UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION IN OPPOSITION TO THE DOE NOPR

In accordance with the Notice issued by the Federal Energy Regulatory Commission ("Commission") on October 2, 2017, the Retail Energy Supply Association ("RESA")[1] hereby files these Comments in response to the Notice of Proposed Rulemaking ("NOPR") in the above-referenced proceeding.[2] In the NOPR, the Commission, at the direction of the U.S. Department of Energy ("DOE") pursuant to DOE's authority under Section 403 of the Department of Energy Organization Act has been directed to "consider and take final action" to impose grid resiliency rules that would implement cost-based regulation to "eligible grid reliability resources" – generators that, among other things, have a 90-day fuel supply on-site. These grid resiliency rules would apply in regional transmission organization and independent system operator ("RTO/ISO") regions with functioning capacity markets. RESA supports competitive wholesale markets and a reliable and resilient grid. If the Commission adopts a final rule that proposes changes to address resiliency, however, it must do so in a prospective manner that would impose the least harm on competitive retail suppliers, thus maintaining the value that they provide to

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] *See Grid Resiliency Pricing Rule*, Docket No. RM18-1-000, 82 Fed. Reg. 46,940 (October 10, 2017).

consumers. RESA believes that this NOPR is not necessary in order to continue to have a reliable and resilient grid. In support of these Comments, RESA submits as follows:

I. BACKGROUND

A. RESA

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity and natural gas. RESA and its members are actively involved in retail electricity and natural gas markets throughout the United States in states that have implemented markets that allow entities other than the incumbent electric or natural gas utility to provide commodity electric and gas service. RESA members are active in the following RTO/ISOs: PJM Interconnection, L.L.C. ("PJM"), ISO New England, Inc. ("ISO-NE"), Midcontinent Independent System Operator, Inc. ("MISO"), New York Independent System Operator, Inc. ("NYISO"), and California Independent System Operator, Inc. ("CAISO"). RESA members possess market-based rate authority from the Commission.

Under the retail supply model, a retail supplier of gas or electricity will provide the commodity gas or electricity to an end-use customer – generally a commercial, industrial or residential consumer. The utility will remain as the distributor of the commodity, generally through distribution-level natural gas pipelines or distribution electric lines. The retail supplier will purchase the gas or electricity in competitive wholesale markets and deliver it (or have it delivered) pursuant to Commission-approved tariffs to the local utility's citygate or distribution system.

RESA's members are a diverse group of companies. Some are independent companies and others are subsidiaries of larger energy-related companies. RESA's members serve customers in approximately 22 states and the District of Columbia. All of RESA's members,

however, share the common belief that competitive wholesale and retail markets deliver a more efficient, customer-oriented outcome than the regulated utility structure.

B. RESA's Participation in Competitive RTO/ISO Wholesale Markets

RESA's members purchase services in the RTO/ISO markets, but they offer more than just electricity service to their customers. Competitive retail suppliers may provide commodity retail energy based on fixed or variable prices which are tied to wholesale prices. Retail suppliers may offer demand response services – assisting customer in reducing electricity at peak and receiving benefits for reducing consumption at peak times. Retail suppliers may offer energy efficiency services to assist customer in reducing their electricity consumption. Retail suppliers may offer electricity with a certain component of renewable energy – or all renewable energy. There is no one model – competitive wholesale markets and retail choice policies in the states have allowed significant innovation which has reduced consumption of energy, lowered prices, and provided valuable services to consumers.

Competitive retail suppliers can respond to requests of customers and provide products and services that meet their needs. Some RESA members participate in default service programs (provider of last resort-type services); some provide services on a customer by customer basis; some provide services to only commercial and industrial customers; some provide service to residential retail customers; and some work in all or a portion of these customer markets.

Competitive retail suppliers operate in an environment of risk. Retail suppliers are not like traditional utilities in a number of important ways. For example, retail suppliers are not cost-based regulated by state public utility commissions (although they comply with a myriad of state requirements in order to be authorized to perform services). Retail suppliers do not have a mechanism to defer costs, like traditional utilities. Retail suppliers do not have a set service area.

They contract with customers bilaterally. Generally, these contracts are long-term – of a duration of one to five years. As a result, when a contract expires, it may or may not be renewed. Thus, a customer today may not be a customer tomorrow. As a result, charges imposed retroactively may not be collectable from the customer if the contractual relationship has expired.

In connection with its retail supply activities, most of RESA's members also utilize a number of commercial products to hedge their risks, including commodity price risks. However, not all risks can be hedged. Retail suppliers often deal with risk by adjusting their pricing to include premiums for unanticipated cost increases or limiting service offerings to shorter terms or to month to month pricing. Retail suppliers can only "price in" risks that can be anticipated.

To offer the valuable and innovative services at competitive prices, retail suppliers participating in competitive wholesale markets require market certainty, transparency and stability. Market certainty, transparency and stability allows retail suppliers to offer products and services that they know they can deliver during the term of the applicable contract. The importance of having confidence in the competitive wholesale market cannot be overstated. As with products and services offered by retail suppliers, the contracts vary by company, by service, by customer type, by term and other conditions. If competitive retail suppliers are participating in default service programs, those programs often require winning suppliers to agree to a standard form contract, which may or may not address unanticipated market changes.

Competitive retail suppliers seek market certainty, transparency and stability so that they may understand and incorporate the rates, products, services and requirements that they procure from the RTO/ISO and turn those into innovative products to customers. While, some contracts offered by retail suppliers contain a "change in law" provision, whereby any increased costs caused by a change in law may be passed on to customers, many jurisdictions do not permit

change of law provisions in fixed-price arrangements. In addition, even when the contract contains a change in law provision, no retail supplier wants to go to its customer and tell them that they will be responsible for added and unexpected charges.

An important factor in market certainty, transparency and stability is the prospective application of rate design and other major changes. Prospective application of rate design changes is general Commission policy, but is critical to competitive retail suppliers. If a competitive retail supplier knows that there is a change to a rate design that could impact a service that it provides to its customers, it can make that adjustment in the product so that the change is reflected in the product on the rate design change's effective date. Without advance notice, the customer may not receive the benefit of the change, may not receive the service contemplated, or the retail supplier may be forced to absorb any change in cost to the extent the cost cannot be passed through.

To have well-functioning competitive wholesale markets, and to allow retail suppliers to offer innovative products, RTO/ISOs must minimize out of market mechanisms and the use of uplift-type mechanisms to collect costs. Out of market mechanisms, unless they are narrowly-tailored to address a particular issue and designed with transparent pricing and procedures, can impair the ability of retail suppliers to accurately price and develop services to retail customers. Out of market mechanisms, like uplift charges, are difficult, if not impossible to hedge with traditional hedging instruments available in the market. Thus, the risk of implementation of out of market mechanisms and uplift may cause retail suppliers to build in premiums in the services they offer to customers, or may limit their innovation. RESA is very concerned that the changes proposed in the NOPR would create an out of market mechanism – cost-based compensation to a

category of generation – that could be difficult, if not impossible, to price and hedge and would undermine the retail marketplace.

C. The NOPR

On September 28, 2017, the Secretary of DOE filed with the Commission the request for a NOPR. DOE directed the Commission to "consider and take final action" on the NOPR within sixty (60) days from the NOPR's publication in the Federal Register.[3] On October 10, 2017, The Commission published the NOPR in the Federal Register. Interestingly, in a Notice published on the Commission's website, the Commission noted, without elaboration, that the NOPR published in the Federal Register differed from that submitted by DOE on September 28, 2017. The Commission retained the October 23, 2017 comment date, despite a wide spectrum of energy market participants and trade association requests for additional time. Finally, on October 4, 2017, the Commission issued a list of questions "in order to assist Staff in understanding the implications of the proposed rule." It appears that the substantive change in the NOPR from the time it was filed with the Commission by DOE and its publication in the Federal Register is that the NOPR would apply only in RTO/ISOs where there are capacity markets. For purpose of these comments, RESA assumes the following RTO/ISOs would be subject to the rule: PJM, NYISO, ISO-NE and MISO.

Under the DOE NOPR, the Secretary directs "the Commission to exercise its authority under sections 205 and 206 of the Federal Power Act to issue a final rule requiring its organized markets to develop and implement market rules that accurately price generation resources necessary to maintain the reliability and resilience of our Nation's bulk power system."[4] To

[3] *See Grid Resiliency Pricing Rule*, Docket No. RM18-1-000, 82 Fed. Reg. 46,940 (October 10, 2017).

[4] NOPR at 46,940.

accomplish this goal, according to DOE, the FERC must allow for the recovery of costs of "fuel-secure" generation "frequently relied upon to make our grid reliable and resilient."[5] "Fuel-secure" generation would be entitled to full recovery of costs on a cost-of-service basis. What is "fuel-secure"? According to DOE, a generator must be able to "provide essential energy and ancillary reliability services and have a 90-day fuel supply on site in the event of supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters."[6]

The rationale for full cost of service regulation – an out of market mechanism -- the DOE expresses is, at best, tenuous. According to DOE full cost of service regulation is required because: (1) there have been retirements of coal and nuclear plants (which DOE equates to "fuel-secure"); (2) it commissioned a Staff Report that identified these plant retirements;[7] (3) it views the wholesale markets as not adequately pricing resiliency attributes of fuel-secure generation; and (4) the North American Electric Reliability Corporation ("NERC") has identified in a letter to the Secretary that the "changing resource mix is altering the operating characteristics of the bulk power system."[8]

The Staff Report does not contain as a remedy for grid resilience, cost-based compensation for "fuel-secure" generation. Quite the contrary. In the summary section (at 11-12), the Staff Report notes that "markets recognize and compensate reliability, and must evolve to continue to compensate reliability, but more work is needed to address resilience." The Staff Report goes on to state that the bulk transmission system reliability is "adequate despite the retirement of a portion of baseload capacity and unique regional hurdles posed by the changing

[5] NOPR at 46,945.

[6] *Id*.

[7] U.S. Department of Energy, *Staff Report to the Secretary on Electricity Markets and Reliability,* August 2017 ("DOE Staff Report").

[8] NOPR at 46,943.

resource mix"; and that "fuel assurance is a growing consideration for the electricity system. Maintaining onsite fuel resources is one way to improve fuel assurance, but most generation technologies have experienced fuel deliverability challenges in the past. While coal facilities typically store enough fuel onsite to last for 30 days or more, extreme cold can lead to frozen fuel stockpiles and disruption of train deliveries. . . ."[9] The DOE Staff Report also notes that "significant progress is already being made to understand what is needed to maintain power system reliability under changing market conditions. . . ."[10]

Importantly, the DOE Staff Report highlights an important reason for coal plant retirements – in addition to the impacts natural gas prices and the introduction of renewables has had on competitive markets – many of the plants have reached the end of their useful life. As the Staff Report finds (at 24): "[m]ost of the power plants being closed today were built in the 1940s to the 1960s before the Clean Air Act was passed in 1970. Many have minimal air pollution controls, use once-through cooling water, and sluice wet coal ash to ponds."

The DOE notes in the NOPR (at 46,944) that the Commission has been examining price formation-related issues and compiling a record. DOE notes that the Commission held a technical conference in 2013 on centralized capacity markets in RTOs.[11] In 2014, the Commission initiated another proceeding on price formation and held a series of technical conferences to discuss issues relating to price formation in the energy, capacity and ancillary service markets.[12] DOE goes on to cite a number of other Commission-initiated proceedings that

[9] *Id*.

[10] *Id*.

[11] *Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators,* Docket No. AD13-7.

[12] *Price Formation in Energy and Ancillary Services Markets in Regional Transmission Organizations and Independent System Operators*, Docket No. AD14-14 (2014) [fix cite]

show the Commission's active engagement in RTO/ISO energy and capacity markets-related issues.[13] DOE cites the following proceedings:

- In November 2016, under Order No. 825, *Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, the Commission directed reforms to settlement intervals and shortage pricing to more accurately compensate resources based on the value they provide the system.[14]
- In November 2016, pursuant to a NOPR entitled *Essential Reliability Services and the Evolving Bulk-Power System—Primary Frequency Response*, the Commission proposed a rule to require all newly interconnecting large and small generating facilities, both synchronous and non-synchronous, to install and enable primary frequency response capability as a condition of interconnection.[15]
- In December 2016, under Order 831, *Offer Caps in Markets Operated by Regional Transmission Organizations and Independent System Operators*, the Commission raised existing caps on energy market offers and allowed those higher-price offers to set market clearing prices.[16]
- In December 2016, pursuant to a NOPR entitled *Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, the Commission proposed revising its regulations to require RTOs and ISOs to incorporate market rules that properly price fast-start resources.[17] As stated in the NOPR, the proposed Fast-Start Pricing "should lead to prices that more transparently reflect the marginal cost of serving load, which will reduce uplift costs and thereby improve price signals to support efficient investments."[18]
- In January 2017, the Commission issued a NOPR entitled *Uplift Cost Allocation and Transparency in Markets Operated by Regional Transmission Organizations and Independent System Operators*.[19] Among other things, this proposed rule would require that "each regional transmission organization (RTO) and independent system operator (ISO) that currently allocates the

[13] *Id*.

[14] *Settlement Intervals and Shortage Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 825,155 FERC ¶ 61,276 (2016).

[15] *Essential Reliability Services and the Evolving Bulk-Power System—Primary Frequency Response*, Notice of Proposed Rulemaking, 157 FERC ¶ 61,122 (2016).

[16] *Offer Caps in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 831, 157 FERC ¶ 61,115 (2016).

[17] *Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 157 FERC ¶ 61,213 (2016).

[18] *Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 157 FERC ¶ 61,213 (2016), at 1.

[19] *Uplift Cost Allocation and Transparency in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 158 FERC ¶ 61,047 (2017).

costs of real-time uplift due to deviations should allocate such real-time uplift costs only to those market participants whose transactions are reasonably expected to have caused the real-time uplift costs."[20] This NOPR establishes that the goals of the price formation in the proceeding are to:

(1) Maximize market surplus for consumers and suppliers;
(2) Provide correct incentives for market participants to follow commitment and dispatch instructions, make efficient investments in facilities and equipment, and maintain reliability;
(3) Provide transparency so that market participants understand how prices reflect the actual marginal cost of serving load and the operational constraints of reliably operating the system; and
(4) Ensure that all suppliers have an opportunity to recover their costs.[21]

Despite the fact that "fuel-secure" generation was not the focus of these proceedings, was not singled out as the issue needed to address, DOE concludes its recitation of the various proceedings with the unsupported statement, "[t]he continued loss of fuel-secure generation must be stopped. These generation resources are necessary to maintain the resiliency of the electric grid."[22] In short, neither the DOE Staff Report, NERC, nor the Commission has identified as the barrier to grid resiliency, the loss of fuel-secure generation. Certainly, no such finding exists to support full cost-of-service cost recovery, especially in light of the likely devastating effects such a policy would have on competitive RTO/ISO markets, through lack of competition, increased prices and harm to consumers. Grid resiliency, if an issue exists, must be addressed comprehensively through non-discriminatory market-based reforms.

In addition, any changes to markets such as that proposed by DOE must not be imposed on a one size fits all basis – as the Commission has acknowledged throughout development of the competitively wholesale and RTO/ISO markets, regional differences exist and rules must be

[20] *Id*. at 1.

[21] *Uplift Cost Allocation and Transparency in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 158 FERC ¶ 61,047, P.6 (2017).

[22] NOPR at 46,945.

adapted to recognize these regional differences.[23] For example, in some regions, there has been significant generation divestiture by investor owned utilities; in other regions, generation remains within the ownership of the investor owned utilities and remains regulated on a cost-of-service basis. Some regions support the Regional Greenhouse Gas Initiative ("RGGI"), retail competition and net metering programs. Some states within the RTO/ISO permit retail access; some do not.

Moreover, as noted above, the Commission, stakeholders and the RTO/ISOs have made significant progress in adjusting, refining and improving wholesale markets while ensuring grid resiliency. PJM's response to the Polar Vortex -- the implementation of the capacity performance program ("CPP") -- is another example of a step the ISO took to address reliability but within the capacity market..[24]

In short, DOE's NOPR appears to be a solution in search of a problem. The bulk transmission system is designed, operated and maintained to ensure reliability. Grid resiliency, really a subset of reliability, is at the forefront of many RTO/ISO policies under development in the stakeholder process. Stakeholder processes in ISO-NE, NYISO, and PJM are underway and improvements are always under consideration. Rushing to implement a "remedy" through a proposal such as that proposed by DOE in the NOPR would set competitive markets back and would undermine all of the market changes undertaken over the last four years to ensure that the bulk power system continues to operate reliably.

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[23] *See e.g., Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,166 at P.827 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005) ("with respect to an RTO or ISO, at the time its compliance filing is made . . . we will allow it to see 'independent entity variations' from the Final Rule pricing and non-pricing provisions").

[24] *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015), *order on reh'g*, 155 FERC ¶ 61,157 (2016), *aff'd, Advanced Energy Management Alliance v. FERC*, 860 F.3d 656 (2017).

II. ARGUMENT

A. The NOPR Must Be Rejected; the Commission Should Permit RTO/ISOs to Continue Considering Market Rule Changes Consistent with Ongoing Commission NOPRs and Final Rules

As DOE acknowledges in the NOPR, the Commission is actively exploring price formation and related issues involved in RTO/ISO energy and capacity markets.[25] Stakeholders in the RTO/ISOs are working on reforms that will address market enhancements to ensure continued reliability and resiliency. These efforts should continue. Rushing through a change to the Commission's regulations that would alter drastically wholesale markets in a mere sixty (60) days is simply unjustified. The Commission must recognize and respect the stakeholder process for implementing market design changes.[26] RTO/ISOs and their stakeholders are examining market design changes to ensure that generation is properly compensated.[27]

First, the DOE Staff Report does not support the DOE's NOPR. The conclusions of the DOE Staff Report are clear – the grid is resilient despite the plant retirements that have occurred (not just coal) over the last few years.[28] The Staff Report notes that there could be improvements. None of the suggested improvements include imposing cost-based recovery for one fuel type. Those improvements are just what the Commission is examining in its various open proceedings and that is what stakeholders and RTO/ISOs are working on. For example, PJM noted that the DOE NOPR would conflict with reform efforts underway at PJM. PJM states, [DOE's interest]

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[25] DOE NOPR at 46,945.

[26] *American Electric Power Service Corp. v. Midwest Independent Transmission System Operator, Inc.*, 122 FERC ¶ 61,083 at P. 172 (2008); *reh'g denied*, 125 FERC ¶ 61,341 (2008).

[27] See, e.g., "Context for PJM Market Design Proposals Responding to State Public Policy Initiatives," June 12, 2017, http://www.pjm.com/~/media/library/reports-notices/special-reports/20170612-context-for-pjm-market-design-proposals-responding-to-state-public-policy-initiatives.ashx.

[28] DOE Staff Report at 12.

"in ensuring fuel security, resilience and proper pricing of reliability attributes aligns with the effort underway between PJM and its stakeholders. Recent reforms, including PJM's capacity performance requirements . . . offer confidence that market designs can evolve when needed to ensure secure fuel supplies and improvements to ensure generator availability."[29]

Second, DOE has offered no evidence that the RTO/ISO rates are unjust and unreasonable under Federal Power Act Section 206 – a pre-requisite for ordering changes such as those requested by DOE. The Commission must make an affirmative finding that the existing rate is unjust and unreasonable and then set a new rate.[30] "When the Commission changes an existing filed rate under Section 206, it is 'the Commission's burden to prove the reasonableness of its change in methodology.'"[31] The NOPR is devoid of any discussion as to whether any RTO/ISO rate is unjust and unreasonable and, if so, what makes it unjust and unreasonable. The Commission's October 4, 2017, request for the industry to answer certain questions does not provide that finding. There is no support or evidence for the proposition that DOE's proposal – to implement a cost-based rate scheme for generators that have 90 days fuel storage on site – will ensure that any replacement rates (if DOE meets the first part of the test to show that the existing rates are unjust and unreasonable) are just and reasonable. The DOE Staff Report finds just the opposite. This simple deficiency must lead to rejection of the NOPR.

In addition, if the remedy proposed in the DOE NOPR is implemented, the Commission would pick and choose particular types of generation to receive cost-based rate recovery over

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[29] *See PJM Responds to DOE Proposal*, PJM Inside Lines, http://insidelines.pjm.com/pjm-responds-to-doe-proposal (October 4, 2017).

[30] *See e.g., Emera Maine, et al. v. FERC*, 854 F.3d 9 (D.C. Cir. 2017); *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *Union Electric Co. v. FERC*, 668 F.2d 389 (8th Cir. 1981); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[31] *Advanced Energy Management Alliance, et al. v. FERC*, 860 F.3d 656, 663 (D.C. Cir. 2017), citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1199 (D.C. Cir. 2005).

other types of generation, removing certain generation from the competitive wholesale markets. Those generators receiving guaranteed cost recovery would have a competitive advantage over generation relying on wholesale markets, creating an unduly discriminatory effect. As the Commission and Courts have held, discrimination which is anti-competitive is in effect presumptively undue. *FPC v. Conway Corp*, 426 U.S. 271 (1976); *City of Frankfort*, 12 FERC ¶ 61,004 (1980).

Third, while "resiliency" is not defined (another significant discrepancy), DOE cannot show that its NOPR, if in place, would have materially prevented the operational issues that arose in the Polar Vortex that arose in January 2014. PJM issued a report dated May 8, 2014 that analyzed the operational events and market impacts during the Polar Vortex.[32] What PJM's Analysis shows is that PJM's communications protocols, its planning, reactions and responses of those generators that could respond, including renewables, allowed the region to keep the lights on. Non-performance during the Polar Vortex was not limited to natural gas. According to PJM, on January 7, 2014, natural gas fired generators accounted for 47 percent of the forced outages; coal-fired generators accounted for 34%.[33] If equipment is frozen, it does not matter if there is fuel onsite.[34]

The RTO/ISO markets reacted to the lessons learned in the Polar Vortex, as the RTO/ISOs have learned from other events, including transmission outages caused by trees or squirrels or hurricanes. For example, a hurricane or substantial rain/flooding event can make coal fuel stored onsite unusable, as occurred during the recent Hurricane Harvey where the coastal W.A. Parish

[32] *Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events*, PJM Interconnection, May 8, 2014.

[33] *PJM Analysis* at 25.

[34] It is also important to note that, just because there is fuel on site does not mean that fuel would remain usable in the event of an adverse weather event.

coal plant was forced to run on natural gas, rather than coal, because its coal was too saturated with rainwater. According to NRG Energy, "[t]he historic rainfall and flooding presented unique challenges for our power plant operations and personnel," NRG said. "The external coal pile at W.A. Parish became so saturated with rainwater that coal was unable to be delivered into the silos from the conveyer system. In response to that situation, we transferred W.A. Parish Unit 5 and Unit 6 to natural gas rather than coal as the fuel source. These units haven't used natural gas for operational purposes since 2009."[35]

As a result of the Polar Vortex and other events, PJM implemented its capacity performance proposal in an effort to ensure that generation is available to provide capacity and respond when the PJM system is stressed. As a result of these RTO-wide improvements, for the winter 2016-2017 period, PJM found that there were no reliability issues identified for base and N-1 analysis.[36] The stakeholder process and Commission initiatives successfully addressed a potential issue without undue delay and with deliberate consideration of the issues.

B. DOE Ignores Innovation and Non-Generator Factors that Aid Grid Resiliency

As noted in detail above, competitive wholesale markets have allowed for innovation. Wholesale market rules in the RTO/ISOs have allowed retail suppliers to offer innovative products and services to retail customers. The Commission must not ignore innovation in the markets that can, and have, contributed to reliability and resiliency. DOE's NOPR, however, would do just that. The NOPR focuses solely on one category of generation – that which stores fuel onsite. It ignores many other features of the wholesale market that aid in grid resiliency.

[35] "Harvey's rain caused coal-to-gas switching: NRG Energy" S&P Platts Global, September 27, 2017, https://www.platts.com/latest-news/electric-power/houston/harveys-rain-caused-coal-to-gas-switching-nrg-21081527.

[36] *See Winter Operations and Market Performance*, presentation by Michael Bryson, FERC Winter Operations Panel, October 20, 2016.

For example, the increasing use of demand response, used in emergencies and for economic reasons, brings substantial and quantifiable benefits to the resiliency of the grid. Demand response is fast acting and has shown to be effective.[37] As further integration of demand response resources occurs, demand response will likely grow and continue to reduce the need for generation. Other enhancements including, better dispatch techniques and procedures, improved communications, tree trimming and related NERC-related reliability requirements and new transmission infrastructure.

An important factor to keep in mind is that with innovation comes technological improvements in all facets of energy development. Technological improvements and innovation is not limited to improved RTO/ISO services, but arise in the generator area as well. As the DOE Staff Report notes, much of the coal generation retired over the last few years was generation built between 1940-1960, prior to implementation of the Clean Air Act. It would be unjust and unreasonable to subsidize through cost-based rates generation that has met or exceeded its operating life, especially when competitive market forces incent new generation to be built that is cleaner and more efficient – even if that generation is coal-fired. Supporting a cost-based recovery methodology as broad as that proposed by DOE in the NOPR would incentivize generation that the competitive market would have replaced by more efficient generation that takes environmental concerns and other externalities into account.

Finally, DOE's NOPR only addresses one grid resiliency concern – the availability of generation when fuel sources are interrupted. It does not address any other resiliency issue – something that a comprehensive analysis of grid resiliency would.

[37] *Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events*, PJM Interconnection, May 8, 2014.

C. DOE's NOPR Would Harm Market Participants and Customers

The remedy proposed in DOE's NOPR, if implemented, would harm the wholesale competitive capacity and energy markets, lead to increased prices and ultimately harm the consumers the Federal Power Act is enacted to protect. Current capacity markets in PJM, ISO-NE, NYISO and MISO utilize auctions in some form in order to select generation to provide capacity. The proposal, which may remove from the competitive marketplace a significant amount of generation to be priced on a traditional cost-of-service basis, would not adversely affect the competitive market. The Commission would be, in effect, re-regulating a large segment of the generation market.[38]

ICF estimates that the "lower bound" of the NOPR will have an annual cost of $800 million ($6.6 billion net present value at a 7% discount rate) assuming high natural gas prices, normal energy demand, and that unit's fixed operations and maintenance costs are partially recovered in the market. The "upper bound" cost of $3.8 billion ($31 billion NPV) is based on an expectation of low gas prices and low energy demand with a minimum offer price rule for all regulated units.[39]

These substantial costs will be passed along to customers in some fashion. Note that DOE's NOPR does not contain any proposals on cost allocation – who will pay, how the costs will be recovered, etc. Retail suppliers may not be able to pass along these increased costs, unless their contracts permit them to do so. And, if their contracts do allow for a pass-through, it will certainly cause rate shock to consumers.

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[38] *See e.g.* NOPR at 46,945 ("the rule requires the organized markets to establish just and reasonable rate tariffs for the recovery of costs and a fair rate of return").

[39] *ICF Analysis: DOE's NOPR Could Cost Near $4B/Year*, RTO Insider, October 4, 2017, https://www.rtoinsider.com/icf-doe-nopr-76642/

The Commission should not impose a one size fits all regulation without allowing for regional variation and further refinements in the stakeholder process. Each RTO/ISO has unique differences based on geography, market participant make up, size of region and zones, among other things. Stakeholders and the RTO/ISO are knowledgeable about those differences and how a particular rule can be implanted in the RTO/ISO region. The Commission should recognize these differences and permit deviations as it has done in other rulemakings.

D. If the Commission Implements the NOPR, the Commission must Delay Its Effectiveness Until the Later of the Next Forward Capacity Auction and Twelve Months

If the Commission implements the NOPR as proposed by DOE or another final rule addressing resiliency, the Commission must do so prospectively, like it implements all rate design changes. In RTO/ISOs with forward auctions, customers have made their commitments to purchase capacity three years in the future. Market Participants have reasonably relied on the rates, terms and conditions of the auction. RESA members have used the auction prices to price their services to retail customers. This reliance is entirely reasonable. A transition cost-of-service compensation for a broad swath of capacity resources was certainly unimaginable prior to the DOE's NOPR. Competitive retail suppliers who have entered into long-term contracts could not have anticipated such a drastic proposed change to competitive wholesale markets as that proposed by the DOE in the NOPR. Significant changes to the market design would also affect the hedges that market participants have executed in reliance on their market obligations and the risks that existed at the time the hedge was entered.

Implementing the NOPR prior to the start of the next forward three year auction cycle in RTO/ISOs with forward capacity auctions would result in retroactive ratemaking in violation of

FPA Section 206, by changing the rate on file at the time the service was made available.[40] The Commission should send any direction to the RTO/ISOs and require any changes to be effective no earlier than the start of the next three year auction. If the cost recovery mechanism imposed by the Commission as a result of the NOPR does not involve capacity markets, any surcharge or other out of market mechanism implemented must be implemented prospectively, at least thirty-six (36) months after issuance of a final rule, to allow entities such as competitive retail suppliers to plan for and incorporate what could be significant changes to markets into their contractual arrangements.

RESA members have reasonably relied on the current market rules in transacting with the RTO/ISOs. Market certainty, transparency and stability are critically important to the success of competitive wholesale markets in general and RESA members specifically so that they may continue to provide innovative services to retail customers. Their reliance on the rules is reasonable. RESA members follow and participate in stakeholder processes so they are aware of potential changes to RTO/ISO rules. RESA members often enter into long-term (greater than one year) contracts with their customers at fixed prices. Significant changes to market rules or laws make it difficult for RESA members to recover any increase in costs incurred to provide service. As noted above, in some cases, a contract may permit a retail supplier to collect additional costs that result from a change in law. In other cases, the retail supplier may not be able to collect those additional costs. Prospective implementation of new rules is critical to retail suppliers so that they can build the changes (and the additional costs) into their pricing and

[40] *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1989, *modified on reh'g*, 844 F.2d 879 (D. C. Cir. 1989; *Transwestern Pipeline Company v. FERC*, 897 F.2d 570, 577 (D. C. Cir. 1990) ("the filed rate doctrine prohibits the Commission from imposing a rate different from one on file at the time gas is sold or service is made available. It allows purchasers of gas to know in advance the consequences of the purchasing decisions they make. . . ."

services. In this case, if the Commission's proposal results in significant contraction of wholesale markets, retail suppliers may not be able to offer the same innovative services or offer features that they've offered in the past.

Finally, if the Commission implements the DOE NOPR as proposed, the Commission must require each RTO/ISO to separately identify by line item on invoices amounts billed that are associated with the costs of compliance with the rule developed. Transparency is critical so that the industry can understand the cost impact of the proposal, and allow competitive retail suppliers to identify and, if permitted recover the costs from customers. It is also important for retail suppliers to be able to identify the cost impact of any change mandated by the Commission.

III. MOTION TO INTERVENE

In accordance with Rule 214 of the Commission's regulations, RESA has shown an interest in this proceeding that cannot be represented by any other party. RESA respectfully requests that the Commission grant its motion to intervene in this proceeding.

IV. CONCLUSION

In sum, the DOE NOPR should be rejected. DOE has not shown that the existing rates are unjust and unreasonable and has simply not shown that its proposed remedy is addressing a real problem with grid resiliency. The DOE NOPR, if implemented, would have significant adverse effects on competitive wholesale markets and market participants such as RESA members. Finally, if the Commission implements the NOPR in some fashion, no changes should take effect until the start of the next three year forward capacity auction cycle, but in no event no sooner than one year from the issuance of a final rule.

WHEREFORE, RESA respectfully requests that the Commission reject the NOPR.

Respectfully submitted,

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