

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

*Carbon Pricing in Organized Wholesale
Electricity Markets*

Docket AD20-14-000

**COMMENTS OF THE ATTORNEYS GENERAL OF MASSACHUSETTS,
CALIFORNIA, DELAWARE, MARYLAND, MICHIGAN, MINNESOTA, NEW
MEXICO, PENNSYLVANIA, RHODE ISLAND, WISCONSIN,
AND THE DISTRICT OF COLUMBIA
ON NOTICE OF PROPOSED POLICY STATEMENT**

Pursuant to the Federal Energy Regulatory Commission’s (“Commission”) notice dated October 15, 2020, the Attorneys General of Massachusetts, California, Delaware, Maryland, Michigan, Minnesota, New Mexico, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia (collectively “States”) submit these comments on the Commission’s proposed policy statement encouraging efforts to incorporate state-determined carbon pricing in wholesale electricity markets, 173 FERC ¶ 61,062 (Oct. 15, 2020) (“Proposed Statement”). The States appreciate the Commission’s recognition of state authority to design and implement programs to advance state climate policy goals and the Commission’s express acknowledgement that its distinct authority to approve organized market rules can and should be exercised in ways that accommodate state policies. We respectfully request that the Commission affirm recognition of these principles while refraining from adopting positions regarding the design elements of state programs, and clarify that the Commission will not prejudge, and will evaluate on a case-by-case basis, any carbon-pricing rules presented to it for consideration.

I. BACKGROUND

On September 30, 2020, the Commission held a technical conference on state-determined carbon pricing in regions with organized wholesale electricity markets operated by regional

transmission organizations (“RTOs”) and independent system operators (“ISOs”) (“Technical Conference”). At the Technical Conference, market participants, regulators, and other stakeholders discussed the role of carbon pricing in advancing state policies intended to reduce greenhouse gas (“GHG”) emissions and provide benefits to electricity consumers. Following the Technical Conference, the Commission published the Proposed Statement, which would, if adopted, “make it the policy of this Commission to 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.” See Proposed Statement at ¶ 15.

II. COMMENTS

As noted in the Proposed Statement, “States are currently taking a leading role in efforts to address climate change by adopting policies to reduce their greenhouse gas (GHG) emissions. The electricity sector is a frequent focus of those policies.” Proposed Statement at ¶ 2. Reducing climate-warming GHG emissions not only provides significant health, environmental, and economic benefits to our residents but also will ensure a safer and more resilient and reliable power system.¹ To that end, many of our States have exercised their traditional regulatory authority and “adopted laws or regulations that require the substantial or complete decarbonization of the electricity sector in the coming decades.” *Id.* Those efforts include Massachusetts’ and California’s cap-and-trade programs, and the ten-state Regional Greenhouse

¹ See generally U.S. Global Change Research Program, *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* (D.R. Reidmiller et al. eds., 2018), <https://nca2018.globalchange.gov/> (assessing the significant health, environmental, and economic harms and risks of climate change in the United States); see also *id.* at ch. 4 (describing how “due to climate change, [the U.S. energy system] is projected to be increasingly threatened by more frequent and longer-lasting power outages affecting critical energy infrastructure and creating fuel availability and demand imbalances,” and how “the growing adoption of [innovative clean technologies and programs] is enhancing system flexibility, reliability, and resilience”).

Gas Initiative (“RGGI”).² The Commission refers to those programs, as well as programs that directly reflect power-sector greenhouse gas emissions in the price of electricity, as “carbon pricing” or “emissions pricing” regimes. *See* Proposed Statement at ¶¶ 3, 5, 6.

The States appreciate the Commission’s recognition that “[c]arbon pricing has emerged as an important, market-based tool in state efforts to reduce GHG emissions, including efforts to reduce GHG emissions from the electricity sector.” Proposed Statement at ¶ 3. Carbon-pricing regimes, when paired with complementary policies to promote equitable access to the benefits of clean energy resources, have been and will continue to be critical tools in facilitating economy-wide decarbonization. We encourage the Commission’s consideration of how organized market rules and operations can impede states’ clean energy and climate policies—for example, by imposing barriers to competition for renewable energy generators or discriminating against state-supported clean energy technologies.³

We are concerned, however, that the Proposed Statement encourages RTOs/ISOs to develop rules even where none may be needed. *See* Proposed Statement at ¶¶ 1, 15. The decades of experience that many of our States have with market-based regulation of carbon dioxide and other harmful power-plant emissions demonstrates that cap-and-trade programs and other policies that price environmental externalities can co-exist successfully with the operations of organized electricity markets without undue adverse impacts. For instance, electric generators have long incorporated the variable cost of RGGI carbon pollution allowances into their auction

² *See* Proposed Statement at ¶ 3. RGGI is a cooperative effort among Pennsylvania is also working toward participating in RGGI beginning in 2022 to help achieve the state’s goal of reducing net GHG emissions from 2005 levels by 26% by 2025 and 80% by 2050.

³ *See, e.g.*, Letter from Maura Healey, Massachusetts Attorney General et al. to Neil Chatterjee, former Chairman, Federal Energy Regulatory Comm’n et al. (Oct. 28, 2019) (outlining state clean energy policy priorities).

bids in day-ahead and real-time energy markets in accordance with market rules. The states participating in RGGI span multiple RTOs/ISOs, all of which integrate carbon allowance costs into their dispatch schemes without compromising reliability or market operations.

The Proposed Statement rightly affirms that it is within states' jurisdiction under the Federal Power Act to establish carbon-pricing regimes and determine other aspects of their regulatory programs. *See* Proposed Statement at ¶ 13. In general, state clean energy and carbon-pricing programs, including cap-and-trade, clean energy standard, and renewable portfolio standard programs, are distinct from the RTO/ISO rules over which the Commission has jurisdiction. The Commission has long recognized this separation,⁴ and we ask that any final policy statement continue to scrupulously respect states' authority to determine their own portfolio of electric resources and to exercise their police powers to promote the health and welfare of their residents.

If an RTO/ISO and its stakeholders determine that it may be appropriate for RTO/ISO rules to integrate state carbon prices directly, then the Commission should consider those proposed rules. *See* Proposed Statement at ¶ 8 (reaffirming that “wholesale market rules that incorporate a state-determined carbon price in RTO/ISO markets can fall within the Commission’s jurisdiction”). The States emphasize that the Commission has long found that RTO/ISO tariffs that integrate the costs of complying with state emission-reduction policies are just and reasonable. An example is the greenhouse gas adder in the real-time Energy Imbalance

⁴ *See, e.g.*, Br. United States & Federal Energy Regulatory Comm’n at 7, 10, 2018 WL 2746229 (May 29, 2018), *Village of Old Mill Creek v. Star*, No. 17-2433 (7th Cir.) (confirming that several types of state clean energy programs target “attribute[s] of generation resources over which [states have] regulatory authority”); *WSPP Inc.*, 139 FERC ¶ 61,061 (2012) (concluding that renewable energy credit transactions fall outside of the Commission’s jurisdiction); *see also Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (“Generally speaking, [renewable energy credits] are inventions of state property law whereby the renewable energy attributes are ‘unbundled’ from the energy itself and sold separately.”).

Market run by the California ISO. But the Commission need not, and should not, declare general positions on the design elements of state programs that are plainly within states' jurisdiction, such as the manner by which state policymakers determine carbon prices, the transparency of those prices to program participants, and the design of any measures to address leakage. *See* Proposed Statement at ¶ 16 (questions (a), (b), & (e)). State agencies have developed substantial expertise in these issues and are the proper entities to design such mechanisms in the first instance. While the Commission has jurisdiction to evaluate RTO/ISO rules intended to accommodate the *outcomes* of state policy design choices, the states' policymaking processes and decisions are exercises of sovereign authority and not themselves subject to the Commission's oversight.

Moreover, any policy statement that generally addresses those considerations runs the risk of predetermining the Commission's consideration of an RTO/ISO's proposed rules designed to incorporate a specific state-determined carbon pricing regime. The Commission should instead continue to evaluate any proposed rules "based on the particular facts and circumstances presented in that proceeding." Proposed Statement at ¶ 16. Notably, there have been few RTO/ISO proposals to integrate state carbon prices directly, and those proposals have been specific to the circumstances of the state program and RTO/ISO at issue. That is to be expected, as state carbon-pricing programs vary significantly—as do RTOs/ISOs and the markets they serve and operate.

III. CONCLUSION

The States respectfully request that the Commission refrain from adopting positions concerning the design elements of state programs that are within states' jurisdiction. Rather, the Commission should affirm its recognition of state carbon-pricing regimes while clarifying that it

will consider any RTO/ISO rules presented to it on a case-by-case basis, as it has previously done, and will refrain from prejudging the considerations that the Commission may consider relevant across diverse filings.

Respectfully submitted,

XAVIER BECERRA
ATTORNEY GENERAL OF CALIFORNIA

By: /s/ Dennis L. Beck, Jr.

David A. Zonana
Supervising Deputy Attorney General
Dennis L. Beck, Jr.
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street
Sacramento, CA 95814
(916) 210-7801
dennis.beck@doj.ca.gov

KATHLEEN JENNINGS
ATTORNEY GENERAL OF DELAWARE

By: /s/ Jameson A.L. Tweedie

Christian Douglas Wright
Director of Impact Litigation
Jameson A.L. Tweedie
Special Assistant Deputy Attorney
General
Ralph K. Durstein III
Deputy Attorney General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8600
Jameson.Tweedie@delaware.gov

MAURA HEALEY
ATTORNEY GENERAL OF
MASSACHUSETTS

By: /s/ Megan M. Herzog

Megan M. Herzog
Special Assistant Attorney General
Massachusetts Office of the Attorney
General
One Ashburton Place
Boston, MA 02108-1598
(617) 963-2674
megan.herzog@state.ma.us

BRIAN E. FROSH
ATTORNEY GENERAL OF MARYLAND

By: /s/ Steven J. Goldstein

Special Assistant Attorney General
Office of the Attorney General of
Maryland
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6414
sgoldstein@oag.state.md.us

DANA NESSEL
ATTORNEY GENERAL OF MICHIGAN

By: /s/ Michael E. Moody
Michael E. Moody
Assistant Attorney General
Michigan Department of Attorney
General
525 West Ottawa
Lansing, Michigan 48909
(517) 335-7627
moodym2@michigan.gov

HECTOR BALDERAS
ATTORNEY GENERAL OF NEW MEXICO

By: /s/ Robert F. Lundin
Robert F. Lundin
Assistant Attorney General
New Mexico Office of the Attorney
General
408 Galisteo St.
Santa Fe, NM 87504
(505) 303-1790
RLundin@NMAG.gov

PETER F. NERONHA
ATTORNEY GENERAL OF RHODE
ISLAND

By: /s/ Tiffany A. Parenteau
Tiffany A. Parenteau
Special Assistant Attorney General
Rhode Island Office of the Attorney
General
150 South Main Street
Providence, Rhode Island 02903
(401) 274-4400, Ext: 2109
tparenteau@riag.ri.gov

KEITH ELLISON
ATTORNEY GENERAL OF MINNESOTA

By: /s/ Leigh Currie
Leigh Currie
Special Assistant Attorney General
445 Minnesota Street, Suite 1400
Saint Paul, MN 55101
(651) 757-1291
leigh.currie@ag.state.mn.us

JOSH SHAPIRO
ATTORNEY GENERAL OF
PENNSYLVANIA

By: /s/ Ann Johnston
Michael J. Fischer
Chief Deputy Attorney General
Ann R. Johnston
Senior Deputy Attorney General
Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(717) 857-2091
ajohnston@attorneygeneral.gov

JOSHUA L. KAUL
ATTORNEY GENERAL OF WISCONSIN

By: /s/ Gabe Johnson-Karp
Gabe Johnson-Karp
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53702-7857
(608) 267-8904
johnsonkarp@doj.state.wi.us

KARL A. RACINE
ATTORNEY GENERAL FOR THE
DISTRICT OF COLUMBIA

By: */s/ Brian R. Caldwell*

BRIAN R. CALDWELL

Assistant Attorney General

Social Justice Section

Office of the Attorney General

for the District of Columbia

400 6th St. NW, 10th Floor

Washington, D.C. 20001

(202) 445-1952 (mobile)

brian.caldwell@dc.gov

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Plymouth, Vermont this 16th day of November, 2020.

By: /s/ Megan M. Herzog
Megan M. Herzog
Special Assistant Attorney General
Massachusetts Office of the Attorney
General
One Ashburton Place
Boston, MA 02108-1598
(617) 963-2674
megan.herzog@state.ma.us