

Jurisdictional Considerations Related To Carbon Pricing in PJM

*On behalf of the American Wind Energy Association and
the Solar Energy Industries Association*

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Overview

- AWEA and SEIA support exploring implementation of a carbon price in PJM. Carbon pricing offers a transparent, market-driven and tech-neutral way to reflect costs associated with state environmental policies in wholesale electricity markets administered by PJM, and would better reflect the true costs associated with serving consumers in PJM.
- Applicable precedent strongly suggests that PJM has the authority to incorporate a price on carbon in its markets under several potential scenarios.
- The precise legal justification for any particular carbon pricing market design will depend on the specific characteristics of any carbon pricing proposal that PJM would ultimately submit to FERC. Any legal questions should not prevent PJM and its stakeholders from exploring carbon pricing options at this early stage in the stakeholder process.
- Additionally, AWEA and SEIA do not believe that concerns that have been raised to date in the stakeholder process related to “price transference” or the Dormant Commerce Clause are insurmountable and should not act as a barrier to further consideration of carbon pricing in PJM.

Key Takeaway

At this phase in the stakeholder process, potential or theoretical legal issues **should not deter** stakeholders from discussing and considering **all potential ways** in which carbon pricing could be implemented in PJM.

Legal Justification For Carbon Pricing in PJM

- **Path 1: “State Originated” Price on Carbon**
 - **State environmental compliance costs – including carbon - can be included in generator bids today.** FERC-approved tariff mechanisms already allow RTOs to incorporate state-originated environmental costs, indicating that PJM has the legal authority to reflect state-originated carbon prices into its wholesale market prices.
 - Today in PJM “[c]osts for environmental controls are part of bids for capacity resources in the PJM Capacity Market” and are “included in energy offers.” (See MONITORING ANALYTICS, LLC, [STATE OF THE MARKET REPORT FOR PJM](#) 275, 278 (2016)).
 - CAISO uses a FERC-approved greenhouse gas (GHG) bid adder that was originally implemented in 2012, and expanded to the multi-state Energy Imbalance Market in 2014.

Legal Justification For Carbon Pricing in PJM (cont.)

- **Path 2: “RTO-Originated” Price on Carbon**

- To date, no RTO/ISO has integrated a carbon pricing directly into its energy market
- The specifics of NYISO’s carbon pricing proposal (when and if it is submitted to FERC), as well as any associated FERC ruling, will likely provide valuable guidance as to whether and how an “RTO-originated” carbon price could be implemented by PJM.
- There are several proposed legal frameworks that would support an RTO-originated carbon price.
- Absent a future federal carbon pricing regime, or even with one, states may decide whether and how to authorize PJM to perform this function on their behalf.

Price Transference

- The issue of “price leakage” or “price transference” has been discussed in the PJM stakeholder process. However, this is not legally problematic – and already happens today.
- At present, generators participating in PJM’s capacity or energy markets alter their bid parameters to reflect state-imposed environmental costs. This affects capacity prices and LMPs in other states.
- State-imposed costs on such generation facilities always have had an impact on FERC-jurisdictional wholesale electricity markets, and vice versa.
- “It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other.” *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 776 (2016).
- Similarly, no one state in a multi-state wholesale market is ever entirely insulated from policy decisions – such as labor, tax, and environmental choices – made in other states.

Dormant Commerce Clause

- The “commerce clause” of the United States Constitution gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. Constitution, Art. 1, Sec. 8, Cl. 3. “The Dormant Commerce Clause” (which is not actually written in the U.S. Constitution) examines whether **a state law** discriminates against or excessively burdens interstate commerce.
- There is no action that PJM and its stakeholders could take that would trigger the Dormant Commerce Clause because PJM is not a state.
- States **routinely** impose laws and regulations related to their authority over in-state utilities and generation resources that do not violate the Dormant Commerce Clause.
- If PJM and its stakeholders pursue a solution in which a state-originated carbon price is incorporated into PJM’s markets, then AWEA and SEIA recommend working with states to ensure that any state law originating such a carbon price does not violate the Dormant Commerce Clause.
- At this phase in the stakeholder process, the Dormant Commerce Clause does not and should not serve as a barrier to additional discussion related to how a carbon price could be implemented in PJM.