

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

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

**REPLY COMMENTS OF THE INSTITUTE FOR POLICY
INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW**

Pursuant to the Federal Energy Regulatory Commission’s (FERC or Commission) October 15, 2020 Notice of Proposed Policy Statement on Carbon Pricing in Organized Wholesale Electricity Markets (Proposed Statement), the Institute for Policy Integrity at NYU School of Law (Policy Integrity) respectfully submits these reply comments.¹ Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity staff have made carbon pricing in wholesale electricity markets an area of particular focus.²

On November 16, 2020, Policy Integrity submitted initial comments on the Commission’s Proposed Statement, highlighting the legal distinction between carbon prices grounded in state law and the Federal Power Act (FPA), and encouraging the Commission to

¹ These comments do not reflect the views of NYU School of Law, if any.

² See, e.g., MATT BUTNER ET AL., CARBON PRICING IN WHOLESALE ELECTRICITY MARKETS: AN ECONOMIC AND LEGAL GUIDE (2020), <https://policyintegrity.org/publications/detail/carbon-pricing-in-wholesale-electricity-markets>; Bethany A. Davis Noll & Burcin Unel, *Markets, Externalities, and the Federal Power Act: The Federal Energy Regulatory Commission’s Authority to Price Carbon*, 27 NYU ENV’T L.J. 1 (2019); Justin Gundlach & Romany Webb, *Carbon Pricing in New York ISO Markets: Federal and State Issues*, 35 PACE ENV’T L. REV. 1 (2017).

recognize important differences between emissions leakage and what it called “economic leakage.”³ In these reply comments, Policy Integrity makes the following points:

- Merely establishing a border adjustment mechanism is not “carbon pricing.” Carbon pricing occurs only when, first, a price is assigned to carbon-dioxide emissions arising from a specified activity or source, and second, emitters are charged that price for each unit they emit;
- It is useful, and not premature or prejudicial, for the Commission to indicate that a carbon pricing program in organized wholesale markets could be FERC-jurisdictional;
- A wholesale market carbon pricing program would not necessarily either replace state-level policies or require changes to those policies to avoid duplicative obligations; and
- The comments of the Competitive Enterprise Institute (CEI) discuss issues that are irrelevant to the subject matter of the Proposed Statement and so do not require address by FERC.

1. Border Adjustments Interact with Carbon Pricing but Do Not of Themselves Amount to Carbon Pricing

Some commenters seem to conflate border adjustments, such as those examined by the PJM Carbon Pricing Senior Task Force, with “carbon pricing.”⁴ In the final Policy Statement, the Commission should clarify what does and does not qualify as carbon pricing, and what are merely design elements of a carbon-pricing policy. Specifically, carbon pricing necessarily involves both assigning a price to each unit of a given category of emissions and then charging emitters that price for each unit they emit over a given time period. By contrast, a border adjustment by itself is not a carbon-pricing policy, but merely an application of one jurisdiction’s

³ Comments of the Institute for Policy Integrity at New York University School of Law, Docket No. AD20-18-000 (filed Nov. 16, 2020) [hereafter Initial Policy Integrity Comments]; *see also* Transcript of “Technical Conference Regarding Carbon Pricing in Organized Wholesale Electricity Markets,” Federal Energy Regulatory Commission, at 41:24–42:2, Sept. 30, 2020 [hereafter Transcript], <https://www.ferc.gov/sites/default/files/2020-11/AD20-14-000-Transcript.pdf>.

⁴ *Compare* Comments of Utah Dep’t of Commerce at 2–3 (referring to “EIM carbon pricing mechanism”), *with* Comments of Western Power Trading Forum at 2 (emphasizing that implementation of state carbon pricing policy that include leakage mitigation “does not necessitate changes to wholesale electricity market design”); *see also, e.g.*, PJM Carbon Pricing Senior Task Force, Expanded Results of PJM Study of Carbon Pricing & Potential Leakage Mitigation Mechanisms (Aug. 21, 2020), <https://www.pjm.com/-/media/committees-groups/task-forces/cpstf/2020/20200821/20200821-item-03-pjm-study-results-de-md-nj-pa-va-il-scenario.ashx>.

carbon price to imports (or, in the case of a two-way adjustment, the removal of that price's application from exports) to mitigate potential leakage.

Making this distinction clear would be especially helpful when examining proposals submitted by a multi-state RTO like PJM or ISO New England. In those contexts, pursuit of an administrative solution (e.g., border adjustments) to the problem of diverse state policies would not necessarily involve the imposition of a carbon price on any generator pursuant to authority granted by the FPA. Rather, the RTO could facilitate implementation of carbon pricing policies adopted and imposed pursuant to state law in a context where such policies—or *the lack of such policies*—affects states across the region. By contrast, an RTO imposing a carbon price on generator, regardless of who specifies the price level, would be subject to the Commission's authority under the FPA.

2. The Commission's Statement Is Correct that Carbon Pricing Could Be FERC-jurisdictional

Diverse commenters voiced support for the Commission's suggestion that a wholesale market carbon pricing program could readily fall within the Commission's jurisdiction⁵—and, more specifically, that it could satisfy the jurisdictional test articulated in *FERC v. EPSA*.⁶ For reasons explained in our recent report, *Carbon Pricing in Wholesale Electricity Markets: An Economic and Legal Guide*, and our other scholarly work, Policy Integrity agrees that the Commission has jurisdiction to consider and, in principle, to adopt such an RTO carbon pricing proposal.⁷

⁵ *E.g.*, Transcript at 23:9–24:7 (Hill); Comments of ACORE at 4; Comments of Am. Petroleum Inst. at 1; Comments of New England Power Generators Ass'n at 1–2; Comments of Sustainable FERC Project at 2.

⁶ 136 S. Ct. 760; *see, e.g.*, Transcript at 52:24–53:13 (Pescoe); Comments of Natural Gas Supply Ass'n at 3–4; Comments of Resources for the Future at 2–3.

⁷ BUTNER ET AL., *supra* note 2, at 22–24, 31–33; Davis Noll & Unel, *supra* note 2; Gundlach & Webb, *supra* note 2.

But multiple other commenters criticized the Commission for “encourage[ing]” efforts to explore potential approaches to carbon pricing and propose one or more such approaches to the Commission pursuant to section 205 of the Federal Power Act.⁸ Encouragement, they said, overstepped in one way or another the boundary separating a neutral and non-prejudicial statement of policy from a biased statement that revealed a preference or predisposition with respect to proposals that might come before the Commission.

Policy Integrity believes that this latter group of commenters misread the Commission’s intention, which is to clarify that a wholesale market carbon pricing proposal would not be “dead on arrival,” should it be presented pursuant to section 205 of the FPA.⁹ Such clarification is warranted, given that speculation about FERC’s receptivity to wholesale market carbon pricing has included suggestions that the Commission might not be open to the idea at all.¹⁰ Viewed against this backdrop, the sort of clarification offered in the Proposed Statement is the opposite of a prejudicial statement and is consistent with the Commission’s indication that it would address any wholesale market carbon pricing proposal submitted to it on a case by case basis, without preconceived interpretations of how the FPA’s provisions might apply.¹¹

3. Carbon Pricing Imposed by an RTO Need Not Replace State-Level Policies nor Duplicate Their Effects

Commenters, echoing points made during the Commission’s Technical Conference,¹² discussed how carbon pricing in a wholesale market would interact with state renewable

⁸ See, e.g., Comments of Am. Forestry & Paper Ass’n at 8–9; Comments of E. Ky. Power Corp. at 16; Comments of Mass. Att’y Gen. at 3.

⁹ See Comments of R Street at 1 (acknowledging value of conveying that proposals would *not* be “dead on arrival”).

¹⁰ See, e.g., Rod Kuckro, *N.Y. Carbon Pricing Plan Creates Quandry for FERC*, E&E NEWS, Aug. 5, 2019.

¹¹ Proposed Policy Statement at PP 8, 15.

¹² Transcript at 110:5–8 (Bowring: characterizing some state programs as applying an “implied prices of carbon”).

portfolio standards (RPSs) and clean energy standards (CESs) that compensate renewable and clean resources that generate electricity without emitting.¹³ Broadly, these points took three forms. Some commenters highlighted that diverse state clean energy policies could be interpreted as implying diverse carbon prices, which would present a challenge for an RTO seeking to integrate a uniform carbon price into its wholesale market.¹⁴ Others voiced concerns that implementation of wholesale market carbon pricing alongside RPSs or CESs could somehow lead to double regulation, double payments, and associated unfairness and inefficiency.¹⁵ And still others highlighted that “there is a place for [RPSs] and [CESs] to coexist with [a] carbon price,”¹⁶ and suggested that an expanded final version of the Proposed Statement could facilitate mutual accommodation between RTO market design and a wide variety of state-level clean energy policies, not only state-level carbon prices.¹⁷

Policy Integrity encourages the Commission to recognize that—in line with this third view—thoughtful design decisions on the parts of both RTOs and states can address concerns about “double payments.” In this regard, we point to the example of New York, where the credits conferred on renewable and clean resources by that state’s Clean Energy Standard are (a) firmly on the state-jurisdictional side of the regulatory line,¹⁸ but also (b) sensitive to wholesale market price changes such that imposition of a carbon price would redirect some or all of those out-of-

¹³ *E.g.*, Comments of Am. Petroleum Inst. at 2 (cautioning that ratepayers might be subject to “double payments”); Comments of Ams. for Prosperity at 2.

¹⁴ *E.g.*, Transcript at 110:20–111:1 (Olson); Comments of Vistra Corp. at 6–7.

¹⁵ *See, e.g.*, Transcript at 178:3–6 (Chairman Chatterjee); Comments of ELCON at 8 (warning of a carbon price “pancaked on top of existing state and federal mandates”).

¹⁶ Transcript 179:3–4 (Mukerji); Comments of Advanced Energy Econ. at 9–12.

¹⁷ Comments of Advanced Energy Econ. at 9–12.

¹⁸ *See Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2019).

market payments, causing them to pass through wholesale market channels.¹⁹ This property is not specific to New York’s design of its Clean Energy Standard.²⁰ As long as there is a procurement process that involves some measure of competition, whether directly (e.g., through competitive solicitation) or indirectly (e.g., through bilateral contracting in a wholesale market setting), imposition of a carbon price in regions with organized markets will push the energy market revenues of clean and renewable resources higher, causing out-of-market payment for procurement of those resources to fall in turn.²¹

Further, carbon pricing can help the Commission to begin repairing the fissures in FERC-state interactions that have followed from disputes over the application to state-supported resources of minimum offer price rules in capacity markets.

4. The Key Points Made by the Competitive Enterprise Institute Are Irrelevant Here, and Are also Incorrect

The Competitive Enterprise Institute (CEI)’s comments take aim not at the contents of the Proposed Statement but at aspects of a carbon pricing policy that is not contemplated by the Commission,²² such as the derivation of the Social Cost of Carbon (SCC) estimated by the Interagency Working Group (IWG).²³ The issues CEI raises are irrelevant to this proceeding, and the Commission does not need to address them. However, should the Commission decide to

¹⁹ SUSAN F. TIERNEY & MARK J. HIBBARD, ANALYSIS GRP., CLEAN ENERGY IN NEW YORK STATE: THE ROLE AND ECONOMIC IMPACTS OF A CARBON PRICE IN NYISO’S WHOLESALE ELECTRICITY MARKETS 3, 12–13 (2019); SAMUEL A. NEWELL ET AL., PRICING CARBON INTO NYISO’S WHOLESALE ENERGY MARKET TO SUPPORT NEW YORK’S DECARBONIZATION GOALS 44–48 (2017).

²⁰ See generally CLAIRE E. KREYCIK ET AL., NAT’L RENEWABLE ENERGY LAB’Y, PROCUREMENT OPTIONS FOR NEW RENEWABLE ELECTRICITY SUPPLY (2011) (surveying RPS procurement approaches and identifying numerous examples of competitive process elements); see also GALEN BARBOSE, LAWRENCE BERKELEY NAT’L LAB’Y, U.S. RENEWABLES PORTFOLIO STANDARDS: 2019 ANNUAL STATUS UPDATE 33–34 (2020) (noting fluctuations in prices of various states’ renewable energy credits with movements in supply and demand).

²¹ See Transcript at 182:5–20 (White).

²² Proposed Statement at P 1 n.2.

²³ Comments of Competitive Enterprise Inst. at 7–12 [hereafter CEI Comments].

engage with these issues, we briefly note here that many of CEI’s key points are incorrect and have been repeatedly refuted elsewhere:

- *CEI contends that the IWG’s SCC should only reflect damages that occur in the U.S.*²⁴ Domestic-only estimates are inconsistent with economic best practice, ignore recent literature on significant U.S. climate damages, and fail to reflect international spillovers to the U.S., U.S. benefits from foreign reciprocal actions, and the extraterritorial interests of U.S. citizens including financial interests and altruism.²⁵
- *CEI cites noted economist Robert Pindyck as a critic of the SCC and the integrated assessment models (IAMs) on which it is based.*²⁶ But Professor Pindyck has himself explained that such characterizations take his criticism of IAMs out of context and elide his basic point, namely that they capture only a portion of actual climate damages from greenhouse gas emissions and that a more accurate accounting would yield a *higher* SCC value.²⁷
- *CEI contends that the value of avoiding climate damages in the future should be discounted at a rate of 7 percent.*²⁸ This view relies on inappropriately applying a discount rate used to capture the valuation of relatively short-term investments to decisions that pertain to a very long time horizon.²⁹ There is increasingly broad agreement—arguably consensus—that the appropriate discount rate to apply when estimating the value of long-term future climate damages is the consumption rate of interest, which tends to hover around 2 percent.³⁰

²⁴ CEI Comments at 7.

²⁵ See *California v. Bernhardt*, No. 4:18-CV-05712-YGR, 2020 WL 4001480, at *25 (N.D. Cal. July 15, 2020) (rejecting use of domestic rather than global value of greenhouse gas damages and explaining that “Executive Order 13783 . . . did not alter by fiat what constitutes the best available science.”). For a fuller discussion of why the global estimate is appropriate, see Joint Comments of Env’t Def. Fund et al. on Proposed Rule, Regulatory Impact Analysis, and Environmental Assessment on the Delay and Suspension of Certain Requirements for Waste Prevention and Resource Conservation 9–19 (Nov. 6, 2017) [hereafter Joint Methane Comments], <https://policyintegrity.org/documents/11-06-17-Joint-SCM-Comments-to-BLM-on-Methane-Suspension-Rule.pdf>.

²⁶ CEI Comments at 8.

²⁷ Joint Methane Comments, *supra* note 25, at 7–8 (citing multiple Pindyck articles and statements, including his endorsement of the IWG’s SCC as an appropriate basis to specify the level of a carbon tax “as a rough and politically acceptable starting point”).

²⁸ CEI Comments at 7.

²⁹ Joint Methane Comments, *supra* note 25, at 19–27.

³⁰ *Id.*; see also Peter Howard & Derek Sylvan, *Wisdom of the Experts: Using Survey Responses to Address Positive and Normative Uncertainties in Climate-Economic Models*, 162 CLIMATE CHANGE 213, 224 (2020), <https://policyintegrity.org/publications/detail/wisdom-of-the-experts> (surveying climate experts regarding appropriate long-term social discount rate); Moritz A. Drupp et al., Uni. of Oslo, *Discounting Disentangled*,

- *CEI points to an upward shift in IWG SCC values between 2010 and 2013 and claims that the change owes to manipulation of flexible models.*³¹ The IWG itself explained this shift in 2013, and again in response to comments in 2015, as resulting from various and extensive technical improvements to the IAMs underlying the IWG SCC’s estimates.³²
- *CEI refers to “a recent peer-reviewed study” that purports to show that changes to two factors in the FUND IAM (climate sensitivity and carbon fertilization) result in a negative value for carbon dioxide emissions—meaning a net benefit to the climate and economy rather than damage.*³³ This study, which was conducted by CEI and the Heritage Foundation, ignored the generally accepted rule that it is never appropriate to estimate the SCC using just one IAM, because such estimation is susceptible to manipulation and tends to yield outlier values.³⁴

In sum, CEI’s comments are rife with errors and mischaracterizations, in addition to being irrelevant to this proceeding. The Commission should disregard them.

Respectfully submitted,

/s/ Justin Gundlach
 Justin Gundlach
 Senior Attorney
justin.gundlach@nyu.edu

/s/ Burcin Unel
 Burcin Unel, Ph.D.
 Energy Policy Director
burcin.unel@nyu.edu

Dated: December 1, 2020

Memorandum (Dep’t of Econ., No. 20/2015, 2015) (surveying economists specializing in discount rates regarding appropriate long-term social discount rate).

³¹ CEI Comments at 8.

³² Interagency Working Group on Social Cost of Carbon, Response to Comments: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, at 5 (July 2015), <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/scc-response-to-comments-final-july-2015.pdf>; Interagency Working Group on Social Cost of Carbon, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866, at 12 (May 2013; revised Nov. 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf> (“The updated versions of the three integrated assessment models were run using the same methodology detailed in the 2010.”).

³³ CEI at 11.

³⁴ Joint Methane Comments, *supra* note 25, at 34–38 (explaining reasons why reliance on just one IAM departs from economic best practice).

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at New York, New York this 1st day of December 2020.

Respectfully Submitted,

/s/ Justin Gundlach
Justin Gundlach
Senior Attorney
Institute for Policy Integrity at
NYU School of Law
139 MacDougal Street, 3rd Fl.
New York, NY 10012
(212) 992-8167
justin.gundlach@nyu.edu