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January 31, 2018

The Honorable Christopher Holden
Chair, Assembly Committee on Utilities and Energy
State Capitol Room 5136
Sacramento, CA 95814

Re: Draft Amendments to AB 813 on CAISO regional expansion

Dear Assembly Member Holden,

On January 23rd, your office released draft amendments to AB 813 addressing the responsibilities of an expanded California Independent System Operator (CAISO). TURN offers comments on the sections included in the draft with the understanding that there are other yet-to-be revealed provisions relating to Governance. This letter does not comment on governance and responds only to the issues addressed by the draft amendments.

As a general matter, The Utility Reform Network (TURN) believes that California can engage in greater regional coordination without transforming CAISO into a full Regional Transmission Organization (RTO). TURN has serious concerns that the regional expansion of CAISO could lead to higher costs for California consumers, greater utilization of coal and gas-fired power plants, higher in-state Greenhouse Gas emissions, fewer in-state jobs, and an increased risk that cutting-edge state policies will be subject to federal preemption.[1] Regional expansion would also irrevocably alter the state's landmark Renewables Portfolio Standard (RPS) program to result in less new renewable energy development, greater reliance on renewable energy that is never delivered to California, and fewer in-state environmental and public health benefits.

I. THE DRAFT AMENDMENTS INCLUDE PROVISIONS THAT ARE AMBIGUOUS, UNENFORCEABLE, AND CONTRADICTORY

The latest draft contains very few enforceable, meaningful and durable protections. As described in the following sections, the obligations identified for inclusion in the governing documents of a multi-state RTO are vague, subject to substantial interpretation, and wholly inadequate to address legitimate concerns about the likely threats to California's interests. Some of the obligations merely mimic existing CAISO and FERC requirements rather than establishing any incremental commitments.

[1] These economic and environmental impacts were documented in extensive written comments submitted by TURN as part of the CAISO SB 350 study process.

A. §8390 - The requirements applicable to the RTO are limited to "bylaws and other organizational documents" rather than tariffs and do not appear to be enforceable by any state entity

Under §8390, no load-serving entity is permitted to join or participate in wholesale markets organized by the RTO unless the issues identified in the following subdivisions are addressed in FERC approved bylaws or other organizational documents. There are two significant flaws in this approach. First, the provision does not identify any state agency charged with reaching determinations as to whether the FERC-approved "bylaws or other organizational documents" sufficiently address the relevant issues. As a result, there is no identified decisionmaking process for determining whether a load-serving entity should be prevented from joining, or participating in, the RTO. Challenges regarding compliance could end up being decided by FERC or in the federal courts.

Second, the requirements only apply to "bylaws and other organizational documents" and not to any tariffs that would affect actual market operations. This narrow definition means that there would be no obligation for an LSE to leave the RTO in the event that FERC-approved tariffs are inconsistent with the concerns identified in the following subdivisions.

B. §8390(b) and (c) - Conflict of interest provisions mimic existing FERC rules

The draft includes two provisions (§8390(b) and (c)) that establish prohibitions on conflicts of interest by RTO board members. These provisions appear to mirror existing FERC requirements for ISOs and RTOs pursuant to Order 888 and Order 2000. Unlike the limited application of this requirement only to Board members in the draft amendments, FERC's conflict of interest requirements apply to both board members and employees and are therefore more comprehensive.[2]

C. §8390(d) - Public meeting and disclosure requirements far more restrictive than current law

The draft would require that meetings of the RTO board and any advisory groups "are held in an open and transparent manner" which includes making "governing documents… notices of meetings…agendas…minutes for those meetings" publicly available. Moreover, the draft would require that the RTO allow participation by the

[2] FERC order 888 includes the principle that "[a]n ISO and its employees should have no financial interest in the economic performance of any power market participant," the ISO "should adopt and enforce strict conflict of interest standards," and "[e]mployees of the ISO should also be financially independent of market participants." FERC Order 2000 established an independence standard for Regional Transmission Organizations (RTO) to ensure that these entities would provide transmission service and operate in a non-discriminatory manner and stated that an RTO "[m]ust be independent of any entity whose economic or commercial interests could be significantly affected by the RTO's actions or decisions."

public "in person or remote electronic means". These provisions represent bare minimums for transparency and are a step backwards from current law.

CAISO is currently subject to open meeting requirements consistent with the Bagley-Keene Act and is obligated to provide public access to corporate records consistent with the requirements of the California Public Records Act.[3] These comprehensive obligations would appear to be replaced by the far weaker provisions in the draft amendments. The result would be fewer protections governing public access to documents and less stringent open meeting rules.

D. §8390(e) and (f) - Preservation of state authority is ambiguous and unenforceable, leaving California vulnerable to preemption, misguided resource adequacy requirements, and FERC-imposed subsidies for coal-fired generation

The draft attempts to preserve key elements of state authority over "matters regulated by the state, including procurement policy, resource planning, and resource or transmission siting within the state or balancing authority." (§8390(e)). This provision is ambiguous with respect to the scope of "matters regulated by the state" that affect the operation of FERC-regulated wholesale markets. CAISO expansion would increase the likelihood of successful federal preemption challenges when state procurement and resource planning policies directly affect multi-state RTO wholesale markets.[4]

The next subdivision specifically empowers the RTO to impose "minimum resource adequacy standards" on states (§8390(f)). The adoption of new "Resource Adequacy" requirements by an independent RTO could severely undermine traditional state authority to establish rules for determining and satisfying long-term planning needs. Any such proposal could override the ability of California regulators to set reliability needs or determine how renewable generation, demand response, energy efficiency, storage and other preferred resources count towards planning targets. Moreover, the CAISO could exercise authority to purchase additional gas-fired resources if it determines that planning needs have not been fully satisfied with eligible generation. Any challenges to CAISO determinations would be considered by the FERC and not by state regulators.

Furthermore, FERC recently ordered each ISO and RTO to identify challenges relating to "grid resilience" including broader consideration of the impact of "wholesale market rules, planning and coordination, and NERC standards" on resiliency and evaluating "options to mitigate any risks".[5] This order follows a series of public statements by FERC

[3] California Public Utilities Code §345.5(b)(3), (b)(4).
[4] See *Hughes v. Talen, 136 S. Ct. 1288 (2016), State of North Dakota v. Heydinger,* No. 14-2156, 14-2251 (8th Cir. 2016).
[5] *Order Terminating Rulemaking Proceeding, Initiating New Proceeding, And Establishing Additional Procedures*, 162 FERC ¶ 61,012, January 8, 2018.

Commissioners and the DOE Secretary expressing the need for RTOs to create new market-based subsidies to prevent the retirement of existing coal and nuclear generation. These statements are consistent with the declared intention of President Trump to use federal regulatory agencies to ensure that anticipated retirements of coal generation will not occur. While the current CAISO balancing authority includes very limited legacy coal capacity, an expanded RTO would likely include substantial amounts of Western coal-fired generation that could become eligible for new FERC-directed subsidies. CAISO expansion could result in California ratepayers being forced to subsidize out-of-state coal generation and extend the lives of these facilities even if these outcomes are contrary to the objectives of state regulators and the Legislature.

E. §8390(g) - Refusal to endorse, organize or operate a centralized capacity market does not save state policies from federal preemption

The draft amendments would require the RTO's governing documents to "not endorse, organize, or operate a centralized market for the forward procurement of electrical generating capacity." (§8390(g)) While helpful, this prohibition is inadequate to protect state policies from the increased threat of federal preemption under an RTO.

In *Hughes v. Talen*, the US Supreme Court identified a variety of "competitive wholesale auctions" that could justify federal preemption of state policy. These include "a 'same-day auction' for immediate delivery of electricity to LSEs facing a sudden spike in demand; a 'next-day auction' to satisfy LSEs' anticipated near-term demand; and a 'capacity auction' to ensure the availability of an adequate supply of power at some point far in the future"[6]. The CAISO already runs two of these three types of "wholesale auctions" in the form of day ahead and real-time energy markets. Any state policies that direct load-serving entities to procure specific resources and have a direct effect on prices in these markets could be subject to challenge even if no centralized market for the forward procurement of capacity is in place.

The risk of preemption will increase if CAISO is expanded to include additional out-of-state market participants who may feel disadvantaged by the California's numerous policies designed to minimize the use of fossil fuels and increase reliance on preferred resources and locally-sited distributed energy resources. These out-of-state utilities and generators would directly experience the impact of California policies on wholesale markets and be motivated to challenge any mechanism that could be deemed to impermissibly discriminate against other resources located within the same RTO footprint.

[6] *Hughes v. Talen, 136 S. Ct. 1288, 1291 (2016)*

F. §8390(h) - Commitment to "not alter a state or balancing authority's resource choices" is not defined or coherent

The draft requires that the governing documents of an RTO "not alter a state or balancing authority's resource choices." The meaning of "resource choices" is not clear and the reference to a "balancing authority" is circular since the RTO would operate its own balancing authority. Unless this provision is modified and refined, it appears to be meaningless.

G. §8390(i) and (j) - Requirement that dispatch protocols "minimize" GHG emissions is inadequate and does not ensure California can apply Cap-and-Trade rules in a regional market

The draft requires the governing documents of an RTO to "have dispatch protocols that minimize emissions of greenhouse gases" (§8390(i)) and ensure a system for tracking GHG emissions (§8390(j)). TURN agrees that a comprehensive tracking system is necessary to permit GHG accounting protocols to function. However, these two provisions fail to ensure that California's aggressive GHG policies can be implemented as part of any RTO market.

The reference to "dispatch protocols that minimize emissions" is not sufficient given the likely inclusion of significant quantities of coal-fired generation located within a Western RTO. Coal-fired resources in other Western states are subject to far less stringent environmental regulations and many units do not face state or federal GHG limitations or prices. With the recent announcement by the Trump administration that the Clean Power Plan will not be implemented, there is little reason to expect that most Western coal-fired generation will be subject to any meaningful GHG limitations in the coming years.

The CAISO's own study pursuant to SB 350 found that regional expansion could increase the use of coal-fired generation throughout the West, cause greater reliance on in-state natural gas plants, and produce a net increase of GHG emissions within California. If the goal is to require GHG emissions to be used as the basis for dispatch, the language should be changed to explicitly require that zero and low-carbon resources receive <u>dispatch preference</u> over higher emission generating sources for the purpose of serving California loads. Moreover, this preference should extend to any <u>secondary dispatch</u> of generation attributable to California loads.[7]

[7] Secondary dispatch refers to the situation where cleaner resources located outside California that would otherwise be used to serve out-of-state customer loads are instead dispatched to serve California and dirtier resources that would otherwise not be operating are incrementally dispatched to serve out-of-state loads. This is a form of "resource shuffling" that can circumvent efforts to apply GHG emissions requirements solely to generation that is explicitly "serving" California. The California Air Resources Board has expressed serious concerns about the potential for secondary dispatch to undermine the application of Cap-and-Trade requirements to out-of-state generation serving California as part of the Energy Imbalance Market.

Out-of-state fossil-fuel generators selling their power to California are currently required to buy and surrender GHG allowances under the Cap-and-Trade program. This requirement can be enforced because imports of electricity into CAISO are tracked. Under a multi-state RTO, there would be no ability to track "imports" into California because the entire geographic footprint would be operated as a single balancing authority.[8] As a result, there would be no way to determine what power is "delivered" or "imported" into California. The inability to make this determination means that application of the Cap-and-Trade requirements to out-of-state generation may become difficult, or impossible, to enforce.

At a minimum, the Legislature should direct the California Air Resources Board to work with CAISO to determine whether and how the Cap-and-Trade requirements would be applied to out-of-state generation. Only after this issue is resolved should any discussion of expanding the CAISO proceed. The application of these requirements should be included in tariffs submitted for FERC approval. If FERC does not approve the tariffs, or the application of California's Cap-and-Trade program within an RTO is deemed invalid by the federal courts, California transmission-owning utilities should be required to give their notice to withdraw from the RTO.

In short, the draft amendments fall woefully short of providing any assurances that the expansion of CAISO into a multi-state RTO would preserve the viability of the existing Cap-and-Trade program structure and California's ambitious GHG reduction goals.

H. §8390(k) - Direction to support "market development" of distributed resources could conflict with state policy and programs

The draft calls for the RTO governing documents to "support market development" of various distributed energy resources. The direction to place primary importance on "market development" could have the unintended effect of creating conflicts between wholesale market design and state policy requirements that rely upon mandates, subsidies or other non-market procurement mechanisms. The language should, at a minimum, be amended to require coordination with state regulators to ensure that wholesale market design does not undermine, or interfere with, state policy initiatives relating to distributed energy resources.

I. §8390(m) - Guaranteeing right of exit upon 2-year notice fails to move beyond current law

The draft would require that all LSEs have the right to unilaterally withdraw from the multistate RTO "with or without cause" subject to providing 2-year advance notice. This provision mirrors existing rights under the CAISO Transmission Control Agreement for

[8] The CAISO has not identified any meaningful method of tracking "delivery" within a regional footprint.

any transmission-owning utility to withdraw upon giving 2 years of advance notice.[9] There are no incremental protections provided by the draft amendments. The draft provision does not specify that the state has the authority to direct any California entity to exercise their withdrawal rights, leaving open the possibility that this condition could be included in RTO governing documents without explicitly preserving the authority of the CPUC or any other state agency to direct the Investor-Owned Utilities to withdraw under any circumstances.

TURN recommends that this language require the CPUC, CARB or the Legislature the right to provide the 2-year notice on behalf of all load-serving entities within the state in the event that the operation of a multi-state RTO infringes upon state sovereignty or does not adequately protect California's economic, environmental or reliability objectives.

II. SEVERAL CRITICAL ISSUES ARE NOT ADDRESSED IN THE DRAFT AMENDMENTS

The draft amendments fail to address or mitigate other significant issues raised by a shift from the current CAISO to a multi-state RTO with an expanded geographical footprint. These issues are identified in the following sections.

A. Expanding CAISO's footprint would destroy the Renewable Portfolio Standard program focus on providing in-state and local environmental, economic and public health benefits

Expanding the CAISO without making other changes to the Renewable Portfolio Standard (RPS) program would eliminate the existing preference for renewable energy projects that directly deliver energy to California customers, displace fossil fuel usage within the state, and provide local environmental and public health benefits. To accomplish these goals, the RPS program requires that 75% of all procurement be sourced from products that have a first point of interconnection within a "California Balancing Authority" or can directly deliver their electricity (without substitution) into a California Balancing Authority.[10]

If the CAISO footprint is expanded to include large portions of the West, then any project connected to the expanded footprint, or able to deliver directly to that footprint from anywhere in Canada, the United States or Mexico, would be eligible to satisfy the 75% portion of RPS compliance. Since the concept of "delivery" does not apply within a single RTO, there would no longer be any meaningful method of determining whether distant renewable energy projects are actually serving California customer needs

[9] AMENDED AND RESTATED TRANSMISSION CONTROL AGREEMENT Among The California Independent System Operator Corporation and Transmission Owners, Section 3.3 (Withdrawal)

[10] Existing California Balancing Authorities include CAISO, Los Angeles Department of Water and Power, Balancing Authority of Northern California, Imperial Irrigation District, and Turlock Irrigation District.

(except from an accounting perspective). Absent any change in the RPS law, the CAISO expansion would effectively allow far more RPS compliance to come from existing, surplus resources outside the state that do not actually provide many of the key benefits to California customers envisioned under the RPS program. The result would be resource shuffling where existing resources substitute for the incremental development of new clean energy infrastructure envisioned by state policymakers and regulators. Substituting existing resources for new development would defeat the key objectives of the RPS program.

Even if significant new renewable resource development occurs under an RTO, the elimination of any delivery requirements would enable greater reliance on remotely located wind generation in Wyoming, New Mexico, Alberta and British Columbia in lieu of developing new locally-based renewable resources. These changes would likely result in both higher levels of in-state GHG emissions and more reliance on local gas-fired generation. The consequences of CAISO expansion on the RPS program outcomes are significant and should not be permitted without further consideration by the Legislature.

B. No protections against rate increases for California customers caused by new out-of-state transmission investments

Revised cost allocation protocols under a multi-state RTO could force California customers to pay for a significant percentage of billions of dollars in new transmission investments in other parts of the West sought by PacifiCorp and other private developers. If California loads are forced to bear the full costs of the existing CAISO transmission grid plus pay a significant share (80% or more) of new investments outside the state, the net impact would be an increase in the Transmission Access Charges and retail rates for California customers. Since the SB 350 study performed by CAISO only included highly idealized transmission cost allocation scenarios, it underestimates the cost allocation risks the state's electric customers could face under an RTO. The Legislature should ensure that California customers are not exposed to escalating transmission rates attributable to out-of-state investments that do not benefit California.

III. THE CAISO SHOULD BE DIRECTED TO CONSIDER ALTERNATIVES TO BECOMING A REGIONAL TRANSMISSION OPERATOR

The presumption that the CAISO must become a Regional Transmission Operator is based on flawed assumptions and false premises. The goal should not be to remove California authority over CAISO, eliminate a board appointed by the Governor and subject to Senate confirmation, encourage an expansion of the balancing authority footprint outside the state, and hope that market forces will yield positive outcomes. Instead, the Legislature should direct CAISO to explore other measures that serve the goal of optimizing system operations, reducing GHG

emissions, and addressing concerns about overgeneration and curtailment. These options include:

• Working with other in-state balancing authorities owned by Publicly Owned Utilities to increase coordination and negotiate terms for joining CAISO as participating transmission owners. No governance changes would be needed to enable CAISO to expand its footprint within the state.

• Expand the voluntary Energy Imbalance Market (EIM) to permit transactions with other western balancing authorities that go beyond real-time and allow day ahead scheduling. CAISO identified this potential change in its most recent policy initiatives roadmap and notes that an expanded EIM would improve market efficiency and more effectively integrate renewable generation while allowing each state to retain control over reliability responsibilities, integrated resource planning, resource adequacy and transmission planning and investment.[11]

• Coordinate with the Bonneville Power Administration to remove barriers to the effective use of northwest hydroelectric power to address challenges caused by intermittent resources located within California.

• Work with other western balancing authorities to reduce barriers to exporting excess power produced by in-state renewable resources.

TURN expects that other creative options for increasing regional coordination could be explored that do not require eliminating California control over CAISO governance and expanding the footprint of its balancing authority. Before pursuing the only action that is almost impossible to reverse, the Legislature should actively explore alternatives that do not pose the same risks to California consumers and state policy.

Thank you for your consideration of our comments and concerns.

Sincerely,

Matthew Freedman
Staff Attorney
The Utility Reform Network

[11] CAISO 2018 Policy Initiatives Roadmap, January 12, 2018, pages 20-22.