UNITED STATES OF AMERICA

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

OCTOBER 23, 2017

Grid Reliability and Resiliency Pricing — **Docket No. RM18-1-000**

COMMENTS OF THE BUSINESS COUNCIL FOR SUSTAINABLE ENERGY

In accordance with the Federal Energy Regulatory Commission's ("Commission" or "FERC") request for comments in the subject proceeding, the Business Council for Sustainable Energy ("BCSE" or "Coalition") respectfully submits the following comments in response to the Secretary of Energy's September 28, 2017 proposal of a rule for final action by the Commission ("DOE NOPR")[1] under Section 403 of the Department of Energy Organization Act.[2]

1. INTRODUCTION AND SUMMARY

BCSE is a coalition of companies and trade associations from the energy efficiency, natural gas, and renewable energy sectors, and also includes independent electric power producers, investor-owned utilities, public power, commercial end-users, and energy and environmental market service companies. BCSE was founded in 1992, and advocates for policies at state, national and international levels that increase the use of commercially-available clean energy technologies, products and services. The coalition's diverse business membership is united around the revitalization of the US economy and the creation of a secure and sustainable energy future for the country.[3] As BCSE is a diverse coalition, not all BCSE members endorse or take

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[1] 82 Fed. Reg. 46,940 (Oct. 10, 2017).

[2] 42 U.S.C. § 7173 (2012) ("DOE Act").

[3] More information about BCSE is available at: www.bcse.org.

positions on the issues included in these comments. The comments contained in this filing represent the position of BCSE as an organization, but not necessarily the view of any particular member with respect to any specific issue.

2. SUMMARY

Through the DOE NOPR, the Secretary of Energy proposes that the Commission consider payments to certain resources located within regional transmission organizations ("RTOs") and independent system operators ("ISOs") with energy and capacity markets. However, the justification for the proposed payments – a type of "resiliency" – is not demonstrated in the proposal to be a current threat in the aforementioned regions.

Further, Section 206 of the Federal Power Act states that before FERC can exercise its statutory authority, it must first determine that existing RTO/ISO tariff provisions are unjust and unreasonable. The DOE NOPR fails to identify or articulate an immediate problem or substantial evidence for greater "resiliency" provided by resources with 90-day on-site fuel supply.

Section 206 also requires FERC to demonstrate that any revisions to existing tariffs are just and reasonable in the event that 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, the proposed solution – full cost of service payments to eligible resources with 90 days of on-site fuel – leaves key questions unresolved about why other generating resources that provide resiliency benefits should not also receive payments, the cost of payments to eligible resources, how such costs would be allocated, and how the payments would impact price formation in the organized markets. Accordingly, the proposed rule has not shown to be just and reasonable and should not be adopted by the Commission.

Additionally, the DOE NOPR does not provide adequate time or detail in the proposal for interested parties to comment, especially given the magnitude of the policy action recommended. FERC should decline this proposal and consider additional information gathering processes to explore the paramount issues of reliability and resiliency in organized markets.

3. COMMENTS

The DOE NOPR Does Not Support Proposed Policy Action Under Section 206 of the Federal Power Act

The DOE NOPR proposes that FERC adopt the proposed rule under authority of Section 206 of the Federal Power Act.[4] 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 an RTO/ISO subject to the rule are, in fact, "unjust, unreasonable, unduly discriminatory or preferential."[5] Second, the Commission must establish that its remedy is just and reasonable and not unduly discriminatory.[6] Further, in order to be legally defensible, the Administrative Procedures Act requires that the Commission's determinations must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and that its findings must be supported by "substantial evidence."[7]

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[4] 16 U.S.C. §824e. The DOE NOPR was proposed by the Secretary under authority granted by Section 403 of the DOE 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 Federal Power Act, but that section does not authorize FERC to direct the amendment of existing utility tariffs.

[5] *Id.*

[6] *See Algonquin Gas Transmission Co. v. FERC*, 948 F. 2d 1305, 1308 (D.C. Cir 1991) (articulating FERC's two-part burden); *see also California Independent System Operator Corporation v. FERC*, 372 F.3d 39, 398-99 (D.C. Cir. 2004); *Atlantic City Electric Company v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002).

[7] 5 U.S.C. §706(2). *See also*, *National Fuel Gas Supply Corp. v. FERC*, 468 F. 3d 831, 839 (D.C. Cir. 2006) ("*National Fuel*").

While the DOE NOPR is correct that "FERC has on numerous occasions imposed market rules on ISOs and RTOs,"[8] the Commission is not authorized to take such action "based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence."[9] There is no evidence, in the DOE NOPR or otherwise, that the retirement of coal and nuclear generation is currently threatening the reliability and resiliency of the electric grid. Further, the Rhodium Group has noted that between 2012 and 2016, only 0.00007 percent of customer-hours impacted by major electricity disruptions were due to fuel supply problems.[10] Nearly all outages were caused by failures in transmission and distribution networks."[11] While there may be long-term issues to explore related to grid reliability and resiliency, the DOE NOPR fails to justify potential action under Section 206.[12]

The DOE NOPR also points to resource performance during the 2014 Polar Vortex in support of its proposal.[13] However, according to the North American Electric Reliability Corporation ("NERC"), performance during the Polar Vortex was more a function of freezing equipment than whether or not a unit had on-site fuel.[14] As noted in a recent PJM Report, extreme cold events such as the 2014 Polar Vortex can trigger higher than average unavailability

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[8] DOE NOPR at 46941.

[9] *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010).

[10] Trevor Houser, John Larsen and Peter Marsters. "The Real Electric Reliability Crisis." Rhodium Group, October 3, 2017. Accessed at *http://rhg.com/notes/the-real-electricity-reliability-crisis*.

[11] *Id.*

[12] *See* The Brattle Group, *Evaluation of the DOE's Proposed Grid Resiliency Pricing Rule*, at 2, 5-7 (October 2017) ("Brattle Report"), attached to Joint Industry Comments Opposing the DOE NOPR, Docket No. RM18-01 (Oct. 23, 2017).
As discussed in the attached Brattle Report, recent retirements of coal and nuclear generation with 90 days of on-site fuel has not impaired reliable system operations, nor that the preservation of generation resources with a 90-day on-site fuel supply is needed to maintain reliability or resiliency.

[13] DOE NOPR at 46942, 46945.

[14] NERC, Polar Vortex Review at 14, 6 (Sept. 2014).

rates for a number of fuel types, both those with and without 90 days of on-site storage.[15] Therefore, the DOE's reliance on the experience of the 2014 Polar Vortex to support its proposal is misplaced.

The DOE NOPR Proposed Policy Actions that Would Override State Prerogatives and Duplicate Existing RTO/ISO Authority

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, and retains the right and responsibility to adjust those structures in response to local and regional issues consistent with the rights reserved to the states under Section 201(a) of the Federal Power Act.[16] The DOE NOPR seeks to override these choices by imposing an unfounded 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.

The payment scheme proposed in the DOE NOPR is also duplicative of existing RTO/ISO authority to provide compensation to generating units that are needed for reliability. If the potential retirement of a generating unit threatens grid reliability, each RTO and ISO has the authority under its respective tariffs to enter into reliability agreements that provide cost recovery

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[15] *See* PJM Interconnection, L.L.C, "PJM's Evolving Resource Mix and System Reliability," (March 30, 2017) ("PJM Report"). PJM Report at 33 (indicating a risk for natural gas, coal and solar); NERC, Polar Vortex Review at 13, 22 (Sept. 2014) (indicating a 26% outage rate for coal units, much higher than the historical monthly performance rates).

[16] 16 U.S.C. § 824(b).

to the generator. 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 additional cost support payments on top of market compensation from the RTO or ISO. The DOE NOPR fails to acknowledge this authority or explain why it is insufficient to ensure sufficiently resilient system operations.

Vague Terms in NOPR Impede Ability of Interested Parties to Fully Understand and Comment on Proposal

The DOE NOPR is not clear about the problem it is seeking to remedy. While the DOE NOPR expresses general concern about "resiliency," it does not define that term. Resiliency for the bulk electric system can generally be considered to relate to preparation for, operation through, and ability to recover from high-impact, low-frequency events, or in other words, the ability of the grid to tolerate disturbance and continue to deliver to customers.[17] The DOE NOPR, however, focuses on something more narrow: "the premature retirements of power plants that can withstand major fuel supply disruptions."[18] As the electricity grid has never experienced fuel supply disruptions lasting anywhere close to three months, there is no basis for the DOE NOPR to establish that criterion as related to "resiliency."

PJM is the RTO that has the most generators expected to receive payments if the proposal were adopted.[19] According to a recent PJM study, the PJM control area is evolving into a more,

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[17] *See* PJM Interconnection, L.L.C, "PJM's Evolving Resource Mix and System Reliability," at 5, 33 (March 30, 2017) ("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, 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), https://doi.org/10.17226/24836.

[18] DOE NOPR at 46941.

[19] *See* Brattle Report.

not less, flexible and resilient system.[20] As PJM explains, diversity of resources is not the single measure to ensure reliability.[21] PJM also 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.[22]

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

Given the concerns stated previously in these comments, the 60-day window for FERC final action imposed by the DOE NOPR is insufficient to address the issues raised.

Section 4 of the Administrative Procedure Act obligates an agency to "provide notice of its proposed rulemaking adequate to afford 'interested parties a reasonable opportunity to participate in the rulemaking process."[23] Further, Sec. 403 of the DOE Organization Act indicates "Any function … which relates to the establishment of rates and charges under the Federal Power Act… may be conducted by rulemaking procedures [that] shall assure full consideration of the issues and an opportunity for interested persons to present their views."[24] 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."[25] The Commission afforded interested persons just thirteen days from the DOE NOPR's October

[20] *See* PJM Report at 4-5.

[21] *Id*.

[22] *Id*. at 39.

[23] 5 U.S.C. § 553 (2012).

[24] 42 U.S.C. § 7173 (2012) ("DOE Act").

[25] *Florida Power & Light Co. v. U.S*, 846 F. 2d 765, 771 (D.C. Cir. 1988), citing *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530–31 (D.C.Cir.), *cert. denied*, 459 U.S. 835, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C.Cir.), *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).

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.[26] The proposal should not be accepted on the basis of the inadequate time for comments and the insufficient factual detail underpinning the proposal.

FERC Should Decline DOE Proposal and Consider Initiating Information Gathering Processes

Reliable service to customers is and will remain the utmost priority for the electric sector. As no immediate reliability and resiliency threats have been demonstrated in the jurisdictions targeted under the proposal, FERC should decline the proposal.

To the extent the Commission has concerns regarding the impact of plant retirements on grid reliability and resiliency, it can gather more information regarding resiliency and what, if any, reforms might be needed to address it within the organized markets. To evaluate whether any resiliency issues exist in a particular RTO/ISO region in relation to fuel diversity, 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. Further, the age of the generation facility, history of operations, access to cooling water, and other indices should be taken into account, and it is important that it be evaluated at the ISO and state level as well.

On-going NERC activities regarding reliability and resiliency also would need to be considered, as many aspects of resiliency have already been addressed in various assessments, guidelines, and standards. There are many technologies and services that can provide reliability

[26] *Notice Denying Extension of Time*, Docket No. RM18-1-000 (Oct. 11, 2017).

and resiliency services: they span the energy efficiency, natural gas, renewable energy and energy storage sectors, among others. These include renewable technologies that are available 24/7 and that provide ramping capabilities; energy efficiency, energy storage and demand response technologies that help balance loads; natural gas resources that provide consistent supply as well as pairing with variable resources; and other currently-available, technologies, products and services.

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 of 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 Federal Power Act's recognition of their exclusive role with respect to generation matters.[27]

4. CONCLUSION

Resiliency and reliability issues are paramount to the electric sector. However, the DOE NOPR fails to identify or articulate an immediate problem or substantial evidence for greater "resiliency" provided by resources with 90-day on-site fuel supply. To the extent the Commission has concerns regarding the impact of plant retirements on grid reliability and resiliency, it can gather more information regarding resiliency and what, if any, reforms might be needed to address it within the organized markets. FERC should decline this proposal and pursue other processes to consider resiliency and reliability issues.

[27] *See* 16 U.S.C. § 824(b).

Respectfully submitted,

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