired in RTO/ISO regions by the end

⁹ Formerly known as the American Coalition for Clean Coal Electricity, or ACCCE.

¹⁰ America's Power's members are as follows: Alliance Resource Partners L.P., American Consolidated Natural Resources, Inc., Associated Electric Cooperative Inc., Berwind Natural Resource Corporation, Big Rivers Electric Corporation, BNSF Railway, Buckeye Power, Inc., Caterpillar Inc., CONSOL Energy, Crouse Corporation, CSX, Carbon Utilization Research Council, Drummond Company, Inc., East Kentucky Power Cooperative, GMS, Inc., JENNMAR, John T. Boyd Company, Kentucky Coal Association, Kentucky River Coal Corporation, Komatsu Mining, Lignite Energy Council, Longview Power, Natural Resource Partners L.P., Norfolk Southern Corporation, Oglethorpe Power Corporation, Peabody Energy, PowerSouth Energy Cooperative, Prairie State Generating Company, Rosebud Mining Company, Union Pacific Railroad, and Western Fuels Association.

of 2030. Moreover, we estimate that coal retirements might be accelerated even without the additional burden of a carbon price.¹¹ Therefore, we urge the Commission to carefully avoid any misimpression that it is encouraging states to adopt carbon prices, further accelerating the pace of coal retirements.

The Proposed Policy Statement acknowledges that the basis for state carbon pricing is to reduce greenhouse gas (GHG) emissions in the electricity sector.¹² While the Proposed Policy Statement identifies states that have adopted carbon prices, it fails to emphasize the fact that 39 states do not price carbon. Moreover, the Proposed Policy Statement does not mention that some states, such as the New England States, have affirmatively told the Commission that they object to a separate carbon price implemented through the wholesale market. Indeed, state representatives were notably absent from the Commission's September technical conference on carbon pricing. America's Power encourages the Commission to recognize the importance of considering the views of all states, not just those that price carbon. We also encourage the Commission to keep in mind that despite the transition the

¹¹ Energy Ventures Analysis (EVA) used screening criteria to estimate the amount of coal-fueled generating capacity that is at risk of retirement due to low capacity factors and other considerations. EVA estimates that an additional — meaning in addition to expected retirements — 23,700 MW to 68,300 MW nationwide are at risk of retirement over the period 2020-2022. Additional at-risk coal in PJM and MISO is estimated to be 17,900 MW to 41,800 MW.

¹² The nation's coal fleet emitted less than 20 percent of U.S. energy-related CO₂ last year. EIA, "How much of U.S. carbon dioxide emissions are associated with electricity generation?" May 26, 2020.

electricity grid is undergoing, coal-fueled generation will be needed for the foreseeable future.

III. COMMENTS

A. The Commission Should Withdraw the Proposed Policy Statement and Terminate this Proceeding.

The Proposed Policy Statement addresses two issues: (1) the Commission's jurisdiction over wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets, and (2) the Commission's proposal to "encourage efforts by RTOs/ISOs and their stakeholders ... to explore establishing wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets."¹³ For the reasons discussed below, the Commission should withdraw the Proposed Policy Statement in its entirety and terminate this docket.

1. The Commission's statement regarding its jurisdiction is unnecessary and will likely to lead to confusion about the Commission's authority.

In the Proposed Policy Statement, the Commission states, in part, as follows:

We clarify that wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can fall within the Commission's jurisdiction as a practice affecting wholesale rates. Whether the rules proposed in any particular FPA section 205 filing do, in fact, fall under the Commission jurisdiction is a determination we will make based on the facts and circumstances in any such proceeding¹⁴

¹³ Proposed Policy Statement at P 15.

¹⁴ Proposed Policy Statement at P 8.

The Commission proceeds with analysis of the two-part test for evaluating whether its action is within its jurisdiction to regulate practices affecting wholesale rates.¹⁵ The Commission concludes that wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can satisfy this two-part test.¹⁶ The Commission also offers that incorporating a state-determined carbon price into RTO/ISO markets could represent the sort of “cooperative federalism” that has been noted by the Supreme Court.¹⁷

At best, the Commission’s statement that wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets *can* be subject to the Commission’s jurisdiction is unnecessary. The Commission’s jurisdiction is established by statute, and the Commission has only the authority granted to it by Congress.¹⁸ There is no need for the Commission to adopt a Policy Statement to “clarify” this point.

The greater concern, however, is that a Policy Statement regarding the Commission’s jurisdiction to review wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets will be misunderstood. Stating that it *can* have jurisdiction over such proposals might cause some to misinterpret the Commission’s Proposed Policy Statement as saying that it *does* have jurisdiction over any and all RTO/ISO carbon-pricing proposals. As

¹⁵ *Id.* at PP 9-12.

¹⁶ *Id.* at P 10 (“The wholesale market rules that incorporate a state-determined carbon price into RTO/ISO markets can satisfy that ‘directly affect’ standard”) and P 12

¹⁷ *Id.* at P 13, citing *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 780 (2016).

¹⁸ *Cal. Indep. Sys. Operator Corp. (CAISO) v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

Chairman Danly observed in his dissenting statement, “it is easy to imagine any number of RTO/ISO carbon-pricing proposals that would violate the Federal Power Act by impermissibly inviting the authorities reserved to the States.”¹⁹ The Commission’s “non-binding, blanket dismissal of potential jurisdictional concerns”²⁰ might create a dangerous misimpression that the Commission has some authority to mandate or influence states to adopt carbon prices, or that any and all proposals to incorporate state-determined carbon prices in wholesale markets are subject to the Commission’s jurisdiction. Thus, the mere act of issuing a Policy Statement addressing the issue of the Commission’s jurisdiction, which can only be determined based on a specific proposal, is in and of itself a jurisdictional step too far. Moreover, such a broad and general statement by the Commission will only serve to undermine the already-strained relationship between FERC and the states.

Finally, on this point, America’s Power notes that if the Commission proceeds with issuing a Policy Statement that addresses its jurisdiction in the manner stated in the Proposed Policy Statement, parties might need to seek clarification or rehearing in order to protect their interests against the misinterpretations discussed above. However, given the Commission’s policy

¹⁹ Proposed Policy Statement, Commissioner (now Chairman) Danly dissent at P 4.

²⁰ *Id.*

against prohibiting rehearing of Policy Statements, parties will be unable to do so.²¹

For all of these reasons, America’s Power agrees with Chairman Danly’s assessment that the Commission should not pre-judge the jurisdictional issue based on unstated assumptions. Even if the Commission intends only to clarify a “framework for applying [its] jurisdiction,” such framework is unnecessary and could cause misinterpretation of the Commission’s jurisdiction.

2. The Commission’s proposal to “encourage” RTOs and ISOs to establish wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets is inappropriate.

The Proposed Policy Statement would “encourage efforts by RTOs/ISOs and their stakeholders — including states, market participants, and consumers — to explore establishing wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets.”²² America’s Power urges the Commission not to address on a generic basis any “encouragement” for RTOs and ISOs to establish wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets.

First, in proposing a policy that encourages filings to incorporate state-determined carbon prices into wholesale market rules, the Commission’s message could be misinterpreted to mean that states should adopt carbon

²¹ See *Inquiry Regarding the Commission’s Policy for Recovery of Income Tax Costs*, 168 FERC ¶ 61,136 at P 4 (2019) (“The Commission’s normal practice is to dismiss requests for rehearing of policy statements and reserve any further discussions of the issues contained therein for specific proceedings in which the policy is applied.”)

²² Proposed Policy Statement at P 15.

prices so that grid operators can submit new market rules for FERC approval. While the Proposed Policy Statement details efforts by some states to adopt clean energy targets, renewable energy portfolios, or decarbonization goals,²³ it failed to mention that many of the states, such as the New England States, have affirmatively told the Commission that they object to a separate carbon price implemented through the wholesale market.²⁴ Those states instead have noted the need for transmission capability sufficient to meet state goals.²⁵ Moreover, some states have declined to adopt such goals or rules. The Commission has no authority to mandate state action on carbon. Further, the Commission has no authority to encourage states to establish carbon prices.

Second, the Commission’s proposal to encourage RTOs/ISOs to propose wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets is an inappropriate use of a Policy Statement. The Commission explains on its website that it issues Policy Statements from time to time in order “to provide guidance and regulatory certainty regarding statutes, orders, rules, and regulations that the Commission administers. Policy Statements typically discuss the factors that the Commission will use to

²³ *Id.* at n.3-4.

²⁴ See e.g., New England States Committee on Electricity Comments on FERC Carbon Pricing Technical Conference Request, Carbon Pricing in FERC Jurisdictional Organized Regional Wholesale Electric Energy Markets, Docket No. AD20-14-000 (May 21, 2020).

²⁵ See, e.g., http://nescoe.com/wpcontent/uploads/2020/10/NESCOE_Vision_Statement_Oct2020.pdf (last visited Nov. 11, 2020).

evaluate future proceedings. Policy Statements have been issued in many areas that fall within the Commission’s jurisdiction.”²⁶

The Proposed Policy Statement does not meet FERC’s own criteria for a Policy Statement. The Commission admits that its goal in proposing the Policy Statement is to encourage RTOs/ISOs and their stakeholders, including states, to propose market rules to incorporate state-determined carbon pricing. The Proposed Policy Statement does not provide “guidance and regulatory certainty,” but rather directs and encourages a single outcome — that is, rules that incorporate carbon pricing — among many permissible outcomes. The impropriety of the Proposed Policy Statement, which Commissioner Danly in his partial dissent described as “unnecessary and unwise,” can be seen by examining how markedly it differs from other Policy Statements the Commission has issued.²⁷ Because there is no need for the Commission to issue a Policy Statement to encourage RTOs/ISOs to adopt market rules that incorporate state-determined carbon prices, and issuance of

²⁶ See <https://www.ferc.gov/enforcement-legal/legal/major-orders-regulations/policy-statements> (last visited November 3, 2020).

²⁷ See, e.g, the following Policy Statements issued by the Commission over the past five years that met the Commission’s criteria for a Policy Statement: *Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief*, Docket No. PL20-7; *Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, Docket No. [PL20-1-000](#); *Policy Statement on Accounting and Ratemaking Treatment of Accumulated Deferred Income Taxes and Treatment Following the Sale or Retirement of an Asset*, Docket No. [PL19-2-000](#); *Policy Statement on Establishing License Terms for Hydroelectric Projects*, Docket No. PL17-3; *Policy Statement on Utilization of Electric Storage Resources for Multiple Services When Receiving Cost Based Rate Recovery*, Docket No. PL17-2; and *Policy Statement on Hold Harmless Commitments*, Docket No. PL15-3.

the Policy Statement creates an impression that the Commission is encouraging or at least influencing a matter beyond its jurisdiction, the Commission should terminate the docket and withdraw the Proposed Policy Statement.²⁸

B. If the Commission Does Not Withdraw the Proposed Policy Statement, Then It Should Clarify Its Intent.

As explained above, America's Power urges the Commission against issuing a Policy Statement in this docket. However, if the Commission does issue a Policy Statement on wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets, along the lines discussed in the Proposed Policy Statement, then it should make certain clarifications in order to avoid any misinterpretation or misunderstanding concerning the Commission's authority and intent.

²⁸ See, e.g., *Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators*, FERC Stats. & Regs. ¶ 35,055 (2016)(withdrawing initial proposal to amend regulations that would have required RTOs to provide data to the Commission in favor of revised approach); *Market-Based Rate Affiliate Restrictions*, FERC Stats. & Regs. ¶ 32,671 (2011) (withdrawing Notice of Proposed Rulemaking (NOPR) seeking to revise regulations regarding shared employees upon reconsideration of merits of the proposal); *Standard of Review for Modifications to Jurisdictional Agreements*, FERC Stats. & Regs. ¶ 35,562 (2008) (withdrawing NOPR regarding standard of review due to judicial developments); *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 112 FERC ¶ 61,073 (2005)(terminating NOPR relating to Standard Market Design in light of comments received and intervening developments); *Capacity Reservation Open Access Transmission Tariffs*, 108 FERC ¶ 61,095 (2004) (terminating NOPR regarding capacity reservations); *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 FERC ¶ 61,265 (1998) (terminating NOPR proceeding to amend qualifying facility regulations in light of legislative changes and state actions); *Regulation of Electricity Sales for Resale and Transmission Service*, 61 FERC ¶ 61,371 (1992) (terminating docket in which it issued Notices of Inquiry to evaluate its then-present policies toward wholesale electricity transactions and transmission service).

With respect to the Commission’s jurisdiction to consider wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets, the Commission should clarify that any such Policy Statement is merely a “framework”²⁹ for the Commission’s exercise of its jurisdiction and is not a final determination that the Commission has such jurisdiction. The need for clarity on this point cannot be overstated, as it is critical for the Commission to avoid the implication that it has jurisdiction over matters reserved to the states. The Commission should specify that (1) its intent is simply to state that it *might* have jurisdiction, when an RTO or ISO submits a proposal under FPA section 205 to incorporate state-determined carbon prices in RTO/ISO markets and (2) such determinations of the Commission’s jurisdiction will be made based on the specific facts and circumstances of each FPA section 205 proceeding.

The Proposed Policy Statement should also be clarified in order to avoid intruding into matters reserved to the states, specifically whether to adopt carbon pricing and, if so, the mechanisms to do so. The Proposed Policy Statement proposes “to encourage efforts by RTOs/ISOs and their stakeholders ... to explore establishing wholesale market rules that incorporate state-determined carbon prices in RTO/ISO markets.”³⁰ This statement could be read as encouraging RTOs and ISOs to establish rules to

²⁹ *Id.* at P 8.

³⁰ *Id.* at P 15.

incorporate state-determined carbon prices into wholesale markets *only if states choose to adopt explicit carbon prices*. On the other hand, the Proposed Policy Statement could also reasonably be interpreted as the Commission encouraging RTOs/ISOs to establish wholesale market rules that incorporate state-determined carbon prices, in a manner that will influence states to adopt carbon prices or otherwise result in state carbon-pricing policies being imposed on other states through market mechanisms designed to address emissions leakage. While the former interpretation is perhaps not objectionable, the latter is beyond the scope of the Commission's authority and robs states of their jurisdiction to determine whether to adopt carbon prices and, if so, the mechanisms to do so. Therefore, if the Commission does not withdraw the Proposed Policy Statement, the Commission should clarify that (1) it encourages RTOs and ISOs to establish rules to incorporate state-determined carbon prices into wholesale markets *only if states choose to adopt explicit carbon prices*; and (2) the Commission is not mandating, directing, or encouraging any policies that would require or even encourage states to adopt carbon pricing.

C. If the Commission Does Not Withdraw the Proposed Policy Statement, It Should Include Additional Considerations.

The Commission identifies several considerations for its evaluation of an FPA section 205 filing for wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets. There are additional considerations that will enable the Commission to determine whether such a

proposal is just, reasonable, and not unduly discriminatory or preferential. America's Power has identified several additional considerations below but reserves the right to raise additional concerns in future proceedings. Those additional considerations are as follows:

1. What would be the impact of carbon-pricing rules on power prices and the affordability of electricity?
2. What would be the impact of carbon-pricing rules on electricity prices in individual states that choose not to adopt a carbon price?
3. How would the adoption of carbon-pricing rules affect the RTO/ISO's resource mix?
4. How would changes to the resource mix caused by carbon-pricing rules affect reliability, resilience, resource retirements, and fuel security?
5. Would carbon-pricing rules cause stranded investments, especially if proposed rules trigger more retirements or accelerate already-expected retirements?
6. Would states and electricity generators that currently participate in RTOs/ISOs withdraw if an RTO/ISO adopts carbon-pricing rules within its region?
7. Would proposed carbon-pricing rules negatively impact non-RTO/ISO regions or states?

IV. CONCLUSION

America's Power appreciates the opportunity to provide these comments and urges the Commission consider them in determining further actions in this proceeding. America's Power requests that the Commission withdraw the Proposed Policy Statement and terminate this proceeding. If the Commission does not withdraw the Proposed Policy Statement and terminate this proceeding, then it should:

- a. Clarify that (i) the Proposed Policy Statement is merely a "framework" for the Commission's exercise of its jurisdiction and is not a final determination; (ii) the determination whether specific RTO/ISO proposals to incorporate state-determined carbon prices in wholesale markets are within the Commission's jurisdiction will be made in each proceeding; (iii) any "encouragement" by the Commission goes no farther than encouraging RTOs/ISOs to incorporate state-determined carbon prices into wholesale markets *only if states choose, on their own, to adopt carbon prices*; and (iv) the Commission is not mandating, directing, or encouraging any policies that would require or even encourage states to adopt carbon pricing; and
- b. Adopt additional considerations, listed on the previous page, for the Commission's review of FPA section 205 proposals by RTOs/ISOs to incorporate state-determined carbon prices in wholesale markets.

Respectfully submitted,

A handwritten signature in black ink that reads "Michelle A. Bloodworth". The signature is written in a cursive style with a horizontal line underneath it.

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