

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

Wholesale Competition in Regions	)	Docket Nos. RM07-19-000
With Organized Electric Markets	)	AD07-7-000
	)	

**Comments of the  
National Association of Regulatory Utility Commissioners**

The National Association of Regulatory Utility Commissioners (“NARUC”) appreciates the opportunity to provide comments to the Federal Energy Regulatory Commission (“FERC or the “Commission”) in response to its February 22, 2008 Notice of Proposed Rulemaking (“NOPR”) in the *Wholesale Competition in Regions with Organized Electric Markets* proceeding (Docket Nos. RM07-19-000 and AD07-7-000).

**COMMUNICATIONS**

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**BASIS FOR NARUC’S INTEREST**

NARUC is the national organization of the State commissions responsible for economic and safety regulation of the retail operations of utilities. Specifically, NARUC’s members have the obligation under State law to ensure the establishment and maintenance of such energy utility

services as may be required by the public convenience and necessity, as well as ensuring that such services are provided at just and reasonable rates. NARUC's members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and terms and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. Both Congress<sup>1</sup> and the Federal courts<sup>2</sup> have long recognized NARUC as the proper party to represent the collective interest of State regulatory commissions.

## **DISCUSSION**

The Commission is proposing to amend its regulations under the Federal Power Act ("FPA") to improve the operation of organized wholesale electric markets. The NOPR focuses on: (1) Demand response and market pricing during a period of operating reserve shortage; (2) Long-term power contracting; (3) Market monitoring policies; and (4) The responsiveness of Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") to customers and other stakeholders. NARUC's comments address all four.

### **(1) DEMAND RESPONSE**

In the area of demand response and the use of market prices to elicit demand response, the NOPR proposes several requirements for ISOs and RTOs, including: (1) Accepting bids from demand response resources in their markets for certain ancillary services; (2) Eliminating, during a system emergency, a charge to a buyer in the energy market for taking less electric

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<sup>1</sup> See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Boards to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns); Cf., 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir. 1994) (where the Court explains "...Carriers, to get the cards, applied to...[NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the [rules] the ICC issued to create the "bingo card" system).

<sup>2</sup> See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

energy in the real-time market than purchased in the day-ahead market; (3) Permitting an aggregator of retail customers (“ARC”) to bid demand response on behalf of retail customers directly into the organized energy market; (4) Modifying their market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortages, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power; and (5) Further studying whether further reforms are necessary to eliminate barriers to demand response in organized markets.<sup>3</sup>

***FERC’s implementation of demand response proposals should respect regional differences and not result in overly prescriptive rules that disrupt existing programs.***

NARUC has consistently supported policies promoting demand-side management.<sup>4</sup> Planning strategies should maintain a proper balance between supply and load that includes demand-side management techniques (including price-responsive demand mechanisms), intermittent and renewable resources, conservation/energy efficiency programs, as well as traditional supply and transmission options.<sup>5</sup>

*Properly implemented* demand response initiatives *can* help to hold down wholesale power prices, increase awareness of energy usage, increase market efficiencies, enhance reliability; and encourage new technologies that support the use of renewable energy resources, distributed generation, and advanced metering.<sup>6</sup> However, FERC’s implementation of the proposals in the area of demand response and the use of market prices to elicit demand response *should not result in overly prescriptive generic rules as “one size does not fit all”*. Even the NOPR acknowledges both that “issues with retail markets are often intertwined with wholesale

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<sup>3</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 6, 46 (2008).

<sup>4</sup> *NARUC’s National Electricity Policy (November 2001)*.

<sup>5</sup> Id.

<sup>6</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 27-31 (2008).

market issues,”<sup>7</sup> and that significant differences exist between regions, including differences in industry structure, mix of ownership, sources for electric generation, population densities and weather patterns.<sup>8</sup> The Commission should continue its recognition and respect of regional differences in market designs. Specifically, new FERC initiatives should be incorporated into RTO/ISO markets in a way that recognizes differences and does not disrupt existing reliability criteria as well as proposed or ongoing regional demand response initiatives.<sup>9</sup> Any issues with regard to any particular RTO/ISO should be addressed separately in a specific RTO/ISO proceeding.

***FERC should continue to closely coordinate its demand response efforts with States.***

Neither FERC nor individual State commissions can manage the transition to a more competitive industry unilaterally because of the division of jurisdictional authority established by the FPA.<sup>10</sup> NARUC continues to support development of creative approaches and processes to address and resolve *region-wide issues* of mutual concern.<sup>11</sup>

Facilitating cost-effective demand response initiatives is one of many areas where the interests of FERC and State regulators overlap. Indeed, a recent Energy Law Journal article by FERC Commissioner Jon Wellinghoff and David Morenoff makes several key points. First, Commissioner Wellinghoff expressly recognizes States have traditionally regulated demand response and will continue to play an important role in cultivating demand response benefits for consumers. Second, he acknowledges FERC’s historical practice has been to respect the

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<sup>7</sup> Id. at P 14.

<sup>8</sup> Id. at P 13.

<sup>9</sup> See Edison Electric Institute, *Demand Response Review: A Survey of Major Developments in Demand Response Programs and Initiatives* (updated April 9, 2008). See also Edison Electric Institute, *Demand Response Review” A Survey of the Demand Response (DR) Programs and Initiatives in Each of the Six Commission-Approved RTOs/ISOs* (December 2007).

<sup>10</sup> *Resolution on the Federal Energy Regulatory Commission's Proposed Rules on Open Access Wholesale Transmission Services and Recovery of Stranded Costs* (July 1995).

<sup>11</sup> Id.

traditional role of States in this area. Third, Commissioner Wellinghoff recommends that enhancing coordination of federal and State demand response initiatives offers the most promising approach to managing the jurisdictional overlap in this area.<sup>12</sup>

The Commissioner is right on all three points. NARUC agrees with his recommendation as does the Department of Energy. In DOE's 2006 Demand Response Report, the agency also recommends both FERC and State agencies work with interested RTOs/ISOs, utilities, and other market participants and customer groups to examine how much demand response is needed to improve the efficiency and reliability of their wholesale and retail markets.<sup>13</sup>

FERC's initiation of the NARUC-FERC Demand Response Collaborative in November 2006 - to increase coordinated federal and State approaches to demand response policies - was a good first step.<sup>14</sup> NARUC appreciates this FERC recognition and outreach. We continue to support the Collaborative's efforts to coordinate federal and State efforts to promote and integrate demand response into retail and wholesale markets and planning.

FERC should build on this effort by implementing any NOPR proposals in the same spirit of cooperative federalism embodied by the Collaborative. State demand response programs were designed in pre-organized market frameworks for the purpose of achieving goals defined by individual State policy makers. Even FERC's 2007 Demand Response Report noted

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<sup>12</sup> Hon. Jon Wellinghoff and David L. Morenoff, "Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Equation", *ENERGY LAW JOURNAL*, Volume 28, No. 2, 389 (2007). Indeed, he also points out on the same page that preempting State laws or regulations that conflict with FERC policies on demand response will undoubtedly raise difficult legal issues.

<sup>13</sup> See U.S. Department of Energy, *Benefits of Demand Response in Electricity Markets and Recommendations for Achieving Them: A Report to the United States Congress Pursuant to Section 1252 of the Energy Policy Act of 2005*, at 57 (February 2006).

<sup>14</sup> This Joint Collaborative is co-chaired by Commissioner Wellinghoff, Commissioner Anne C. George, Connecticut Department of Public Utility Control and Commissioner Phyllis Reha, Minnesota Public Utilities Commission. The Collaborative initiated a research project to publish a report: "Overcoming Barriers to Customer Demand Response through Coordinated Retail and Wholesale Regulatory Policies". The report will identify regulatory and market barriers that limit participation in demand response; and outline options to coordinate retail and wholesale regulatory policies that would reduce or eliminate barriers and stimulate greater participation in demand response. It will also identify disconnects and barriers in coordination between retail and wholesale policies regarding demand response.

that the actions of several States to introduce greater demand response into retail markets partially address the need for wholesale-retail coordination identified in the 2006 FERC Demand Response Report.<sup>15</sup>

NARUC's long-standing policy is to preserve and strengthen the States' traditional roles in regulating distribution systems, planning, siting approval, reliability assurance, and consumer protection.<sup>16</sup> Federal policies should not interfere with the States' authority over all aspects of retail service including establishing just and reasonable retail rates, assuring retail rates are designed to encourage reductions in peak demand and encouraging demand-side management options.<sup>17</sup>

Even if FERC preempts State laws and regulations that preclude participation by retail customers in wholesale markets,<sup>18</sup> significant barriers to increased use of demand response and other problems would remain.<sup>19</sup> Federal preemption cannot solve the disconnect between wholesale and retail rates, which mutes price signals to retail customers.<sup>20</sup> No one can seriously contend that demand response can achieve its full potential without the support of State regulators.<sup>21</sup> Indeed, even FERC acknowledges in the NOPR that more effective demand response requires the action of State commissions; tying retail rates to wholesale market-clearing prices; and linking wholesale and retail markets.<sup>22</sup> We agree. The full benefits of demand

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<sup>15</sup> See Federal Energy Regulatory Commission, *2007 Assessment of Demand Response and Advanced Metering: Staff Report*, (September 2007), at 13-15. See also Federal Energy Regulatory Commission, *Assessment of Demand Response and Advanced Metering: Staff Report*, Docket No. AD06-2-000, at 75-77 (August 8, 2006).

<sup>16</sup> NARUC's *National Electricity Policy* (November 2001).

<sup>17</sup> Id.

<sup>18</sup> Hon. Jon Wellinoff and David L. Morenoff, "Recognizing the Importance of Demand Response: The Second Half of the Wholesale Electric Equation", *ENERGY LAW JOURNAL*, Volume 28, No. 2, 417 (2007).

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id. at 417-418.

<sup>22</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at footnote 48, 2 (2008). Also, States largely oversee decisions about access to advanced metering equipment that gives consumers greater ability to provide demand response.

response can be delivered to electricity consumers only with joint FERC and State coordination to manage the jurisdictional overlap. FERC should continue its focus on coordinated actions.

***The State law exemption should be modified to avoid inadvertently displacing State authority and State policy decisions on demand response.***

This continued focus on cooperative federalism suggests a specific modification to one NOPR proposal. The NOPR draft language inadvertently allows displacement of State authority based on uncertainty or silence in the State law or regulations. FERC should remedy this problem.

The State law exception turns on whether the demand response proposal would *not be permitted* by State retail laws or regulations. However, because of the split in jurisdictional authority, most State rules either will not address *permission* specifically, or there will be some *ambiguity* on where it is permitted. Most State laws and regulations will be silent on the issue as laws establishing retail service were not drafted with wholesale markets in mind.<sup>23</sup> From a policy perspective, one cannot reasonably infer consent from silence or ambiguity. When regulations are drafted this way – wasteful and unnecessary litigation at tax and ratepayer expense is the only likely outcome.

In four paragraphs of the NOPR, using similar verbiage, the State law exemption places the *burden on the State regulator to affirmatively show* that the demand response proposal conflicts with State law or regulations:

The Commission proposes to obligate each RTO or ISO to accept bids for demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources (1) are technically capable of providing the ancillary service and meet the necessary technical requirements, and (2) submit a bid under the generally applicable bidding rules at or below the market-clearing price, ***unless the laws or regulations of the relevant***

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<sup>23</sup> There are State laws and regulations that have not been updated since the creation of organized markets, much less the issuance of this proceeding.

*electric retail regulatory authority **do not permit** a retail customer to participate.* {emphasis added}<sup>24</sup>

The Commission proposes to require RTOs/ISOs to amend their market rules as necessary to permit an ARC [aggregator of retail customers] to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, *unless the laws or regulations of the relevant electric retail regulatory authority **do not permit** a retail customer to participate.* {emphasis added}<sup>25</sup>

*Except for circumstances where the laws and regulations of the relevant retail regulatory authority **do not permit** a retail customer to participate,* there is no prohibition on who may be an ARC, and an individual customer may serve as an ARC on behalf of itself and others. {emphasis added}<sup>26</sup>

The market rules do not have to allow bids from an ARC where this is ***not permitted** under the laws or regulations of relevant electric retail regulatory authority.* The RTO or ISO must receive explicit notification from the relevant retail regulatory authority in order to disqualify a bid from an ARC that includes the demand response of that authority's retail customers. {emphasis added}<sup>27</sup>

NARUC respectfully requests FERC alter the State law exemption to avoid conflicts with State demand response programs as follows:

The Commission proposes to obligate each RTO or ISO to accept bids for demand response resources, on a basis comparable to any other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources (1) are technically capable of providing the ancillary service and meet the necessary technical requirements, and (2) submit a bid under the generally applicable bidding rules at or below the market-clearing price, ~~unless~~ **only if** the laws or regulations of the relevant electric retail regulatory authority ~~do not~~ **expressly permit** a retail customer to participate.

The Commission proposes to require RTOs/ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, ~~unless~~ **only if** the laws or regulations of the relevant electric retail regulatory authority ~~do not~~ **expressly permit** a retail customer to participate.

~~Except for circumstances w~~**Where** the laws and regulations of the relevant retail regulatory authority ~~do not~~ **expressly permit** a retail customer to participate, there is no

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<sup>24</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 56 (2008).

<sup>25</sup> *Id.* at P 86.

<sup>26</sup> *Id.* at P 88.

<sup>27</sup> *Id.* at P 90.

prohibition on who may be an ARC, and an individual customer may serve as an ARC on behalf of itself and others.

The market rules ~~do not have to~~ **shall not** allow bids from an ARC **unless** ~~where~~ this is ~~not~~ **expressly** permitted under the laws or regulations of relevant electric retail regulatory authority. The RTO or ISO must receive explicit notification from the relevant retail regulatory authority in order to disqualify a bid from an ARC that includes the demand response of that authority's retail customers.

These formulations address the problems and uncertainty noted supra with the NOPR's language. The revised language properly places the *burden on the RTO/ISO to get explicit and affirmative permission from the State regulator to allow* the demand response proposal. Here, *uncertainty or silence* in the State law or regulation does *not* constitute consent. Instead, the State law exception depends on whether the demand response proposal *is expressly permitted* by State retail laws or regulations. FERC should modify the State exemptions to avoid displacing State authority and to preserve State policy decisions on demand response.

## (2) LONG-TERM POWER CONTRACTING

In the section on long-term power contracting, the Commission proposes that RTOs/ISOs be required to dedicate a portion of their websites for market participants to post offers to buy or sell power on a long-term basis. This is designed to promote greater use of long-term contracts through improving transparency among market participants.<sup>28</sup>

***The implementation of the NOPR's "bulletin board" proposal should not interfere with long-term contracts that are driven by State policy objectives.***

Long-term power contracts are an important element in a functioning electric power market because they improve price stability, mitigate the risk of the abuse of market power and provide a platform for investment in new generation and transmission.<sup>29</sup> However, this proposal for a RTO/ISO website "bulletin board" as a tool to facilitate long-term contracting should not

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<sup>28</sup> Id. at P 7.

<sup>29</sup> Id. at P 130.

result in standardizing these contracts. Federal standardization can only undermine critical market efficiency programs driven by State policies, *e.g.*, integrated resource planning, renewable portfolio standards and resource adequacy requirements. Long-term contracts utilized to provide State-jurisdictional retail service must continue to be driven by State policy objectives rather than by federal policy.<sup>30</sup>

### (3) MARKET MONITORING POLICIES

***FERC should allow Market Monitoring Units (MMUs) to continue to perform market mitigation as they are best positioned to do so and their continued exercise of mitigation authority presents fewer conflicts of interest than the alternative.***

The NOPR proposes to eliminate MMUs' support of the RTOs/ISOs in some aspects of tariff administration.<sup>31</sup> One specific NOPR suggestion - removing MMUs' market mitigation function<sup>32</sup> - is a bad idea.<sup>33</sup> It isn't a coincidence that the majority of ANOPR commenters, representing a wide spectrum of market participants, consumer groups, RTOs/ISOs, opposed the proposal,<sup>34</sup> or that FERC Commissioner Sudeen Kelly, in her dissent, rejected it.<sup>35</sup>

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<sup>30</sup> NARUC's long-standing policy is to preserve and strengthen the States' traditional roles in regulating distribution systems, planning, siting approval, reliability assurance, and consumer protection. *NARUC's National Electricity Policy (November 2001)*.

<sup>31</sup> FERC proposes each RTO and ISO provide its MMUs with sufficient access to market data, resources and personnel, and that the MMU (or the external MMU in a hybrid structure) report directly to the RTO/ISO board. The MMU's functions would include: (1) identifying ineffective market rules and recommending proposed rules/tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and others; and (3) notifying appropriate FERC staff when a market participant's behavior requires investigation. The Commission also proposes expanding the list of recipients to receive MMU recommended rule/tariff changes, broadening the scope of behavior the MMU must report to FERC, removing the MMU from tariff administration, requiring each RTO/ISO to include ethics standards for MMU employees in its tariff, and consolidating all MMU provisions in one section of each RTO/ISO tariff. Finally, FERC proposes expanding the dissemination of MMU market data to a broader constituency more frequently. Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 8 (2008).

<sup>32</sup> Id. at P 210.

<sup>33</sup> According to *NARUC's National Electricity Policy (November 2001)*, FERC should recognize States' rights to active participation in RTO governance, including the development and revision of market rules, with federal authorities, of market power mitigation programs. An effective and independent monitoring of the wholesale electricity markets includes empowering the relevant States and federal agencies with authority to investigate, enforce, and remedy problems resulting from the exercise of market power or other abusive behavior that distorts market operations.

<sup>34</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 204 (2008).

MMUs should continue to perform market mitigation because they are most knowledgeable about the functioning of their respective markets and, in most cases, already have direct experience preventing the exercise of market power and market manipulation.<sup>36</sup> The efficacy of the oversight can only suffer if this responsibility is transferred to entities that lack the background knowledge and experience to perform the mitigation function. While the NOPR concedes that market monitors have played an integral role in organized electric markets by providing valuable reporting and analysis services not only to FERC, but also to RTOs/ISOs, market participants and State Commissions<sup>37</sup> - it provides no empirical basis for shifting this oversight function. On its face, it makes little sense to split the monitor function from imposing mitigation to remedy detected market anomalies. It would be much like having one mechanic tell you what's wrong with your car's engine, but insisting another mechanic fix it - a prescription for faulty implementation. Moreover, without question, the entity engaging in mitigation garners significant information about how the market functions that can only assist in early and consistent detection of new problems.

The NOPR says the current practice of allowing MMUs to support the RTOs/ISOs in tariff administration, including mitigation, necessarily makes their role subordinate and weakens the MMUs' independence.<sup>38</sup> The NOPR adds that freeing MMUs from these functions would allow them to objectively monitor the markets without the bias that might arise from their personal involvement in tariff administration.<sup>39</sup>

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<sup>35</sup> Id. (Kelly, Commissioner, *concurring in part and dissenting in part*).

<sup>36</sup> FERC implicitly recognizes that MMUs are better equipped by noting that any failure by the RTO/ISO to carry out required mitigation would be readily apparent to the MMU as their job of monitoring the markets necessarily including determining whether mitigation has been properly performed. Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 209 (2008).

<sup>37</sup> Id. at P 163.

<sup>38</sup> Id. at P 207.

<sup>39</sup> Id. In support of its proposal, the NOPR contends mitigation is supposed to be "nondiscretionary." It's not quite that simple. The complexities of modern organized wholesale electricity markets do not reduce market

Commissioner Kelly's dissent provides a persuasive and concise counter to the NOPR's rationale. Citing to the record, she points out that:

- MMUs are better positioned to make determinations regarding the exercise of market power than are the RTO/ISO staff members who frequently have longstanding close personal relationships with the very market participants whose actions at times need to be mitigated.<sup>40</sup>
- Having RTO/ISO staff mitigate creates a much greater conflict of interest than any incidental conflict created by having the internal MMU both mitigate and report on the functioning of the markets.<sup>41</sup>
- The concerns expressed to support removing the MMU from mitigation are misplaced.<sup>42</sup> “[T]here is no reason to fear that a market monitor would hesitate to report market power problems or potential market abuses just because it [is] involved in implementing mitigation measures in that market.”<sup>43</sup>

Commissioner Kelly's rationale is airtight. The NOPR proposal could create an even greater conflict of interest because the RTO/ISO would be more heavily influenced than would be the MMU by market participants, upon whom RTOs/ISOs depend on for its existence. RTO/ISO employees have close personal relationships with, and are often former employees of, market participants. The current practice of MMU mitigation insulates the RTO/ISO from

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mitigation to an exact science. Whether market mitigation should or can be implemented to respond to particular circumstances always will be a matter of subjective analysis.

<sup>40</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617 (2008) (Kelly, Commissioner, *concurring in part and dissenting in part*, at 2)(citing Portland Cement Association Aug. 16, 2007 Comments, Dockets AD07-7, RM07-19, at 19).

<sup>41</sup> Id. (Kelly, Commissioner, *concurring in part and dissenting in part*, at 3) (Contending that “shifting the mitigation responsibility to RTO staff gives rise to a much larger conflict of interest than exists with having mitigation responsibility lie with the independent MMU exclusively” (citing BP Energy Company Sept. 14, 2007 Comments, Docket Nos. AD07-7, RM07-19, at 31). )

<sup>42</sup> Id. (Kelly, Commissioner, *concurring in part and dissenting in part*, at 2)(citing NYISO September 14, 2007 Comments, Dockets. AD07-7, RM07-19, at 23.).

<sup>43</sup> Id.

market participant influence. Otherwise, the RTO/ISO would be subject to the full brunt of market participant displeasure and influence. The NOPR proposal will create inherent conflicts of interest that will threaten the integrity of market monitoring/market power mitigation and should be rejected.

***Unimpeded State regulator access to MMU data is crucial to leverage regulatory oversight and assure a properly functioning market.***

The NOPR declines to propose a generic standard specifying the type of data that may be disseminated to State commissions.<sup>44</sup> Instead, it suggests the information to be released may continue to be developed on a case-by-case basis as long as it generally consists of market analyses of the type generally gathered by MMUs and remains subject to appropriate confidentiality restrictions.<sup>45</sup> This is a mistake. *FERC should provide explicit standards that assure its partners in market oversight – the States - have the same access to data as our FERC colleagues.* By granting such access, the FERC can leverage market oversight while, as explicitly acknowledged in the NOPR, giving State regulators the access to data *they need* to fulfill their statutory responsibilities.<sup>46</sup>

States and FERC have shared responsibility for overall market oversight and regulation. Enhanced information exchange is critical element of this joint oversight. States need access to the same scope of MMU data as the Commission. Limiting access to data conclusions *only does not provide an adequate basis to evaluate its credibility and sufficiency.* States need underlying data imbedded in aggregate information to verify and analyze the MMUs' findings. Only

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<sup>44</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 226 (2008).

<sup>45</sup> Id.

<sup>46</sup> Id. at P 219("In particular, given the integral relationship between wholesale and retail rates, the Commission acknowledged the need for information by state commissions to assist them in performing their regulator functions."). See also NARUC's National Electricity Policy (November 2001)(Whether a State has competitive retail markets or more traditional regulatory structures, Federal, State and regional agencies and organizations overseeing the development of wholesale energy markets in those States require comprehensive and timely market information.).

through access to the MMU's direct findings can there be confidence that the job is being done properly. Increased transparency can only improve MMU oversight and increase confidence in RTO/ISO markets.

FERC's concerns about granting States full access center on the individual commission's ability to protect from public disclosure information that "could harm market participants or facilitate collusion."<sup>47</sup> However, this is not a basis for restricting State access. States recognize these concerns. Since 2001, NARUC and its members have continued to encourage RTOs/ISOs to adopt policies that allow public access to information necessary to enable adequate monitoring of energy markets, *while also providing protection for information demonstrated to be commercially sensitive.*<sup>48</sup>

According to the NOPR, since public disclosure of certain information could harm market participants, it is necessary to balance the need for information access with confidentiality concerns.<sup>49</sup> FERC proposes RTOs/ISOs develop confidentiality provisions for their tariffs that protect commercially sensitive material, but not be so restrictive as to permit the release of little, if any, information.<sup>50</sup> It suggests MMUs may entertain requests for information from State commissions, as long as they pertain to general market trends and performance, are not designed to aid State enforcement or actions against individual companies, and the MMU can

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<sup>47</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 219 (2008).

<sup>48</sup> *NARUC's National Electricity Policy (November 2001)*.

<sup>49</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 219 (2008). The NOPR continues to believe that while confidentiality provisions serve a useful purpose, they should not be drafted in such a way to impose unnecessary barriers to the dissemination of information.

<sup>50</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 235 (2008).

accommodate such requests within its budgetary and time constraints without jeopardizing its ability to perform its core tariff-defined functions.<sup>51</sup>

Imposing these limitations on State access to information is inefficient and unnecessary. States are not just another stakeholder. They, like the FERC, are public servants charged with overseeing these operations “in the public interest.” Disclosure of information to States is a completely different proposition than disclosure to the public or market participants. Requiring unnecessary proceedings – and potentially extended litigation - over specific requests, *at taxpayer or ratepayer expense*, is not good policy, particularly, since historically State commissions have demonstrated their ability to maintain the integrity of commercially sensitive materials.

Others interested in efficient market functioning and oversight have joined NARUC in providing substantial support in the record to allow State commissions to make tailored requests for information.<sup>52</sup> Information should not be limited to general market trends and performances. It makes no sense to first acknowledge States do not have tools and resources to monitor markets as effectively as MMUs,<sup>53</sup> but then limit access to information that can aid State enforcement actions that can only assure more efficient operations.

The NOPR also sets up FERC as an additional gatekeeper for needed data, permitting State commissions to petition FERC on a case-by-case basis for information that does not fall within proposed acceptable parameters.<sup>54</sup> According to the NOPR, this “safety valve” should

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<sup>51</sup> Id. at P 234. The NOPR continues to believe that the proposed restriction on information designed for enforcement purposes is a reasonable one. It reasons that such requests would not only implicate serious confidentiality concerns, they could overwhelm the MMU’s workload. The NOPR says that such requests would likely involve more detailed investigations than would be required for general market information or for MMU referrals to FERC.

<sup>52</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 232 (2008).

<sup>53</sup> Id. at P 234.

<sup>54</sup> Id. at P 237.

alleviate State concerns that they may be prevented from acquiring information for which they have a compelling need, while ensuring that FERC will be able to examine such requests in light both of State needs and the ability to fashion adequate confidentiality protections.<sup>55</sup>

This is, as was the earlier proposal, inefficient and unnecessary. States don't make gratuitous data requests. This gatekeeper proposal only highlights the fact that FERC agrees States must have the ability to acquire certain information – *and the restrictions proposed elsewhere in the NOPR's proposals are likely to hamper proper State oversight*. For the same reasons noted, supra, FERC should not impose an additional gatekeeper function to evaluate State commission information needs or legitimacy of requests. It can only waste both State and Federal resources and ratepayer funds on unnecessary proceedings.

The NOPR also proposes that the existing provisions regarding the confidentiality of MMU referrals to FERC, as well as the confidentiality of the progress and results of its own investigations, be retained.<sup>56</sup> For obvious reasons, FERC should inform affected State Commissioner colleagues of MMU referrals. State regulators need information about specific market participants to properly exercise their own regulatory authority. Properly informed State Commissioner actions or inaction can complement FERC efforts to avoid potentially inconsistent outcomes and duplicative efforts.

#### **(4) RTO/ISO RESPONSIVENESS<sup>57</sup>**

***FERC should reject the hybrid board proposal because it jeopardizes the fundamental principles of RTO/ISO independence.***

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<sup>55</sup> Id.

<sup>56</sup> Id. at P 240.

<sup>57</sup> FERC proposes to establish criteria to ensure an RTO/ISO is responsive to customers, stakeholders, and ultimately to the consumers who benefit from and pay for electricity services - including: (1) inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness. Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 9, 245 (2008).

FERC encourages each RTO/ISO to develop a mechanism that best suits its own governance structure and needs.<sup>58</sup> The NOPR presents two options for consideration: the board advisory committee and the hybrid board.<sup>59</sup> NARUC continues to urge FERC to reject the hybrid board proposal as it jeopardizes RTO/ISO board independence.<sup>60</sup> This hybrid board proposal contradicts FERC's own Order No. 888<sup>61</sup> and Order No. 2000.<sup>62</sup> Commissioner Kelly's dissent<sup>63</sup> cogently summarizes the conflict:

“The Commission has already spoken clearly on the importance of RTOs/ISOs being independent of market participants. Having an independent board is the cornerstone of RTO/ISO policy. Order Nos. 888 and 2000 require that an RTO/ISO be independent from market participants in order to provide regional transmission and energy market services on a non-discriminatory basis. If an RTO or ISO adopted a hybrid board, I do not believe they could be categorized as independent.”<sup>64</sup>

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<sup>58</sup> Id. at P 277.

<sup>59</sup> Id.

<sup>60</sup> In a November 1997 *Resolution Concerning Independent System Operations of Electric Transmission Assets*, NARUC points out that RTOs/ISOs should be structured with procedures that clearly establish independence by ensuring *at a minimum* that industry participants that own or control sources of power generation, supply, or transmission do not have control of governance. Such independence could be accomplished by requiring (1) that industry participants that own or control sources of power generation, supply, or transmission do not have control of RTO/ISO boards; or (2) that the board is made up solely of non-market participants in a quasi-public or non-profit entity; or (3) that the RTO/ISO is independently owned and operated; or (4) other methods that clearly assure independence of the governance.

<sup>61</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>62</sup> Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

<sup>63</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617 (2008) (Kelly, Commissioner, *concurring in part and dissenting in part*, at 2)(“Further, I disagree with the NOPR's proposal to promote responsiveness of RTOs/ISOs by allowing them to adopt hybrid boards with stakeholder members. Providing for stakeholder representatives on an RTO/ISO board is inconsistent with an independent governing structure.”).

<sup>64</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617 (2008) (Kelly, Commissioner, *concurring in part and dissenting in part*, at 2-3).

Order No. 888 points out an RTO/ISO must be independent of market participants to insure impartiality in policy, operation and dispute resolution decision making.<sup>65</sup> The NOPR itself recognizes in several places that prior FERC record findings make it imperative that a regional transmission entity be independent from market participants.<sup>66</sup> But despite this recognition of FERC's long-standing policy on independent governance, the NOPR provides no compelling rationale for the proposed shift in policy.

FERC must preserve actual and perceived RTO/ISO independence as it gives participants in organized wholesale markets confidence that the markets are being administered fairly; proprietary and critical infrastructure information is being protected; and customers will ultimately receive the benefits of competition.

A hybrid board cannot achieve this critical objective. Stakeholder representation on a hybrid board conflicts directly with the same stakeholders' fiduciary responsibility to its employers to maximize company profits. It is unrealistic to expect a stakeholder board member to ignore the interests of its employer.

Not only is it illogical to expect a Stakeholder member to act impartially, it will be difficult, if not impossible, to detect conflicted conduct. As Commissioner Kelly noted in her dissent:

"I also fear that a board with independent and non-independent members will suffer from a divisive atmosphere with suspicion as to whether non-independent board members were acting in the best interests of the RTO/ISO and its customers or in the best interest of the particular market participant represented by that non-independent board member."<sup>67</sup>

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<sup>65</sup> Order No. 888 ¶ 31,036 at 31,730-31.

<sup>66</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 247 (2008). In *Order No. 2000*, FERC determined that independence is a required characteristic necessary for an RTO/ISO to prevent any undue discrimination and to bring benefits to market participants. *Id.* at P 272. An RTO/ISO's decision-making process must be independent in both reality and perception. *Id.*

<sup>67</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617 (2008) (Kelly, Commissioner, *concurring in part and dissenting in part*, at 3).

Moreover, a hybrid board is far more likely to be unwieldy and ineffective because of the need to represent so many different market interests. The RTO/ISO will struggle to ensure fair representation because smaller companies are less likely to have resources necessary to participate. The result: not all sectors of the market will be fairly represented. Decisionmaking with such diverse interests will be a tedious and time-consuming process. An independent board is the best approach for unbiased, effective and balanced decisions.

As many commenters indicated, a board advisory committee is a better way to allow stakeholder input.<sup>68</sup> As Commissioner Kelly notes in her dissent:

“In contrast, I believe that the NOPR’s proposal to encourage RTOs and ISOs to establish a stakeholder advisory committee would meet the NOPR’s goal of improving RTO/ISO responsiveness without jeopardizing the fundamental independence of RTOs/ISOs. I also believe consideration should be given to the RTO/ISO mission statement as a tool to respond to any continuing stakeholder need for more RTO/ISO accountability.”<sup>69</sup>

Indeed, the NOPR also recognizes that the board advisory committee is a particularly strong mechanism for ensuring responsiveness.<sup>70</sup> This approach effectively balances the interests of stakeholders in formulating policy advice to the board without sacrificing independence. As a further safeguard to assure an advisory board does not wield improper influence, the Commission should require that these advisory committees have open positions for State commissions and State consumer advocates.

## CONCLUSION

NARUC respectfully submits that the Commission considers the above comments in this proceeding.

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<sup>68</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 264 (2008).

<sup>69</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617 (2008) (Kelly, Commissioner, *concurring in part and dissenting in part*, at 3).

<sup>70</sup> Wholesale Competition in Regions with Organized Electric Markets, Notice of Proposed Rulemaking, 122 FERC ¶ 61,617, at P 277 (2008).

**Respectfully submitted,**

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**By: \_\_\_\_\_/s/\_\_\_\_\_**

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**April 21, 2008**

## CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 21st day of April, 2008.

By: \_\_\_\_\_/s/\_\_\_\_\_  
Grace D. Soderberg