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## **ICNU Comments on WSC Discussion Paper and Draft Proposal**

Please find attached the Industrial Customers of Northwest Utilities' Comments regarding the CAISO's Discussion Paper and Draft Proposal on Potential Topics within the Primary Authority of the Western States Committee. Thank you.

*Additional submitted attachment is included below.*

# Optional Stakeholder Comments Template

## Western States Committee (WSC) Primary Authority Discussion Paper

Submitted by	Organization	Date Submitted
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Stakeholders are encouraged to use this template to provide comments on the *Potential Topics within the Primary Authority of the Western States Committee* Discussion Paper and Draft Proposal posted on October 7, 2016.

All documents for the Regional Grid Operator and Governance Proceeding are available at:

[http://www.energy.ca.gov/sb350/regional\\_grid/documents/index.html](http://www.energy.ca.gov/sb350/regional_grid/documents/index.html)

Submit comments to the California Energy Commission Docket 16-RGO-01:

<https://efiling.energy.ca.gov/Ecomment/Ecomment.aspx?docketnumber=16-RGO-01> or  
docket@energy.ca.gov

**Comments should be submitted by October 31, 2016.**

### **Comments on Western States Committee Authority**

The Industrial Customers of Northwest Utilities (“ICNU”) appreciates this opportunity to comment in California Energy Commission (“CEC”) Docket No. 16-RGO-01, regarding the California Independent System Operator’s (the “ISO”) Discussion Paper and Draft Proposal on Potential Topics within the Primary Authority of the Western States Committee (“WSC Paper and Draft Proposal”). ICNU is an incorporated, non-profit association of large electric consumers in the Pacific Northwest, with membership that includes large power customers of PacifiCorp and customers of several other potential new Participating Transmission Owners (“PTOs”) considering integration into the ISO. Like many stakeholders with significant interests outside of California, ICNU is considering the potential benefits of an ISO that encompasses a larger regional footprint. In this context, ICNU has commented in both the Regional Resource Adequacy (“RA”) and Transmission Access Charge (“TAC”) initiatives that future support for a regional ISO will depend upon a determination that: 1) joining the market will result in no harm to large customers of PacifiCorp or any other potential new PTOs; and 2) any incremental benefits associated with the market are shared equitably between market participants.

Additionally, several ICNU members could be significantly impacted by the regionalization of the ISO in other ways. For example, multiple members are power generators that might be affected considerably, in that capacity, by regionalization of the transmission grid. Also, many ICNU members take power from public utility customers of the Bonneville Power Administration (“BPA”), rendering the future role of public power and BPA in regional ISO operations and affairs of prime import. On a number of

levels, therefore, the establishment of a fairly representative regional ISO governance structure, including a robust Western States Committee (“WSC”), will be critical to ensure the support of large consumers throughout the Northwest.

1. *Please indicate your organization’s overall level of support for the ISO’s proposal regarding potential topics for the primary authority of the WSC.*

*To indicate level of support, please select one of the following options: (1) Fully support; (2) Support with qualification; or, (3) Oppose. Please provide an explanation of your organization’s position. (For example, if your organization fully supports, please provide reasons for your support. If your organization supports with qualification, please describe your qualifications or specific modifications that would allow you to fully support the proposal. If your organization opposes, please explain why you oppose the proposal.*

Among the three options provided, ICNU’s present level of support for the ISO’s proposal could be characterized as “Support with qualification.” ICNU strongly supports a robust WSC with primary authority to determine RA and transmission cost allocation issues, but the complexity of potential preemption controversies, especially on RA matters, leads ICNU to recommend additional protective measures to ensure that state authority will not be diminished or impaired. In other words, state participation in a WSC on the potential topics proposed by the ISO (and possibly others) will be important, but will not be sufficient, standing alone, to adequately preserve state authority.

In fact, state participation in a WSC may add a layer of complexity to potential preemption considerations that necessitates additional counteractive protections, in that an individual state’s association with the WSC could be considered as a form of implicit or tacit acceptance of ultimate regional ISO policy and action—e.g., given a state’s opportunity to influence and shape outcomes, regardless of whether final ISO decisions precisely accord with individual state interests. Indeed, the ISO expressly envisions that the WSC will exert primary authority on issues in order to, among other things, ensure that regional ISO rules developed on such issues are “responsive to the unique policy interests of each state.”<sup>1/</sup> While ICNU would not necessarily agree with an inference of “implicit or tacit acceptance” by states merely through WSC participation, it is not hard to imagine the argument being made that individual states should be construed to have accepted diminished or impaired state authority, based on the fact that the WSC was explicitly designed to ensure that the “unique” policy interests of “each” state are upheld. Accordingly, failure to anticipate and establish additional safeguards against such a contingency would seem highly imprudent, particularly at this formative stage of regional ISO governance design.

The ISO rightly identifies the potentially daunting challenges ahead in delineating between intricate state and regional ISO concerns. For example, the ISO notes: “Resource adequacy programs are comprised of a number of moving parts, some of which are quite technical and complex.”<sup>2/</sup> Likewise, in the context of transmission cost allocation, the ISO identifies “the potential complexity of different policy mandates and the need to balance and consider the different benefits associated with each policy situation.”<sup>3/</sup> These statements align with similar and quite recent observations from the United States Supreme Court on

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<sup>1/</sup> WSC Paper and Draft Proposal at 5.

<sup>2/</sup> Id. at 6.

<sup>3/</sup> Id. at 8.

the complexity and intertwined nature of state and federal power issues which the WSC will need to consider. For instance, the Court acknowledges that the statutory division, between state and Federal Energy Regulatory Commission (“FERC”) authority within the Federal Power Act, “generates a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity *are inextricably linked.*”<sup>4/</sup> Three months later, remarking upon the federal-state collaborative dynamics which could similarly characterize policy issues within a WSC-regional ISO Board relationship, Justice Sotomayor stated: “Pre-emption inquiries related to such collaborative programs *are particularly delicate.*”<sup>5/</sup>

ICNU suggests that, if the U.S. Supreme Court recognizes the particular delicacy of preemption concerns and the inextricable relationship of federal-state power policy which the WSC and regional ISO Board will be called upon to determine, then the ISO and all stakeholders would be wise not to underestimate the potential for future controversy that could beset the best laid plans of the current governance proposal. In this light, ICNU has recommended relatively straightforward clarifications to Principle 1.1 of the ISO’s governance proposal which would likely eliminate many of the preemption concerns that could potentially arise upon implementation of the ISO’s RA and TAC initiative proposals.<sup>6/</sup> Moreover, these clarifications would empower the WSC to operate under definite guidelines in resolving potential preemption claims, thereby allowing the WSC to focus upon issues of primary authority effectively and without distraction. That is, the WSC could concentrate upon “a general policy matter in which state regulatory officials are already deeply involved,” as contemplated by the ISO,<sup>7/</sup> with individual state regulatory officials secure in the knowledge that regional ISO governing principles are both sufficiently broad *and detailed* so as to ensure that corporate WSC process and determinations cannot be adjudged to later diminish or impair state authority.

ICNU understands that the intent of the ISO in promoting an effectual WSC is to establish a peer relationship between a regional ISO and its constituent states, as opposed to a subordinate relationship marked by the regular exertion of preemptive authority via FERC tariffs. This would seem a reasonable interpretation of the ISO’s vision of a future RA program in which a regional “ISO *works with* the various local regulatory authorities (“LRAs”) to ensure that sufficient capacity has been procured in both the year-ahead and month-ahead time frame.”<sup>8/</sup> Specifically, an RA program in which the regional ISO “works with” LRAs would appear at odds with a preemptive regime in which the ISO Board can dictate RA requirements to LRAs. If ICNU is correct in this understanding of an envisioned “peer relationship,” then the proposed clarifying additions to governance Principle 1.1 will cement the envisioned federal-state power balance and help preserve state authority. Conversely, absent clarification and elaboration on Principle 1.1 to supplement the coequal role of states (partly manifest in the form of a robust WSC governing alongside a regional ISO Board), the well-intentioned “primary authority” of the WSC will likely prove chimerical. Stated differently, if the ISO Board and WSC later disagree on the potential diminution or impairment of state authority on any particular policy issue, without stronger state protections in the foundational governing principles, a regional ISO Board decision may well be given preemptive effect over an LRA decision affecting retail rates.<sup>9/</sup>

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<sup>4/</sup> FERC v. Electric Power Supply Ass’n (“EPSA”), 136 S.Ct. 760, 766 (2016) (emphasis added).

<sup>5/</sup> Hughes v. Talen Energy Marketing, LLC, 136 S.Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) (emphasis added).

<sup>6/</sup> See ICNU Comments on 2<sup>nd</sup> Revised Governance Proposal at 3-4.

<sup>7/</sup> WSC Paper and Draft Proposal at 5.

<sup>8/</sup> Id. at 5 (emphasis added).

<sup>9/</sup> See, e.g., Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986); Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988); Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm’n, 539 U.S. 39

By highlighting the potential for preemption controversies and the need to ensure that a WSC does not have merely illusory authority, ICNU hopes to bring to the fore tensions that have not been squarely addressed. In particular, there is a possibility that, whether through a commendable desire to reach consensus or a tendency to avoid direct confrontation on thorny issues, many key stakeholders participating in regionalization efforts may not realize how far apart they seem to be on their visions of federal-state balance within a regional ISO, and whether and how often preemptive power would be exerted.

For instance, in commenting on the establishment of a WSC, Pacific Gas & Electric (“PG&E”) “does not support the open-ended pre-emption of ISO authority contemplated by the current proposal.”<sup>10/</sup> Similarly, on the precise issues of RA and transmission cost allocation included within the ISO’s WSC proposal, Southern California Edison “would not support the [Western States C]ommittee having ‘primary authority’ or ‘final’ authority over these issues.”<sup>11/</sup> On the other hand, the California Large Energy Consumers Association views the proposed areas of WSC authority as “too limited” and supports revision of governance principles in explaining that “the language should be broader and the authority should encompass topics traditionally regulated by states.”<sup>12/</sup>

With ICNU also supporting strong authority for a WSC, a sharp divide between certain ratepayer advocates and LSEs on appropriate federal-state balance is apparent—weighing powerfully in favor of the need for additional clarity and definition in governance principles to ensure that the parameters of WSC and state authority are understood and acknowledged by all stakeholders, before moving forward. ICNU submits that it would be vastly preferable for the ISO to address fundamental differences up front between oppositely aligned stakeholders, and to at least attempt to solve barely concealed preemption controversies, rather than punting the issue. Further, strong positions on federal-state authority are not limited to the ratepayer and utility sectors, as public interest organizations (“PIOs”) and independent energy producers (“IEP”) have also advocated for limitations on WSC authority and invoked FERC preemptive authority.<sup>13/</sup>

In light of the considerable divides on WSC authority and future federal-state power balance in general, ICNU agrees with the call to have FERC weigh in on regional ISO governance design, and the role of the WSC, as soon as possible. For example, PG&E “recommends that the ISO consult with FERC *now* to seek further guidance on these issues.”<sup>14/</sup> Likewise, the Office of Ratepayer Advocates (“ORA”) has asked the ISO to clarify whether “FERC approval of the governance proposal is required before implementation,” specifically including “FERC approval of the proposal to allow the WSC to have primary

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(2003); EPSA, 136 S.Ct. 760 (2016); Hughes v. Talen, 136 S.Ct. 1288 (2016). In citing these cases, ICNU does not mean to imply that the facts and specific holdings in each case are directly applicable to a future controversy involving a regional ISO and an LSE and/or LRA. Rather, such precedent demonstrates that federal preemption has often been cited as grounds to preclude states from exercising retail rate authority, and specifically in the context of FERC-related regulation, emphasizing the need to address potential controversy associated with a regional ISO.

<sup>10/</sup> Summary of Stakeholder Comments to Revised Governance Proposal at 10.

<sup>11/</sup> Id. at 11.

<sup>12/</sup> Id. at 10.

<sup>13/</sup> E.g., id. at 12 (“the proposal still provides the WSC with primary authority over Section 205 filings on issues of resource adequacy and transmission cost allocation .... PIOs want to reiterate what we believe is FERC’s interpretation of Section 205 filing rights – that only FERC-approved organized markets (ISOs, RTOs, RSOs) and transmission owners have Section 205 filing rights and they cannot be denied their Section 205 rights”); id. at 14 (“IEP does not support the concept of a WSC with a veto authority over 205 filings .... [W]eaving into the Regional ISO Board’s Bylaws a specific role for the WSC is unnecessary and unwarranted”).

<sup>14/</sup> Id. at 10 (emphasis added).

authority over Section 205 filings.”<sup>15/</sup> If FERC will not allow a WSC with primary authority on issues designed to prevent the diminution or impairment of state authority, or if FERC will not approve governance principles requiring binding governing document provisions that preserve state authority, then states and ratepayers should be apprised before progressing further on regionalization efforts. As ORA has explained, it is critically important that “current CAISO ratepayers, who have funded the CAISO and existing transmission infrastructure, ... are not burdened with more than their fair share of costs.”<sup>16/</sup> By the same token, regional ISO ratepayers will fund the regional ISO and future transmission infrastructure, and should also not be burdened with unfair costs. A strong WSC with primary authority on RA and transmission cost allocation issues, supported by governing principles clearly preserving state authority over retail rates, will be crucial to ensure that all regional ISO ratepayers are protected against inequitable cost burdens.

2. *The ISO’s discussion paper identified at page 5 certain factors that may be relevant in establishing whether a particular topic within the categories of Resource Adequacy or transmission cost allocation should be within the primary approval authority of the WSC. Please provide any comments you may have on whether the factors that have been identified are the correct ones or if other factors or criteria should be considered.*

ICNU believes that the ISO has identified appropriate factors for determining topics that should be within the areas of primary authority of a WSC. At this time, ICNU does not have any additional factors or criteria to offer.

3. *The ISO’s discussion paper identifies the system wide planning reserve margin target as a topic within RA that should be within the primary approval authority of the WSC. Please comment on this aspect of the proposal. Please also comment on whether there are any other specific topics within the category of RA for which the WSC should have primary approval authority.*

ICNU has previously expressed concern over potential rate impacts of a system-wide planning reserve margin (“PRM”) for a regional ISO, and explained why a system-wide PRM is unnecessary.<sup>17/</sup> Notwithstanding, the clarifications to Principle 1.1 which ICNU has proposed would act as a vital safeguard to ensure that ratepayers of a new PTO like PacifiCorp are not faced with increased costs, due to a system-wide PRM—i.e., increased RA costs ultimately attributable to a PRM established by a regional ISO that is higher than a PRM approved by an LRA, or costs which would not have been incurred by an LSE but for integration into a regional ISO and subjection to a higher PRM. Should a system-wide PRM be established, ICNU agrees that the PRM target should fall under the primary authority of a WSC.

Additionally, ICNU recommends that the following RA topics also be considered as areas of primary authority for a WSC: 1) load forecasting; 2) allocation of RA requirements; 3) resource counting methodology; and 4) backstop procurement authority. In concurrently filed comments on the ISO’s proposed governance principles, ICNU has provided references to more detailed discussion as to why these RA topics implicate significant risks of LSE cost increases, thereby prompting the need for ratepayer

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<sup>15/</sup> Id. at 17.

<sup>16/</sup> Id. at 9.

<sup>17/</sup> E.g., ICNU Comments on RA Straw Proposal at 6; ICNU Comments on Second Revised RA Straw Proposal at 5-6; ICNU Comments on August 10 RA Working Group at 3-4.

protections to ensure that state regulatory authority is not diminished or impaired.<sup>18/</sup> In addition to proposed clarifications to Principle 1.1, WSC primary authority on these issues would help safeguard state authority. To the extent that any of these additional RA topics are considered too technical to allow for primary authority exercise by a WSC, at the very least the WSC could fill a role somewhere between “primary authority” and “advisory,” i.e., an “advisory plus” role which allows for a greater degree of oversight and input to ensure that state interests are adequately considered.

4. *The ISO’s discussion paper identifies as a topic for the WSC’s primary approval authority cost allocation between sub-regions for policy driven projects that support policy mandates of, or provide benefits to, more than one sub-region. Please comment on this aspect of the proposal. Please also comment on whether there are any other specific topics within the category of [transmission cost allocation] for which the WSC should have primary approval authority.*

ICNU supports the inclusion of transmission cost allocation within WSC primary approval authority for policy driven projects supporting policy mandates of, or providing benefits to, more than one sub-region of a regional ISO. The ISO adequately articulated the rationale for this in stating that “the WSC may be the most effective vehicle for determining an appropriate and fair allocation of costs to the states within the regional system operator footprint.”<sup>19/</sup> In short, states should have a central role in allocating costs caused by state policy.

Similarly, ICNU would hope that “fair” cost allocation means that, absent agreement by all states within any affected sub-region, the WSC would not attempt to allocate costs to an entire sub-region for policy driven projects supporting the policy mandates of only a limited portion of states within that sub-region. For this reason, ICNU supports a primary WSC role even in circumstances involving projects driven by only a single sub-region—i.e., since a single sub-region may be comprised of multiple states. Notwithstanding, ICNU reiterates that state participation in a WSC will not be sufficient, standing alone, to adequately preserve state and LRA authority in these and other circumstances. Rather, via clarified governance principles and definitive regional ISO governing document and tariff provisions, individual states and LRAs must retain authority on retail rate issues to protect new PTO customers against any unfair or contended cost allocations between states, as an independent safeguard should the WSC does not function as hoped.

ICNU also believes that primary WSC authority may be appropriate on transmission cost allocation for economic and even reliability projects. For instance, economic benefits attributable to projects could, at least potentially, be difficult to clearly differentiate according to state boundaries, meaning that states should be enabled to decide proper cost allocations via a WSC determination. Moreover, there would be no downside in allowing the WSC to exert primary authority in circumstances where economic benefits are clear-cut on a state-by-state basis because, by definition, proper allocation would be uncontroversial in such circumstances. Likewise, at least allowing for primary WSC authority on reliability projects will afford states an opportunity to resolve controversy if it does exist, without any downside in all other instances when reliability allocation among states is not controversial.

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<sup>18/</sup> See ICNU Comments on 2<sup>nd</sup> Revised Governance Proposal at 3 & nn.5, 6, 8, and 9.

<sup>19/</sup> WSC Paper and Draft Proposal at 8.



5. Please comment on any other topics that your organization feels should be included in this proposal.

ICNU agrees that it would be beneficial for the ISO to expressly adopt the position, within regional ISO governance principles, that “a state’s participation in the WSC should not prevent it from advocating its own state-specific policy preferences either in the ISO stakeholder proceedings or in federal regulatory or judicial proceedings involving ISO proposals.”<sup>20/</sup> Clarification on this point would address the concerns expressed by ICNU regarding a potential inference that individual states would “implicitly or tacitly” accept the diminution or impairment of state authority on an issue via participation in WSC determinations. However, ICNU recommends that the ISO state this position within a governing principle in the broadest possible terms, in order to avoid preclusive effect arguments in *any* potential setting. For example, if the quoted text above were simply inserted directly into a governance principle, by hyper-literal application a state might only be able to avoid preclusion arguments in a federal setting, i.e., “in *federal* regulatory or judicial proceedings.”

The ISO also seeks comment and input on whether: 1) “the WSC’s advisory role should be broadly defined and whether there are any specific areas where the WSC should be encouraged to provide advisory input”; and 2) “there is a role for the WSC to participate in developing guidelines in areas such as load forecasting, and if so, whether it should be an advisory role or a more formal approval role.”<sup>21/</sup> As to the first issue, ICNU would support the broadest possible latitude within which the WSC could exert advisory influence, beyond issues in which the WSC would not already be exercising primary authority. The WSC could always decline to advise the regional ISO on any issue once given such broad authority, and, in practice, probably would decline to be involved in the minutiae of functionally important but mundane matters of policy associated with a significant portion of regular operations. Without a broadly defined role, however, the WSC could potentially be precluded from advising the regional ISO on issues of critical interest to states, or, at the very least, forced to waste time and resources in arguing over the propriety of advising on a particular issue. Lastly, ICNU does not have any specific areas to suggest for WSC advisory input at this time, although an advisory role which is defined to the maximum extent possible would make such specification unnecessary.

In terms of the second ISO request, ICNU has already recommended expansion of WSC primary authority to include load forecasting as well as several other RA topics. Accordingly, ICNU would support a WSC role in the development of regional ISO guidelines on such issues. Regarding whether that role should be advisory or on a more formal approval basis, ICNU again recommends providing the WSC with maximum authority to determine its level of involvement. ICNU believes that the WSC would likely delegate and defer exercising its full authority whenever efficient, allowing the WSC to focus on important elements of guideline development. However, the alternative course of prescribing a more limited role for the WSC could result in the formation of what might later prove to be undesirable and even arbitrary barriers to state input on various issues.

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<sup>20/</sup> Id. at 10.

<sup>21/</sup> Id. at 9.