

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

**Grid Reliability and
Resiliency Pricing**

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Docket No. RM18-1-000

JOINT INDUSTRY COMMENTS OPPOSING THE DOE PROPOSAL

Pursuant to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) October 2, 2017 Notice Inviting Comments,¹ the following entities² (collectively, “Joint Industry Commenters”) submit these comments in response to the Secretary of Energy’s September 28, 2017 proposal of a rule for final action by the Commission (“DOE NOPR”)³ under section 403 of the Department of Energy Organization Act.⁴

- Advanced Energy Economy
- Alliant Energy Corporate Services, Inc.
- American Biogas Council
- American Council on Renewable Energy
- American Forest & Paper Association
- American Petroleum Institute
- American Wind Energy Association
- Conservation Law Foundation
- EDP Renewables North America LLC
- Electric Power Supply Association⁵
- Electricity Consumers Resource Council
- Energy Storage Association

¹ *Grid Reliability and Resilience Pricing*, Notice Inviting Comments, Docket No. RM18-1-000 (issued Oct. 2, 2017) (“October 2 Notice”).

² With respect to each association joining these comments, the comments represent the position of the association as an organization, but not necessarily the views of any particular member of such association with respect to any issue.

³ Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (Oct. 10, 2017) (“DOE NOPR”).

⁴ 42 U.S.C. § 7173 (2012).

⁵ Participation in these Joint Industry Comments represents the position of the Electric Power Supply Association (“EPSA”) as an organization, but not necessarily the views of individual members of EPSA with respect to any issue, in particular Talen Energy Corporation.

- E.ON Climate & Renewables North America, LLC
- Independent Petroleum Association of America
- Interstate Natural Gas Association of America
- Invenegy Thermal Development LLC
- Natural Gas Supply Association
- NextEra Energy Resources, LLC
- Solar Energy Industries Association
- Vestas-American Wind Technology, Inc.

For the reasons described herein, the Commission should not adopt the DOE NOPR.

I. EXECUTIVE SUMMARY

Through the DOE NOPR, the Secretary of Energy asks the Commission to provide discriminatory compensation to certain coal and nuclear resources located within regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) with energy and capacity markets. The justification for the proposed payments – resiliency – is not well defined, nor does the DOE NOPR demonstrate that resiliency is lacking in the aforementioned regions. Instead, the DOE NOPR relies on the following narrative:

- (i) coal and nuclear resources have increasingly been losers in the wholesale markets;
- (ii) RTO/ISO markets do not adequately value on-site fuel security, leaving reliability at risk during extreme weather events like the 2014 Polar Vortex; and
- (iii) full cost of service payments are therefore needed to prevent “early retirement” of resources with 90 days of on-site fuel supply in regions with energy and capacity markets.

The DOE NOPR is deficient because it fails to provide substantial evidence in support of items (ii) and (iii) above, which are the lynchpins of its proposed regulatory action. As discussed in greater detail below and in the attached report prepared by The

Brattle Group, there is no evidence demonstrating that RTOs/ISOs need to subsidize resources with 90 days of on-site fuel in order to maintain reliable service during severe weather events or otherwise, and indeed there is substantial evidence showing that electric systems that lack, or are transitioning to lesser reliance on, coal and nuclear resources are nonetheless operated in a manner that is both reliable and resilient.

In fact, outages caused by disruptions of fuel supply to generators appear to be virtually nonexistent. According to a recent analysis performed by the Rhodium Group consultancy, a mere 0.00007% of customer-hours lost to outage were caused by fuel supply emergencies between 2012-2016, a period when 32% of the country's coal fired power units and 6% of its nuclear generating units were retired.⁶ The same period also featured two of the coldest winters during the past 30 years in the Eastern United States, including the 2014 Polar Vortex. The vast majority of electric service disruptions in the United States are related to distribution or transmission outages, not unscheduled generation outages. And virtually all of the customer-hours that were lost due to fuel supply disruption between 2012-2016 were related to a single incident involving one coal plant in Northern Minnesota.⁷

These statistics and others described below and in the attached Brattle Report suggest that the DOE NOPR is a transparent attempt to prop up uneconomic generation that is unable to compete due largely to sustained low prices for natural gas and that is not otherwise needed for reliability. Section 206 of the Federal Power Act ("FPA") holds FERC to a higher standard. Before FERC can exercise this statutory authority, it must

⁶ Houser, Larsen & Marsters, *The Real Electricity Reliability Crisis* (Oct. 3, 2017), available at http://rhg.com/notes/the-real-electricity-reliability-crisis?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosgenerate&stream=politics.

⁷ *Id.*

first determine that existing RTO/ISO tariff provisions are unjust and unreasonable. The DOE NOPR fails to identify or articulate a problem with the existing RTO/ISO tariffs, and the need for greater resiliency purportedly provided by resources with 90-day on-site fuel supply is not supported by substantial evidence.

Section 206 also requires FERC to demonstrate that any revisions to existing tariffs are just and reasonable in the event existing deficiencies are identified. The DOE NOPR fails equally in this regard. Even if there were a need to incentivize resiliency in the targeted markets (a supposition that is not supported by the evidence cited in the DOE NOPR), the proposed solution – full cost of service payments to eligible resources with 90 days of on-site fuel – leaves key questions unresolved about the basis for an on-site fuel preference, why other generating resources that provide resiliency benefits should not also receive payments, the cost of such payments, how such costs would be allocated to customers, and how the payments would impact price formation in the organized markets. Accordingly, the proposed rule has not been shown to be just and reasonable and cannot be adopted by the Commission.

II. DESCRIPTION OF THE JOINT INDUSTRY COMMENTERS

The Joint Industry Commenters are an ad hoc group of 20 energy industry associations and individual companies that reflects a broad and financially significant cross-section of the energy economy, including representatives of independent power producers, renewable energy developers, advanced technology interests, vertically integrated utilities, industrial customers, and the natural gas and petroleum sector. It is quite uncommon for the views of this diverse group to align as they do with respect to the DOE NOPR.

The DOE NOPR is the rare regulatory proposal with the power to unite. In this case, the Joint Industry Commenters share a common belief in limiting interference with efficient competitive market outcomes. Interventions in competitive markets to address a demonstrated market failure should be made only after a thorough and deliberate identification and evaluation of a market failure and careful vetting of potential solutions. As discussed herein, the Joint Industry Commenters agree that the DOE NOPR does not demonstrate that the retirement of coal and nuclear generation is currently threatening the reliability and resiliency of the electric grid, nor justifies the adoption of preferential payments for those resources as proposed.

III. COMMENTS

A. **The DOE NOPR Does Not Demonstrate that Existing RTO/ISO Tariffs Are Unjust and Unreasonable.**

The DOE NOPR proposes that FERC adopt the proposed rule under authority of section 206 of the FPA.⁸ To invoke its section 206 authority to make the proposed changes, FERC must satisfy both prongs of section 206. First, it must find that the existing rates or tariffs for service by each RTO/ISO subject to the rule are, in fact, “unjust, unreasonable, unduly discriminatory or preferential.”⁹ Second, the Commission then must establish that its remedy is just and reasonable and not unduly discriminatory.¹⁰ Further, in order to be legally defensible, the Administrative Procedure Act (“APA”) requires that the Commission’s determinations must not be “arbitrary, capricious, an

⁸ 16 U.S.C. § 824e. The DOE NOPR was proposed by the Secretary under authority granted by section 403 of the Department of Energy Organization Act, but that section does not establish any additional authority for FERC to take final regulatory action. The DOE NOPR also references section 205 of the FPA, but that section does not authorize FERC to direct the amendment of existing utility tariffs.

⁹ *Id.*

¹⁰ *See Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002); *Algonquin Gas Transmission Co. v. FERC*, 948 F. 2d 1305, 1308 (D.C. Cir 1991) (articulating FERC’s two-part burden).

abuse of discretion, or otherwise not in accordance with law” and that its findings must be supported by “substantial evidence.”¹¹

While the DOE NOPR is correct that “FERC has on numerous occasions imposed market rules on ISOs and RTOs,”¹² the Commission is not authorized to take such action “based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence.”¹³ There is no evidence, in the DOE NOPR or otherwise, that the retirement of coal and nuclear generation currently is threatening the reliability and resiliency of the electric grid. In fact, there is substantial evidence to the contrary. The DOE NOPR thus fails to justify potential action under section 206.

1. Retirement of generation with 90 days of on-site fuel is not resulting in grid or service problems.

The DOE NOPR is not clear about the problem it is seeking to remedy.¹⁴ While the DOE NOPR expresses general concern about “resiliency,” it does not define that term. While the concept of resiliency is still evolving,¹⁵ resiliency for the bulk electric system can be generally considered to relate to the preparation for, operation through, and ability to recover from high-risk, low-frequency events, or in other words, the ability of the grid to tolerate disturbance and continue to deliver to customers.¹⁶ The DOE NOPR,

¹¹ 5 U.S.C. § 706(2). See also *Nat’l Fuel Gas Supply Corp. v. FERC*, 468 F. 3d 831, 839 (D.C. Cir. 2006).

¹² DOE NOPR at 46,941.

¹³ *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010).

¹⁴ On October 4, 2017, the Commission Staff posted a list of questions for consideration by commenting parties, to assist Staff in its review of the NOPR (“October 4 Staff Questions”). Where specific question listed by the Commission are addressed in these comments, the question is identified for ease of reference. This discussion is responsive to October 4 Staff Questions, Need for Reform, Question 1.

¹⁵ See The Brattle Group, *Evaluation of the DOE’s Proposed “Grid Resiliency Pricing Rule”* at 2, 9-11 (Oct. 2017) (“Brattle Report”) (attached hereto as Attachment A).

¹⁶ See PJM Interconnection, L.L.C, *PJM’s Evolving Resource Mix and System Reliability* at 5, 33 (Mar. 30, 2017), available at <http://www.pjm.com/~media/library/reports-notices/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx> (“PJM Report”). As described in the National Academies on Science’s Report on Enhancing the Reliability of the Nation’s Electricity System, resilience is “about limiting the scope and impact of outages when they do occur, restoring power rapidly afterwards,

however, focuses on something more narrow: “the premature retirements of power plants that can withstand major fuel supply disruptions.”¹⁷ Given that the proposed policy action is designed to address this particular issue, rather than trying to enhance (or even define) resiliency more generally, it is fair to focus on whether there is a sound basis for taking action under section 206 to defer retirements of generation units with at least a 90-day supply of on-site fuel, or otherwise encourage resources to maintain such fuel supplies.

There is no evidence demonstrating that recent retirements of coal and nuclear generation with 90 days of on-site fuel have impaired reliable system operations.¹⁸ As the Brattle Report notes, current and projected resource adequacy is forecasted to meet or exceed targeted reserve margins until at least 2022.¹⁹ This is true even in those markets with a high number of projected generation retirements.²⁰ This demonstrates that existing RTO and ISO tariff mechanisms are ensuring resource adequacy, even in the face of rapidly changing markets and regulatory shifts that have resulted in coal and nuclear retirements.

The DOE NOPR does not provide any demonstration that RTOs and ISOs have encountered significant problems with either reliability or resiliency. PJM Interconnection, L.L.C. (“PJM”) is the RTO that has the most generators expected to receive payments if the proposal were adopted.²¹ While the definition of an eligible resource remains unclear, the Brattle Report estimates that approximately 65 GW of

and learning from those experiences to better deal with events in the future.” See National Academies of Sciences, Engineering, and Medicine, *Enhancing the Resilience of the Nation’s Electricity System* at 2 (2017), available at <https://doi.org/10.17226/24836>.

¹⁷ DOE NOPR at 46,941.

¹⁸ Responsive to October 4 Staff Questions, Need for Reform, Questions 4 and 5.

¹⁹ Brattle Report at 6-7.

²⁰ *Id.* at 7 (citing NERC, *2016 Long-Term Reliability Assessment* at 2-3, 6 (Dec. 2016)).

²¹ *Id.* at 27.

generation resources in the PJM markets may qualify.²² However, there is no indication that these incentives are necessary for this market. In fact, the Brattle Report finds that the DOE NOPR is most likely to provide incentives for resources in the organized markets that have, and will continue to have, the highest number of generation units with long-term on-site fuel supplies, even after anticipated near-term retirements.²³ If the hallmark of a resilient grid truly is the existence of these units, then it would seem more logical to establish incentives in regions where they are lacking.

According to a recent PJM study, the PJM control area is efficiently evolving into a more, not less, flexible and resilient system.²⁴ Even with the retirement of some coal and nuclear generation and other changes in the generation mix, PJM has found – based on actual data and analysis – that “[p]ortfolios composed of up to 86 percent natural-gas fired resources maintained operational reliability” and that “[m]ore diverse portfolios are not necessarily more reliable.”²⁵ As PJM explains, diversity of resources is not the single measure to ensure reliability.²⁶ And PJM commits to an on-going review of these issues, both through reliability analyses and stakeholder engagement, to ensure a resilient and reliable grid through operational, market compensation, and regulatory options.²⁷

As discussed more fully in the Brattle Report, there are a number of open questions regarding what types of events the grid should be prepared to meet and what attributes would improve the resilience of the grid.²⁸ A proper evaluation of grid resilience should begin with a methodical and systematic evaluation of these threats on a

²² *Id.*

²³ *Id.* at 22.

²⁴ *See* PJM Report at 4-5.

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Id.* at 39.

²⁸ *See* Brattle Report at 5-11.

region-specific basis, rather than immediately targeting a lack of on-site fuel as the most urgent threat to grid resilience.²⁹ As noted in the report, there is no evidence that suggests preservation of generation resources with a 90-day on-site fuel supply is needed to maintain reliability or resiliency.³⁰ Indeed, the Brattle Report has identified an array of independent studies and analyses that support a finding that reliability and resiliency have not been adversely affected by retirements of uneconomic coal and nuclear plants.³¹

2. The studies cited in the DOE NOPR do not support DOE's proposed payment scheme.

The DOE NOPR cites to several studies in support of its proposal to grant discriminatory compensation in favor of a preferred set of generation resources. Unfortunately, however, the DOE NOPR muddies the water by selectively quoting from those documents while ignoring information that rebuts the conclusions reached by the Secretary. When read in full, the studies cited in the DOE NOPR actually support the conclusion that the grid has responded positively to the additions of new technology, which has helped to hasten recovery from extreme events and sustain a high level of reliability.

For example, the DOE NOPR relies on a flawed report by IHS Markit. The report claims to take a “fresh look” at the electricity markets by assuming a counterfactual scenario under which the U.S. generation mix includes “little to no” nuclear, coal or oil generation within the next 10 years.³² There is, however, no real world basis on which to predict such an extreme loss of nuclear, coal or oil generation in the next 10 years. The

²⁹ *Id.* at 36-37.

³⁰ *Id.* at 16. Responsive to October 4 Staff Questions, Eligibility, 90-Day Requirement, Question 2.

³¹ See studies cited in Brattle Report, Appendix A.

³² See DOE NOPR at 46,943; IHS Markit, *Ensuring Resilient and Efficient Electricity Generation* (Sept. 2017) (“IHS Markit Report”).

Department of Energy’s own Energy Information Administration projects significant levels of generation fueled by a diverse mix of fuels including nuclear and coal sources through 2040, highlighting the fictional nature of the scenario underlying the IHS Markit Report.³³ The skewed assumptions underlying the IHS Markit Report cited in the DOE NOPR thus do not support a showing of need for the preferential financial support proposed in the DOE NOPR.³⁴

Reliance on selective sentences from the Synopsis of NERC Reliability Assessments³⁵ also provides no support for the proposed cost-of-service payments for preferred generation. As noted in the North American Electric Reliability Corporation (“NERC”) CEO’s cover letter to the Secretary, this Synopsis was provided as background material for their meeting in May 2017, intended only to provide a summary of NERC’s focus on assuring the reliability and security of the grid. The DOE NOPR fails to acknowledge the whole picture provided in NERC’s underlying reliability assessments that place NERC’s summary findings in context. While the NERC Synopsis notes that “rapid changes occurring in the generation resource mix and technologies are altering operational characteristics of the grid,”³⁶ NERC recommends that state and federal regulators consider a variety of options to address reliability concerns before they arise.³⁷ These include technological, infrastructure and economic solutions for all aspects of the grid.³⁸ Indeed, the NERC Synopsis describes how NERC continues to study the impacts of fuel diversity and generation retirements in order to timely identify emerging issues in

³³ U.S. Energy Information Administration, *2017 Annual Energy Outlook at 70*, available at [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf).

³⁴ Brattle Report at 33-34.

³⁵ DOE NOPR at 46,943 (citing Letter from Gerry Cauley, NERC, to Secretary of Energy Rick Perry (May 9, 2017), Attachment, “Synopsis of NERC Reliability Assessments” at 1 (“NERC Synopsis”).

³⁶ NERC Synopsis at 2.

³⁷ *Id.* at 3.

³⁸ *Id.*

this area.³⁹ NERC has not found an urgent reliability risk from retirement of generation and is properly addressing the ongoing monitoring and assessment of reliability based on the attributes of essential reliability services⁴⁰ in a fuel- and technology-neutral manner.

The DOE NOPR also points to resource performance during the 2014 Polar Vortex in support of its proposal,⁴¹ but again distorts the facts.⁴² Performance during the Polar Vortex was more a function of freezing equipment than whether or not a unit had on-site fuel.⁴³ As noted in the PJM Report, extreme cold events such as the 2014 Polar Vortex can trigger higher than average unit unavailability rates for generation fueled by a range of fuel types, regardless of whether that generation has or does not have 90 days of on-site fuel storage.⁴⁴ In fact, coal generation during the 2014 Polar Vortex period experienced a high outage rate due in part to coal piles freezing.⁴⁵ Although the following winter reached similar frigid temperatures, none of the previously impacted markets experienced similar power supply concerns, due to the market response and other changes following the 2014 Polar Vortex. Indeed, PJM and ISO New England Inc. (“ISO-NE”) implemented capacity market reforms specifically designed to ensure that committed capacity resources make the investments necessary to be able to provide electricity when called upon.⁴⁶ The DOE NOPR’s reliance on the experience of markets

³⁹ *Id.* at 5-11.

⁴⁰ *Id.* at 7.

⁴¹ DOE NOPR at 46,942, 46,945.

⁴² Responsive to October 4 Staff Questions, Need for Reform, Question 2.

⁴³ NERC, *Polar Vortex Review* at 14, 6 (Sept. 2014), available at http://www.nerc.com/pa/rrm/January%202014%20Polar%20Vortex%20Review/Polar_Vortex_Review_29_Sept_2014_Final.pdf (“Polar Vortex Review”).

⁴⁴ PJM Report at 33 (indicating a risk for natural gas, coal, and solar); Polar Vortex Review at 13, 22 (indicating a 26% outage rate for coal units, much higher than the historical monthly performance rates).

⁴⁵ Polar Vortex Review at 3.

⁴⁶ Brattle Report at 6, 13-15. See also *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015), *order on reh’g*, 155 FERC ¶ 61,157 (2016); *ISO New England Inc.*, 147 FERC ¶ 61,172 (2014), *reh’g denied*, 153 FERC ¶ 61,223 (2015).

prior to the reforms put in place after the 2014 Polar Vortex is thus particularly misplaced.

3. The DOE NOPR would override state prerogatives and duplicate existing RTO/ISO authority.

The DOE NOPR also fails to acknowledge that its preferential payment program would override the resource procurement decisions of the states and duplicate the existing authority of RTOs/ISOs to procure resources needed for reliable system operations.⁴⁷

State and local authorities regulate the resource procurement decisions of load serving entities within the RTO/ISO regions in different ways. Some states continue to engage in integrated resource planning, while other states rely on RTO/ISO markets to determine which generation resources will be used to serve load. In either case, however, each state has made a deliberate decision to rely on a particular regulatory or market structure for resource procurement consistent with the rights reserved to the states under section 201(b) of the FPA.⁴⁸ The DOE NOPR seeks to override these choices by imposing a federal mandate for the procurement of a preferred set of resources, regardless of and possibly in addition to the generation already procured through the regulatory and market structures chosen by each state. Even assuming the Commission had jurisdiction under section 201 to take such preemptive actions, no justification for (or even acknowledgement of) the decision to override state resource procurement decisions is provided in the DOE NOPR.

The payment program proposed in the DOE NOPR is also duplicative of existing RTO/ISO authority to provide compensation to uneconomic generating units that are needed for reliability. If the potential retirement of a generating unit threatens grid

⁴⁷ Responsive to October 4 Staff Questions, Other, Question 4.

⁴⁸ 16 U.S.C. § 824(a).

reliability, each RTO and ISO has the authority under its respective tariff to enter into reliability agreements that provide cost recovery to the generator.⁴⁹ Under these provisions, each RTO and ISO completes case-specific evaluation of units declaring an intent to retire to ensure that only those generating units actually required for reliability are provided out-of-market cost support payments from the RTO or ISO. The DOE NOPR would displace this careful, fact-specific inquiry with an across-the-board payment mechanism divorced from the actual reliability or resilience needs of the RTO or ISO. The DOE NOPR fails to acknowledge existing RTO/ISO authority in this regard, much less explain why it is insufficient to ensure sufficiently resilient system operations.

In addition, a number of regions have already undertaken reforms to address the concerns raised in the DOE NOPR.⁵⁰ As noted above, PJM and ISO-NE have implemented capacity market reforms that impose strict performance requirements ensuring that resources are able to provide electricity when called upon.⁵¹ The DOE NOPR would have the Commission conclude that these performance requirements fail to recognize the “additional” benefits of having 90 days of on-site fuel. Yet resources with a capacity obligation in PJM and ISO-NE are already subject to a “no excuses” performance obligation that is agnostic to fuel supply. The very concerns raised in the DOE NOPR thus already are being addressed by market reforms voluntarily adopted by RTOs/ISOs that would be subject to the DOE NOPR, without any mention or explanation

⁴⁹ See, e.g., *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 (2004), *order on reh’g*, 110 FERC ¶ 61,053, *order on reh’g*, 112 FERC ¶ 61,031 (2005), *reh’g denied*, 114 FERC ¶ 61,302 (2006); *Cal. Indep. Sys. Operator Corp.*, 138 FERC ¶ 61,112 (2012); *Cal. Indep. Sys. Operator Corp.*, 134 FERC ¶ 61,211 (2011); *ISO New England Inc.*, 125 FERC ¶ 61,102, *order on clarification*, 125 FERC ¶ 61,234 (2008), *reh’g denied*, 130 FERC ¶ 61,089 (2010); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237 (2012); *N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 (2015), *order on compliance and reh’g*, 155 FERC ¶ 61,076 (2016).

⁵⁰ Responsive to October 4 Staff Questions, Other, Questions 3 and 5.

⁵¹ See *supra* note 46.

as to how these programs are inadequate or, in the words of the FPA, unjust and unreasonable or unduly discriminatory or preferential.

Given all of these factors – the need for FERC to find that current tariffs are unjust and unreasonable, the focus of the proposal on on-site fuel supply (in spite of broader references to resilience), the wealth of analysis showing that retirements of plants with on-site fuel supply have not undermined grid reliability or resiliency, the mischaracterization of the limited analysis cited in support of the proposal, and the failure to acknowledge state prerogatives on resource planning and acquisition or existing RTO/ISO authorities to manage the reliability effects of plant retirements – the DOE NOPR does not meet the threshold requirements for Commission adoption of the proposed rule. Therefore, because the DOE NOPR provides no basis for taking action under section 206, the Commission should decline to adopt the proposed rule.

B. DOE’s Proposed Reforms Are Not Clearly Specified, Are Not Targeted to the Asserted Problems, Are Expensive for Ratepayers, Are Disruptive of Markets, and Are Therefore Not Just and Reasonable.

As detailed above, the DOE NOPR fails to offer substantial evidence demonstrating that retirements of certain generators with 90-day on-site fuel supplies threatens the resiliency of the electric grid and thus renders existing RTO/ISO tariffs unjust and unreasonable. Also absent is any evidence that the rate reforms proposed – namely, ensuring full cost recovery for certain eligible units in RTO/ISO markets – would be an effective or appropriate approach to maintaining grid resiliency.⁵² Nor does it allow FERC to conclude that it will yield just and reasonable outcomes.

⁵² Responsive to October 4 Staff Questions, Need for Reform, Questions 4 and 5.

The DOE NOPR appears to envision a construct where all eligible resources in the affected regions would be assured full cost recovery, including a reasonable return, without any need to demonstrate a risk of retirement or resiliency benefit. Beyond that, all key elements of the proposal remain to be determined. Even the most fundamental questions remain unanswered, including whether the compensation for eligible resources that is envisioned would be accomplished through the markets for energy, ancillary services, or capacity in the impacted regions, or some other out-of-market revenue stream. Would the proposal require dispatch of fuel-secure resources, regardless of economic merit? Develop a separate, capacity-like resiliency product? Specify a new ancillary service? Establish additional reliability-must-run (RMR) type cost-based agreements, with costs paid by transmission customers? And could each RTO/ISO implement completely different cost recovery schemes?

By leaving open for further discussion so many dimensions of how such a compensation mechanism will be developed and implemented, the DOE NOPR fails to provide interested parties an adequate opportunity to provide meaningful comment.⁵³ It is therefore impossible for the Commission to conclude that the DOE NOPR's proposed solution will result in RTO/ISO tariff provisions that are just and reasonable. If the Commission concludes notwithstanding the discussion above that the threshold requirements for action under section 206 have been satisfied, we offer the following

⁵³ As discussed in detail *infra* Section III.C, the APA requires the Commission to provide notice of proposed rules adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process. Critically, a notice of proposed rulemaking must provide sufficient factual detail and rationale to permit interested parties to comment meaningfully. 5 U.S.C. § 553; *see also Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (“The APA requires the Commission to provide notice of its proposed rulemaking adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process. Such notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” (internal citations omitted)).

specific comments on the proposed regulatory text to flag serious problems with the remedy proposed.

1. Eligibility⁵⁴

As a threshold matter, it is unclear which RTOs/ISOs would be subject to the DOE NOPR, making it impossible for interested parties to meaningfully comment. After sending the proposal to the Commission, the Secretary revised the proposal prior to publication in the *Federal Register* to restrict application to FERC-jurisdictional RTOs and ISOs “with energy and capacity markets.”⁵⁵ The reference to capacity markets appears to exclude Southwest Power Pool, Inc. and California Independent System Operator Corporation, and clearly includes PJM, New York Independent System Operator, and ISO-NE, each of which has a mandatory capacity market, but leaves open the question as to whether Midcontinent Independent System Operator, Inc.’s voluntary capacity auction would qualify generation located in that RTO for payments under the proposed regulations. The lack of any discussion in the preamble on this significant aspect of the proposal is a significant omission.

With respect to the generating units that would be eligible for payments under the DOE NOPR, a unit must (i) be “physically located” in a Commission-approved RTO or ISO; (ii) be able to provide “essential energy and ancillary reliability services;” (iii) have a 90-day fuel supply on site; (iv) be in compliance with all applicable federal, state, and local environmental laws and regulation; and (v) not be subject to state or local cost of service regulation by any state or local regulatory authority.⁵⁶ These eligibility

⁵⁴ Responsive to October 4 Staff Questions, Eligibility.

⁵⁵ DOE NOPR at 46,948.

⁵⁶ *Id.*

requirements are not reasonably related to the articulated need to postpone retirements of otherwise retiring generation units.

For example, while the DOE NOPR focuses on the threatened loss of the electric grid's resiliency as a result of "premature" retirements of fuel-secure resources, the proposed eligibility requirements do not limit eligibility for payments to generation units that are at risk of retirement or that have otherwise been identified by the owner as slated for retirement.⁵⁷ No showing is required that a particular resource is failing to recover its costs. Likewise, the proposal makes no attempt to limit eligibility to units for which retirement might be found to be "premature" – there are no proposed criteria for excluding units facing retirement due to old age, needed capital improvements that are uneconomic, or state regulatory direction. Eligibility does not even depend on any unit-specific evaluation of the units' contribution to resiliency. There is also no limitation to pre-existing units in the proposal: new generating units built solely for the purpose of earning a guaranteed return without regard for market need or forecasted utilization would appear to qualify under the proposed rule.

The Brattle Report estimates that approximately 89 GW of currently operating capacity may be eligible under the proposed rule.⁵⁸ As noted above, the majority of this capacity is located in PJM.⁵⁹ However, only a small fraction of this capacity is currently planned for retirement by 2025.⁶⁰

The overly broad proposed eligibility criteria would exacerbate the market-distorting effects of the proposed rule, and violate the Commission's long-standing policy

⁵⁷ For example, it does not exclude resources that are operating under long-term power sales agreements.

⁵⁸ Brattle Report at 27.

⁵⁹ *Id.* See *supra* note 22.

⁶⁰ *Id.*

that out-of-market solutions should only be invoked in narrow circumstances when there is an affirmative finding that market design solutions cannot effectively solve the problem.⁶¹ Some resource owners may be induced to take steps to become eligible for full cost recovery under the DOE NOPR, such as by stockpiling fuel oil for oil-fired units or even by divesting rate base generation from vertically integrated operating companies to unregulated affiliates. The more units in the market eligible for preferential cost-of-service payments, the greater the distortion of the market. Thus, even if the record developed in this proceeding were to somehow adequately demonstrate an existing resiliency problem that renders RTO/ISO tariffs unjust and unreasonable, the solution must be narrowly tailored to apply to only those generating units required to support resiliency needs.⁶²

⁶¹ *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at PP 17-22; *see also N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116 at PP 2-3 (“[T]he Commission has repeatedly stated that our jurisdictional markets should utilize market mechanisms to ensure that the resulting rates are just and reasonable. . . . In doing so, the Commission has emphasized that [“reliability must run”] agreements should be of limited duration so as not to perpetuate out-of-market solutions that have the potential, if not undertaken in an open and transparent manner, to undermine price formation.”); *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 at P 31 (“Markets should be designed so that as much as possible the market results in efficient prices that send appropriate signals for new entry. . . . The Commission, therefore, reaffirms its finding that RMR contracts should be used only after market design changes have been implemented and have been unsuccessful”).

⁶² Indeed, the Commission expressed this limitation in its numerous reliability-must-run proceedings. *See, e.g., PJM Interconnection, LLC*, 110 FERC ¶ 61,053 at P 147 (“The goal here is to support reliability needs by fully compensating any unit for all going forward costs for the period it must delay its exit. It is not intended to promote entry of any particular generator type or to support additional generation as the sole solution.”). The Commission ultimately required multiple compliance filings in each of the applicable dockets and a two-day technical conference to ensure all reliability-must-run tariff provisions were narrowly-tailored to fit the reliability concerns in the RTOs/ISOs. In doing so, the Commission explicitly recognized the risk that out-of-market payments resulting from the compensation for reliability-must-run units could undermine price formation in the existing wholesale markets. *See, e.g., id.* at P 114 (“As we concluded in the rehearing section of this order on similar issues, a transparent market process is preferable to cost-of-service rates that can cause high uplift payments. . . . As we stated in our May 6 Order, our policy on reliability compensation will be to rely on markets and proper market design, and to use non-market solutions only as a last resort.”).

2. Implementation⁶³

The DOE NOPR also fails to provide basic principles and essential details necessary to permit interested parties and the Commission to reasonably evaluate how payments under the proposed rule would be implemented. The proposal is unclear about whether added compensation is to be provided by changes to energy market rules, the creation of new ancillary service products, changes to capacity market structures, or new out-of-market payments. Section (iii)(A) of the proposed regulatory text requires both a just and reasonable rate for “the purchase of electric energy” from an eligible resource and the recovery of costs plus a fair return for eligible resources “dispatched during grid operations.”⁶⁴ The structure of the DOE NOPR thus leaves unanswered whether the dispatch of, and sale of energy from, a resource is required for cost-of-service payment eligibility, or whether simply having available capacity is sufficient.

The proposed requirement to assure “full cost compensation” for eligible resources similarly raises questions as to likely disruptions for existing wholesale markets and market participants. The Commission relies heavily on organized markets and their competitive forces to provide energy reliably at least-cost.⁶⁵ As a result, the Commission has repeatedly affirmed its policy that jurisdictional markets should appropriately utilize market mechanisms to ensure that the resulting rates are just and reasonable. By contrast, out-of-market payments designed to guarantee a specific resource’s operational costs undermines the markets’ competitive price formation principles, resulting in significant price distortion. Such market distorting policies therefore hinder the necessary price signals to market participants to invest in the infrastructure upon which grid reliability

⁶³ Responsive to October 4 Staff Questions, Implementation.

⁶⁴ DOE NOPR at 46,948.

⁶⁵ See Brattle Report at 37.

and resiliency is founded. The shift in the Commission’s policy direction contemplated in the DOE NOPR would not only increase regulatory and financial risks for competitive market participants and investors, but could increase future costs to customers above and beyond the actual cost-of-service payments mandated under the proposed rule.⁶⁶

Notably, the Commission has highlighted the dangers to organized markets associated with such significant out-of-market actions in prior proceedings addressing reliability reforms.⁶⁷ Those dangers have not been addressed in the DOE NOPR.

The proposed rule similarly fails to address how payments would interact with bilateral contracting opportunities for merchant coal and nuclear units, where such bilateral contracts provide essential cost recovery that prevents these resources from leaving the market. Units that have a bilateral agreement would be eligible for cost-of-service payments under the proposal, implying that they may no longer have a choice to rely on the flexibility afforded by market-based rates. For those units not under, or rolling off of, a power purchase agreement (“PPA”), no reasonable buyer would enter into a new PPA with an eligible unit for fear that the buyer also might have to support the same resource through the payments envisioned under the NOPR. The resulting uncertainty surrounding the ultimate cost of purchasing power from the wholesale markets as compared to entering into a PPA will result in a chilling effect for those wishing to pursue bilateral contract options. And this uncertainty conceivably could encourage buyers or sellers under existing agreements to terminate or renegotiate PPAs to shift costs to other wholesale market purchasers in the applicable RTO/ISO. The resulting uncertainty will ultimately create greater financial risk for competitive market

⁶⁶ *Id.* at 36-37.

⁶⁷ *See supra* note 61.

participants, spawning overall increased costs to consumers, while not necessarily generating improved grid resiliency.

3. Rates⁶⁸

The costs associated with the DOE NOPR's proposed federally-mandated procurement of "resilient" fuel-secure resources would be significant, and have not been either acknowledged or quantified by the DOE NOPR. Given the uncertainty surrounding many elements of the proposed rule, such as the affected markets and the universe of potentially eligible resources within those markets, as well as the wide range of potential implementation approaches, it is difficult for even sophisticated parties to evaluate the potential costs resulting from the proposed rate structure.

The proposed rule suggests RTO/ISOs would be required to provide a rate comprising not only the eligible unit's cost of service,⁶⁹ but also compensation for the "benefits and services" the unit provides to grid operations.⁷⁰ First, it is not clear whether the proposal is to require full cost of service recovery for eligible units, and additional compensation for benefits and services it provides, or whether compensation would be capped a full cost of service. Second, as discussed above, the benefits of resiliency and on-site fuel-assurance have not been sufficiently defined or quantified to ensure the resulting rates paid to eligible generators are just and reasonable. Nor has it been adequately demonstrated that such "benefits and services" are not already compensated and provided for through existing wholesale market products.

⁶⁸ Responsive to October 4 Staff Questions, Rates.

⁶⁹ It is also worth noting that the costs eligible to be recovered under a unit's cost of service have not been sufficiently defined in the DOE NOPR.

⁷⁰ DOE NOPR at 46,948 ("(B) The just and reasonable rate shall include pricing to ensure that each eligible resource is fully compensated for the benefit and services it provides to grid operations, including reliability, resiliency and on-site fuel-assurance, *and* that each eligible resource recovers its fully allocated costs and a fair return on equity." (emphasis added)).

Despite the high degree of uncertainty, an analysis conducted by the Brattle Group suggests that costs resulting from the proposed rule would be substantial. The Brattle Report estimates that the annual cost of subsidies under the proposed rule would be in the range of \$4 to \$11 billion per year.⁷¹

Finally, an additional shortcoming of the DOE NOPR is the failure to identify how the costs of the proposed payment program will be recovered. In order to determine who would be responsible for costs under the program, the Commission would need to identify who is benefitting from the program. This determination, and the resultant shifting of costs, would need to be fully defined and justified.

C. The Opportunity for Public Comment, and the Time Available for Commission Consideration, Is Wholly Inadequate for a Proposed Policy Change of this Magnitude.

The foregoing discussion identifies serious flaws in the DOE NOPR, with respect to both the underlying need for preferential payments to resources with 90 days of on-site fuel as well as the DOE NOPR's proposed solution and its implications for competitive markets and consumers. Addressing these concerns is simply not possible within the 60-day window for FERC final action imposed by the DOE NOPR, particularly given the lack of factual support and details about resulting market reforms contained in the DOE NOPR itself. Any attempt to adopt the DOE NOPR's ill-defined and potentially market-altering reforms in this timeframe would almost certainly fall short of administrative law requirements.⁷²

⁷¹ Brattle Report at 32.

⁷² 5 U.S.C. § 706(2). *See also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F. 3d at 839.

Section 4 of the APA⁷³ obligates an agency to “provide notice of its proposed rulemaking adequate to afford ‘interested parties a reasonable opportunity to participate in the rulemaking process.’ Such notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”⁷⁴ The instant rulemaking fails both requirements. The Commission afforded interested persons just *13 days* from the DOE NOPR’s October 10 publication date to submit initial comments, denying a request supported by a broad coalition of energy industry associations, state regulators, consumer advocates, and market participants to extend the initial comment period to a more reasonable 90 days.⁷⁵ A 13-day comment period is inconsistent with administrative law practices,⁷⁶ and is woefully inadequate to evaluate the complex issues involved in assessing the possible value and efficacy of on-site fuel supply, and to consider the impacts of the proposal on complex organized market structures and dynamics.

Compounding the short comment period is the vagueness of the DOE NOPR itself, which fails to provide sufficient factual detail to permit interested parties to comment meaningfully. The foregoing discussion identifies numerous important details that were not addressed in the DOE NOPR concerning the proposed payments to eligible resources and the relationship of those payments to the existing markets that will need to be developed in compliance filings by the RTOs and ISOs. These compliance filings

⁷³ 5 U.S.C. § 553.

⁷⁴ *Fla. Power & Light Co. v. United States*, 846 F.2d at 771 (citing *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530–31 (D.C. Cir. 1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977)).

⁷⁵ *Grid Reliability and Resilience Pricing*, Notice Denying Extension of Time, Docket No. RM18-1-000 (issued Oct. 11, 2017).

⁷⁶ See Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993) (“each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”).

would need to be developed and filed within 15 days after a final rule's effective date.⁷⁷ The proposal would further require RTO/ISO implementation of compliance changes within 15 days of the compliance filings, a timeline that would not allow the public to comment effectively on the compliance filings or allow serious consideration by the Commission.

Reliable service to customers is and will remain the utmost priority for the electric sector. If threats to reliability are found, immediate action should be taken. But no such need for immediate action is necessary to address the retirement of merchant coal and nuclear generation as claimed in the DOE NOPR.⁷⁸ To the extent the Commission has concerns regarding the impact of such retirements, it can gather more information regarding resiliency and what, if any, reforms might be needed to address it within the organized markets. Only then could FERC, consistent with its statutory obligations under section 206 of the FPA, (i) determine whether existing RTO/ISO tariffs are unjust and unreasonable because they have failed to compensate resources that provide resiliency benefits; and if so, (ii) identify an economically efficient and regionally appropriate way to compensate the resources that supply any resiliency characteristics that are needed.

Gathering the necessary information to make these determinations would be a significant undertaking. To evaluate whether any resiliency issues in relation to fuel diversity exist in a particular RTO/ISO region, the Commission would need to consider the particular resource mix in that region, its unique weather and fuel supply characteristics, and how the region's regulatory and market structures interact with resource procurement decisions. On-going NERC activities regarding reliability and

⁷⁷ Responsive to October 4 Staff Questions, Other, Question 1.

⁷⁸ Responsive to October 4 Staff Questions, Need for Reform, Question 4.

resiliency also would need to be considered, as many aspects of resilience already have been addressed in various assessments, guidelines, and standards. By declining to adopt the payment scheme proposed in the DOE NOPR, the Commission can explore these issues as it deems appropriate, including through technical conferences and the submission of formal written comments and region-specific reports by the RTOs and ISOs. In any such fact-gathering process, it would be important for all affected stakeholders including state regulators to have a role in informing the Commission what, if any, resiliency concerns may exist in a particular region. Consultation with state utility commissions is particularly critical given their historical role in resource planning and procurement decisions, and the FPA's recognition of their exclusive role with respect to generation matters.⁷⁹

IV. CONCLUSION

There is no evidence to demonstrate that generation resources with 90 days of on-site fuel supply are needed to ensure reliable and resilient grid operations. The DOE NOPR thus has failed to demonstrate that existing ISO and RTO tariffs are unjust and unreasonable because they do not provide preferential payments to such resources, nor has it demonstrated that it would be just and reasonable and not unduly discriminatory or preferential to require ISOs and RTOs to amend their tariffs to provide for such payments. Accordingly, the DOE NOPR has not made the predicate showings needed for Commission action under section 206 of the FPA and cannot be adopted.

⁷⁹ See 16 U.S.C. § 824(b).

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Attachment

ATTACHMENT A