

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Grid Reliability and Resilience Pricing

Docket No. RM18-1-000

**COMMENTS OF THE
TRANSMISSION ACCESS POLICY STUDY GROUP**

In response to the Commission’s October 2, 2017 Notice Inviting Comments¹ and the Office of Energy Policy and Innovation’s Request for Information,² the Transmission Access Policy Study Group (“TAPS”) submits these comments on the Notice of Proposed Rulemaking issued by the Secretary of Energy, as revised by the Commission’s Federal Register Notice.³

The NOPR proposes that the Commission, in exceptionally short order, significantly revamp the compensation of certain generators by Independent System Operators and Regional Transmission Organizations (collectively, “RTOs”). The NOPR asks the Commission to act to protect the resilience of the Bulk Power System (“BPS”) without defining what resilience is, without showing that there is a problem that needs fixing, without clearly explaining the proposed solution, and without providing the industry with meaningful opportunity to analyze and comment on the NOPR. Indeed,

¹ Notice Inviting Comments (Oct. 2, 2017), eLibrary No. 20171002-3039, *corrected*, Errata Notice (Oct. 11, 2017), eLibrary No. 20171011-3067 (“Notice”).

² Request for Information (Oct. 4, 2017), eLibrary No. 20171004-3095 (“Staff’s Request for Information”).

³ U.S. Dep’t of Energy, Letter from the Secretary of Energy and Proposal for a NOPR (Sept. 29, 2017), eLibrary No. 20170929-5055 (“Original NOPR”), as revised in version published in the Federal Register, Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (Proposed Oct. 10, 2017) (“NOPR” or “Proposed Rule”). *See* FERC, Notice of Federal Register Publication, (Oct. 11, 2017), eLibrary No. 20171011-3068.

unexplained changes to the proposed regulatory text (which are inconsistent with statements elsewhere in the NOPR) less than two weeks before the due date for comments have left even the scope of the NOPR's application uncertain.

TAPS strongly cautions the Commission against taking rash action on an ill-defined proposal that will have long-term, adverse ramifications for our nation's consumers and businesses. Issuing a rule on this inadequately specified and insufficiently justified NOPR would violate the Commission's express obligations under Section 206 of the Federal Power Act ("FPA"), 16 U.S.C § 824e. Specifically, the NOPR provides no basis to find that existing RTO rates are unjust and unreasonable, and fails to adequately specify the rate determined to be just and reasonable, much less support that determination.⁴ Moreover, the NOPR could impose duplicative charges on Load-Serving Entities ("LSEs") with resources contributing to resiliency, but which are subject to state or local cost-of-service recovery. Compounding these problems, the NOPR proposes that the Commission mandate implementation of RTO rate changes on a schedule that precludes the Commission from determining whether those changes are just and reasonable.

Instead, TAPS urges the Commission to terminate this docket. Potential risks to resiliency could instead be examined from the ground up, clearly identifying the problem to be studied and ensuring that any solution proposed is tailored to address the identified problem in the most cost-effective manner, consistent with the Commission's FPA obligations.

⁴ *Emera Me. v. FERC*, 654 F.3d 9, 30 (D.C. Cir. 2017).

I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities (“TDUs”) (whether municipal, cooperative, or investor-owned utilities) in more than thirty-five states, promoting open and non-discriminatory transmission access.⁵ Representing LSEs entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS has long supported Commission initiatives to form independent RTOs to provide non-discriminatory access and foster the robust generation competition needed to enable LSEs to meet their load-serving obligations reliably and affordably.

TAPS members span the continent, serving load in the eastern RTOs, other RTOs, and in non-RTO regions. They own or have long-term bilateral contracts for the full range of resources, including coal, nuclear, gas, hydro, wind, and solar, reflecting commitments made over decades in accordance with local and state laws and policies. TAPS member municipal and cooperative utilities retain an obligation to serve—even in states that eliminated that obligation for investor-owned utilities. TAPS members have an interest in ensuring that RTO markets respect their traditional, state-authorized business model by recognizing the contribution of self-supply commitments.

⁵ David Geschwind, Southern Minnesota Municipal Power Agency, chairs TAPS’s Board, and Jane Cirrincione, Northern California Power Agency, is Vice Chair. John Twitty is TAPS’s Executive Director.

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II. COMMENTS

A. *The NOPR Does Not Allow for Meaningful Comments or Reasoned Decision-Making*

The NOPR proposes that the Commission take final action within just sixty days from Federal Register publication⁶—much less than the time usually required to complete a rulemaking.⁷ To do so, the Commission has given the public little more than three weeks from issuance (and less than two weeks from publication of the NOPR in the Federal Register) to submit initial comments on the NOPR, and only fourteen days to submit reply comments. That schedule not only denies the public adequate time to comment on the proposal, but also precludes the Commission from engaging in the required reasoned decision-making.

As described in TAPS's October 4, 2017 Answer in Support of Motion for Extension of Time,⁸ particularly in the context of the major change to wholesale

⁶ NOPR at 46,945.

⁷ See, e.g., Exec. Order No. 12,866, § 6(a), 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.”). While the Original NOPR suggests that final action could include adoption of the Proposed Rule as an interim final rule, see Original NOPR at 1, the Commission, by establishing this proceeding and issuing a request for comments on the NOPR, appears to have appropriately ruled out that option.

⁸ eLibrary No. 20171004-5163. On October 11, 2017, the Commission issued a notice denying the

electricity market pricing proposed in the NOPR, TAPS and other trade associations play an important role in presenting the viewpoints of a broad base of stakeholders to the Commission. But truncating the rulemaking process incorrectly elevates speed over substance and has hindered the ability of TAPS and other stakeholders to offer the Commission meaningful input on and analyses of the NOPR, undermining the fundamental value afforded by notice and comment rulemaking.⁹ Nothing in Section 403(b) of the Department of Energy Organization Act, 42 U.S.C. § 7173(b), requires that the Commission compromise its rulemaking processes in this manner; indeed, it expressly mandates that any rulemaking time limits be “reasonable.”

Moreover, the NOPR’s claimed need for speed is highly questionable. As noted in the recent DOE Grid Study,¹⁰ which is repeatedly cited in the NOPR,¹¹ “BPS reliability is adequate today despite the retirement of 11 percent of the generating capacity available in 2002,” and “at the end of 2016, the system had more dispatchable capacity capable of operating at high utilization rates than it did in 2002.”¹² At the June 22, 2017 Reliability Technical Conference, NERC’s President and Chief Executive Office (“CEO”) told this Commission, “I am pleased to report that the state of reliability in North America remains

extension with no explanation. eLibrary No. 20171011-3036.

⁹ *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 528 (D.C. Cir. 1982) (“[t]he process of notice and comment rule-making . . . is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules.”) (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976) (en banc)).

¹⁰ U.S. Dep’t of Energy, *Staff Report to the Secretary on Electricity Markets and Reliability* (Aug. 2017), https://energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf (“DOE Grid Study”).

¹¹ See, e.g., NOPR at 46,942-43.

¹² DOE Grid Study at 63 (citing NERC’s June 2017 State of Reliability Report, http://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/SOR_2017_MASTER_20170613.pdf (“2017 State of Reliability Report”)).

strong, and the trend line shows continuing improvement year over year.”¹³ In fact, a “key finding[]” of NERC’s 2017 State of Reliability Report is “BPS resiliency to severe weather continues to improve.”¹⁴ And as the DOE Grid Study recognizes,¹⁵ NERC has various initiatives underway to evaluate and address the potential impacts of the nation’s changing resource mix. If anything needs to be done, there is time to do it right and in accordance with the Commission’s legal obligations.

The problems created by the NOPR’s unreasonable deadlines are compounded by its lack of details and its confusing, internally contradictory statements. As discussed below, the NOPR lacks the specificity necessary to permit interested parties or the Commission to analyze the Proposed Rule and assess its appropriateness and impact. As a result, no final rule adopted in anything close to the sixty-day period identified by the Secretary could meet the Commission’s obligations, as an independent agency, under the FPA and the Administrative Procedure Act (“APA”).

B. The NOPR is Incomprehensibly Vague and Does Not Allow for Meaningful Analysis

Pursuant to the APA, an agency is required to publish a notice that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”¹⁶ The NOPR lacks sufficient clarity and particularity necessary to enable stakeholders to comment on the NOPR in a meaningful and informed manner.

¹³ NERC, *Remarks of Gerry Cauley, President and CEO North American Electric Reliability Corporation* at 1 (June 22, 2017), <https://www.ferc.gov/CalendarFiles/20170717080645-Cauley,%20NERC.pdf>.

¹⁴ 2017 State of Reliability Report at vi. *See also id.* at 5-6, 13 (analysis of data demonstrates “better resilience than in prior years”).

¹⁵ DOE Grid Study at 64, noting NERC working group and task force efforts underway concerning Essential Reliability Services, Integration of Variable Generation, and Distributed Generation.

¹⁶ 5 U.S.C. § 553(b)(3).

1. The NOPR Fails to Define the Problem it Seeks to Address

Establishing a need for reform is a necessary predicate to satisfying the Commission's obligation under the FPA to find existing rates unjust and unreasonable before directing changes. In urging the Commission to act expeditiously, the NOPR invokes concerns over resiliency, but does not define that term. As the very first question in Staff's Request for Information highlights,¹⁷ before adopting the drastic solutions proposed by the NOPR, the Commission must clearly define the problem to be addressed.

To the limited extent the Commission has previously touched upon resiliency, it has recognized it as potentially spanning a multitude of hazards.¹⁸ Indeed, the DOE Grid Study itself describes resilience in terms of hardening or recovery.¹⁹ Resiliency could involve a wide range of facility types and operating capabilities, and may vary based on the circumstances, generation mix, and transmission system characteristics of each region. As described in the DOE Grid Study, resilience also includes advance planning for contingencies, interagency coordination, and training exercises to enhance the grid's ability to anticipate, absorb, adapt to, and/or recover from potential events.²⁰ In a 2007 Congressionally-mandated study, the DOE specifically highlighted the contribution of distributed generation to resiliency, noting that it "can improve resilience through its

¹⁷ Staff's Request for Information at 1 ("[w]hat is resilience, how is it measured, and how is it different from reliability? What levels of resilience and reliability are appropriate? How are reliability and resilience valued, or not valued, inside RTOs/ISOs? Do RTO/ISO energy and/or capacity markets properly value reliability and resilience? What resources can address reliability and resilience, and in what ways?").

¹⁸ See, e.g., Physical Security Reliability Standard, Order No. 802, 79 Fed. Reg. 70,069, 70,071 (Nov. 25, 2014), 149 FERC ¶ 61,140, P 21 (2014) ("the Commission will continue to consider ways for industry to best inform the Commission of its current and future resiliency efforts, which could take the form of reports and/or technical conferences to address specific areas of concern (e.g., spare parts, fuel security, and advanced technologies)," *reh'g denied*, 151 FERC ¶ 61, 066 (2015)).

¹⁹ DOE Grid Study at 63.

²⁰ *Id.*

reliance on larger numbers of smaller and more geographically disperse[d] power plants, rather than large, central station power plants and bulk-power transmission facilities.”²¹

Without a clear definition of the problem the NOPR is intended to solve, it is impossible to assess accurately the justness and reasonableness of existing rates, or whether the NOPR’s proposed compensation aimed at a specific set of resources—coal and nuclear, with at least a ninety-day fuel supply on site, that are not supported by cost-of-service regulation—is a reasonable means to address that problem and will produce just and reasonable rates.

2. The NOPR’s Intended Scope is Unclear; Any Further Action should Clearly Exclude CAISO, SPP, and MISO

The Original NOPR was applicable to RTOs with “a day-ahead and a real-time market or the functional equivalent.”²² The version subsequently published in the Federal Register, however, adds a further important qualification: the RTO must also have “energy and capacity markets.”²³ Nothing in the NOPR explains this new restriction, which is also not mentioned in Staff’s Request for Information. Indeed, other parts of the NOPR seem to contemplate compliance by all six Commission-jurisdictional RTOs.²⁴

While, as discussed below, TAPS has serious concerns about the Commission adopting the proposed NOPR, any further action taken should clearly define its scope to

²¹ U.S. Dep’t of Energy, *The Potential Benefits of Distributed Generation and Rate-Related Issues that May Impede Their Expansion, A Study Pursuant to Section 1817 of the Energy Policy Act of 2005* § 7.3 (Feb. 2007), <https://www.ferc.gov/legal/fed-sta/exp-study.pdf>.

²² See Original NOPR, Proposed § 35.28(g)(12)(ii).

²³ NOPR, Proposed § 35.28(g)(10)(ii).

²⁴ See, e.g., NOPR, Part IV.C (describing proposed submission of compliance filings by “each Commission-approved RTO and ISO”), Part VI (estimating burden using six respondents).

exclude the California Independent System Operator Corporation (“CAISO”), Southwest Power Pool, Inc. (“SPP”), and the Midcontinent Independent System Operator, Inc. (“MISO”). The NOPR does not define “capacity market.” However, CAISO and SPP do not have any kind of a capacity market. And while MISO has a *voluntary* capacity market, it does not have a mandatory capacity market like the three eastern RTOs. Significantly, the Commission has to-date expressly excluded MISO from its technical conferences pertaining to capacity markets issues.

For example, the Commission’s September 2013 Technical Conference on Centralized Capacity Markets in Regional Transmission Organizations and Independent System Operators was strictly confined to the three eastern markets.²⁵ The Staff Report that formed the foundation for that conference recognized that mandatory capacity market constructs were developed in regions that have largely deregulated their retail markets, and thereby limited the ability of many LSEs to commit to generation resources on a long-term basis, unlike MISO.²⁶ More recently, as its title makes clear, the Commission similarly excluded MISO from its technical conference in Docket No. AD17-11 on “State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.”

²⁵ See Docket No. AD13-7-000, Transcript of Technical Conference at 4:22-5:8 (Sept. 25, 2013) eLibrary No. 20130925-4009 (noting intent to focus on ISO New England (“ISO-NE”), PJM interconnection, L.L.C. (“PJM”) and New York Independent System Operator, Inc. (“NYISO”) during the technical conference). See also FERC, Docket No. AD13-7-000, Notice Allowing Post-Technical Conference Comments at 1 & n.1, (Oct. 25, 2013), eLibrary No. 20131025-3045 (“the technical conference focused solely on the centralized capacity markets in the ISO-NE, NYISO and PJM regions. Thus, post-technical conference comments should be focused on those regions as well.”). That proceeding is referenced in the NOPR at 46,944 n.28.

²⁶ FERC, *Centralized Capacity Market Design Elements, Commission Staff Report* at 1 (Aug. 23, 2013), <http://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf>.

There is good reason to exclude CAISO, SPP, and MISO from the scope of the NOPR and any future actions arising from it. States in those regions have largely retained the retail obligation to serve, or implemented other mechanisms to assure sufficient capacity; they do not use a mandatory wholesale capacity market to support investment in and maintenance of generation. For example, less than 10% of MISO allows retail choice; the remaining 90%+ is traditionally regulated, and LSEs retain retail service obligations and the associated ability to make long-term capacity commitments, subject to active supervision by state and local regulators.²⁷ This Commission rejected MISO's proposal to adopt an eastern-style mandatory capacity market with minimum offer price rules; it recognized that under MISO's voluntary capacity market, LSEs continue to meet resource adequacy requirements through state-supervised long-term commitments, with the voluntary capacity auction playing only a residual balancing role,²⁸ and no evidence of price suppression.²⁹ The Commission also very recently rejected MISO's efforts to establish an eastern-style capacity market in the small portion of MISO that has at least partially deregulated at retail.³⁰

LSEs in SPP similarly retain the obligation to serve, subject to state and local regulatory supervision. SPP has no capacity market.

In CAISO, which likewise does not have an RTO-administered capacity market, the state of California and Local Regulatory Authorities actively manage the resource

²⁷ MISO, Docket No. ER17-284-000, Prepared Direct Testimony of Richard Doying at 3, Tab A (Nov. 1, 2016), eLibrary No. 20161101-5205.

²⁸ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229, PP 43, 46-53 (2015), review pending sub nom. *NRG Power Mktg., L.L.C. v. FERC*, No. 16-1027 (D.C. Cir. docketed Jan. 19, 2016).

²⁹ *Id.* PP 105-111.

³⁰ *Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,128 (2017).

mix. LSEs are required to secure sufficient capacity to meet load-serving obligations, reflecting California's strong preference to procure capacity needs through a bilateral market that can include LSE-owned generation.³¹

Especially given the NOPR's proposal to exclude from eligibility for compensation generation "subject to cost of service rate regulation by any state or local regulatory authority,"³² extending the NOPR's applicability to CAISO, SPP, and MISO would serve only to undermine the predominant regulatory model of those regions and this Commission's policy in favor of long-term contracting.³³ Generators choosing not to make such long-term commitments despite ample opportunity³⁴ should not be rewarded with full cost recovery through the RTO, as apparently proposed by the NOPR.

3. The NOPR's Proposal is Otherwise Unclear and Internally Inconsistent

Other fundamental aspects of the NOPR are also unclear. As a result, analysis of the NOPR and its potential impact is frustrated, impeding meaningful comments and precluding reasoned decision-making.

For example, it is not clear whether qualifying resources are to be compensated only when they are dispatched, or in some other manner.³⁵ The NOPR would require

³¹ CAISO, *Fifth Replacement FERC Electric Tariff*, Appendix A and § 40, https://www.caiso.com/Documents/ConformedTariff_asof_Jul10_2017.pdf; see also Cal. Pub. Util. Code § 380.

³² NOPR, Proposed § 35.28(g)(10)(i)(E).

³³ See Part II.C below.

³⁴ 153 FERC ¶ 61,229, P 110 (merchant generators have the opportunity to sell their capacity to LSEs through long-term bilateral contracts; those merchants that elect not to do so, and instead offer capacity in the voluntary auction, may recover more or less than through cost-of-service regulation).

³⁵ See NOPR, Proposed §§ 35.28(g)(10)(iii)(A)(2), 35.28(g)(10)(iii)(B), 35.28(g)(10)(iv).

consistency between day-ahead and real-time energy markets,³⁶ but also appears to adopt two other opposing schemes of compensation, proposing that resiliency resources be both “fully compensated for the benefits and services [they] provide[] to grid operations,”³⁷ and also that “each eligible resource recover[] its fully allocated costs and a fair return on equity.”³⁸ Is the intent that qualifying resources be entitled to recovery of more than their fully allocated costs, including a return on equity? The NOPR offers no justification for why that might be just and reasonable. Nor is there any explanation of whether or how these revenue streams would take account of compensation received by such generators in the RTO markets (capacity, energy, ancillary services) or outside the markets (e.g., from state programs providing compensation for particular generator attributes).

And is it the intent to fully support qualified nuclear and coal units indefinitely, without regard to age or efficiency, and without any assessment of the need for such resources in a particular area? What does it mean for resources to be fully compliant with federal, state and local environmental rules?³⁹ Would the compensation to be provided under the NOPR include the cost of modifications to make a non-compliant unit compliant? Could existing plants be modified or re-powered, or new plants be constructed, to qualify for the NOPR’s compensation?⁴⁰

It is also unclear whether compensation requires meeting specific requirements for bidding (e.g., requirements to offer into the markets as a price-taker) or performance

³⁶ NOPR, Proposed § 35.28(g)(10)(ii).

³⁷ NOPR, Proposed § 35.28(g)(10)(iii)(B).

³⁸ *Id.*

³⁹ NOPR, Proposed § 35.28(g)(10)(i)(D).

⁴⁰ *See* Staff’s Request for Information at 2.

(e.g., penalties or disqualification in the event a resiliency unit fails to respond when called upon). What happens as the generator uses its coal pile so that it no longer has a ninety-day supply on site, as required by the Proposed Rule?⁴¹ What happens when a qualifying plant is on a scheduled or unscheduled outage (e.g., for refueling a nuclear plant)? How are mine-mouth plants treated?

Staff's Request for Information highlights a myriad of additional questions as to how the compensation directed by the NOPR would work.⁴² Without knowing the answers, it is impossible for stakeholders, the public, and the Commission to assess and comment on whether existing compensation in RTO markets is unjust and unreasonable, and whether the Proposed Rule appropriately addresses the deficiency, consistent with the Commission's statutory responsibilities.

4. The NOPR Fails to Account for the Potential for Unintended Consequences

TAPS believes that RTO-administered energy and ancillary service markets are generally working well, consistent with the Commission's obligation to ensure the lowest reasonable cost to consumers.⁴³ TAPS supports just and reasonable pricing, and has to some degree supported or not opposed certain aspects of the Commission's price formation proposals that have been adopted or remain pending before the Commission.⁴⁴

⁴¹ See NOPR, Proposed § 35.28(g)(10)(i)(C).

⁴² Additional unaddressed concerns include when and how environmental compliance prerequisites (referenced in proposed Section 35.28(g)(10)(i)(D)) are measured, and how the ability to provide essential reliability services (referenced in proposed Section 35.28(g)(10)(i)(B)) is considered (e.g., is a resource capable of providing some, but not all, essential reliability services eligible under the rule?).

⁴³ See, e.g., TAPS, Docket No. AD14-14-000, Responses to Staff Questions at 3, 9 (Mar. 6, 2015), eLibrary No. 20150306-5257.

⁴⁴ For instance, TAPS did not oppose the Commission's proposal to settle energy transactions in its real-time markets at the same time interval it dispatches energy and to settle operating reserves transactions in its real-time markets at the same time interval it prices operating reserves (see TAPS,

TAPS has also supported Commission proposals to address the changing resource mix.⁴⁵ TAPS did so, however, after fully evaluating the proposals and their consequences.

The timing for, and lack of clarity in, the NOPR makes such evaluation impossible here. But it seems pretty clear that as proposed, the NOPR could have significant adverse impacts on RTO energy and ancillary service markets, increasing the electricity bills of consumers and businesses, perhaps by billions of dollars,⁴⁶ and complicating the seams between RTOs.

The NOPR's potential impact on federal policies and state regulation is also a concern. For example, the Commission favors and has sought to support long-term bilateral power supply commitments, which have proven to be the best way to provide long-term cost recovery for merchant generators consistent with competitive markets.⁴⁷ In Order No. 719, the Commission recognized that "long-term power contracts are an important element of a functioning electric power market," allowing buyers and sellers to manage risk, and "improv[ing] price stability, mitigat[ing] the risk of market power

Docket No. RM15-24-000, Comments (Nov. 30, 2015), eLibrary No. 20151130-5267), and while questioning the need for generic action and urging accommodation of regional variation, TAPS was generally supportive of the NOPR in *Uplift Cost Allocation and Transparency in Markets Operated by Regional Transmission Organizations & Independent System Operators*. See TAPS, Docket No. RM17-2-000, Comments (Apr. 4, 2017), eLibrary No. 20170410-5213.

⁴⁵ For example, TAPS has expressed its support of most elements of the Commission's pending proposal to ensure that as the nation's resource mix continues to evolve, balancing authorities have adequate primary frequency response to maintain grid reliability. See Docket No. RM16-6-000, Comments of the American Public Power Association, Large Public Power Council, and Transmission Access Policy Study Group (Jan. 24, 2017), eLibrary No. 20170124-5139.

⁴⁶ For example, economic consulting firm ICF International preliminarily projects that the Proposed Rule could cost consumers an additional \$4 billion annually. See Rich Heidorn Jr., *ICF Analysis: DOE NOPR Cost Could Near \$4B/Year*, RTO Insider, Oct. 4, 2017, <https://www.rtoinsider.com/icf-doe-nopr-76642/>.

⁴⁷ See TAPS, Docket No. AD17-11-000, Post-Technical Conference Comments at 5-7 (June 22, 2017), eLibrary No. 20170622-5149; TAPS, Docket No. AD13-7-000, Post-Technical Conference Comments at 7-8 (Jan. 8, 2014), eLibrary No. 20140108-5184.

abuse, and provid[ing] a platform for investment in new generation and transmission.”⁴⁸

The Commission therefore supplemented earlier steps it had taken to foster long-term contracting.⁴⁹

The NOPR, however, could significantly undermine that policy by eliminating the incentives for qualifying generators to seek out, renew, or even maintain long-term arrangements. Generators eligible for compensation under the NOPR would have no incentive to improve their performance, or to compete for long-term contracts with LSEs. Indeed, such generators might even seek early termination of existing long-term contracts in order to secure cost-based compensation (and perhaps more) under the NOPR instead. Absent protection from mandatory double payment (*see* Part II.C, below), LSEs would likewise have a strong incentive to seek early termination of such long-term power supply arrangements.

The NOPR may also undermine state regulation by encouraging LSEs currently subject to cost-of-service regulation to restructure their holdings of otherwise qualifying resources as merchant generation in order to capture the compensation—whatever that might be—provided by the Proposed Rule.

In addition, the NOPR could interfere with existing and impending regional measures to address fuel security and generator performance. Without addressing the reasonableness of such programs, we note that both ISO-NE and PJM have implemented “Pay for Performance” programs that use incentives and penalties with the goal of

⁴⁸ Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100, 64,133 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281, P 278 (2008), *corrected*, 126 FERC ¶ 61,261 (2010), *on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

⁴⁹ *Id.* PP 280, 301.

assuring that all “resources that clear the market and assume a Capacity Performance obligation . . . perform during periods of system stress, with a failure to do so resulting in the loss of their capacity revenues.”⁵⁰ These programs also provide additional compensation for resources that over-perform in times of system stress.⁵¹ Both ISO-NE and PJM will apply their Pay for Performance rules to generators’ real-time performance in the 2018-2019 Capacity Commitment Period beginning June 1, 2018.⁵² Given that these programs have not yet taken full effect, and may provide payments that overlap with the characteristics compensated under the NOPR, the potential is high that the NOPR will unduly interfere with market rules that have already had the benefit of regional stakeholder input and vetting.

Indeed, to the extent a resource retirement poses a threat to the grid, the eastern RTOs already have in place programs to retain generating units the RTO determines are needed for reliability.⁵³ ISO-NE and PJM currently provide for cost-based compensation of capacity resources the RTO has designated as “must-run” for reliability purposes,⁵⁴

⁵⁰ *PJM Interconnection L.L.C.*, 155 FERC ¶ 61,157, P 33 (2016), *petition denied sub nom. Advanced Energy Management All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017); *see also ISO New England Inc.*, 147 FERC ¶ 61,172, PP 2-3 (2014), *reh’g denied*, 153 FERC ¶ 61,223 (2015), *appeal pending sub nom. NEPGA v. FERC*, No. 16-1023 (D.C. Cir. docketed Jan. 19, 2016) (describing problems ISO-NE intended to address when it proposed its Pay for Performance program). In ISO-NE, the Pay for Performance program will replace the currently-effective Winter Reliability Program—an interim, stop-gap initiative compensating resources providing firm fuel service and demand response resources that respond in times of system stress in order to address reliability concerns during the winter months. *See ISO New England Inc.*, 152 FERC ¶ 61,190, P 45 (accepting tariff provisions that implement a winter reliability program to help ensure reliability during the winter seasons prior to Pay for Performance being implemented in 2018), *reh’g denied*, 154 FERC ¶ 61,133 (2016).

⁵¹ *See generally* 155 FERC ¶ 61,157; 147 FERC ¶ 61,172.

⁵² 147 FERC ¶ 61,172, P 23.

⁵³ Other RTOs have such programs, as well. *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,237, PP 9-10 (2012), *order on reh’g*, 153 FERC ¶ 61,313 (2015) (describing MISO’s System Support Resource program).

⁵⁴ *See* ISO-NE, *Transmission, Markets, and Services Tariff* §§ III.13.2.5.2.5.1, III.13.2.5.2.5.2, https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_3/mr!_sec_13_14.pdf (providing for

and NYISO has proposed to revise its tariff to provide a similar process.⁵⁵ The NOPR provides no explanation of how its proposed new compensation scheme relates to existing RTO compensation for needed resources at risk of retiring, much less why the existing compensation is unjust and unreasonable.

In short, as these examples highlight, the NOPR does not begin to identify the potential for significant unintended consequences. Particularly when combined with the truncated process directed by the NOPR, this failure denies stakeholders a meaningful opportunity to understand and comment on the impact of the Proposed Rule, thereby precluding reasoned decision-making by the Commission.

C. The Proposed Rule Would Impose Duplicative Charges on LSEs with Resiliency Resources Subject to State or Local Cost-of-Service Recovery

While the NOPR leaves much undefined, it is very clear the NOPR would disqualify resources subject to state or local cost-of-service recovery from receiving compensation for the resiliency contributions of their generation to the system.⁵⁶ It does so regardless of the fact that those resources may provide comparable contributions to resiliency and face similar economic challenges. If, nevertheless, the Commission issues a final rule based on this NOPR, any such rule should avoid punishing those market participants that bear the cost of their own resilient resources by requiring them to

cost recovery of an existing generating capacity resource whose retirement bid into the capacity market is rejected for reliability reasons); *see generally* PJM, *Open Access Transmission Tariff* § V, <https://www.pjm.com/directory/merged-tariff/oat.pdf> (providing an “Avoidable Cost Credit” to generators needed to maintain system reliability and electing to remain online past the date specified in the resource’s retirement notice).

⁵⁵ NYISO has proposed a reliability must-run process, approval of which is still pending with the Commission in Docket Nos. ER16-120-000 and EL15-37-001.

⁵⁶ NOPR, Proposed § 35.28(g)(10)(i)(E).

shoulder a share of the full cost-of-service of uneconomic “competitive” resilient generators as well.

TAPS members have ownership in or long-term purchases from resources that, but for the NOPR’s exclusion of generators subject to cost-of-service regulation, would be eligible for compensation under the NOPR. For example, while we urge above that the Commission clarify that the Proposed Rule would *not* apply to CAISO, SPP, or MISO, we note that TAPS members in MISO own or have long-term purchases from coal and nuclear units that would qualify for compensation under the NOPR but for the cost-of-service exclusion.⁵⁷

To avoid undue discrimination and highly unjust and unreasonable rates, any rule directing compensation for resilient resources should enable LSEs to self-supply their share of such resources,⁵⁸ or otherwise exempt those LSEs from shouldering any portion of the costs to support uneconomic “competitive” resilient generators. If not, those LSEs and the consumers and businesses they serve would effectively double-pay for resiliency, bearing far more than their fair share of such costs. To avoid such plainly unjust and unreasonable results, the Commission has long provided for self-supply of required services.⁵⁹

⁵⁷ For example, TAPS member WPPI Energy (“WPPI”) has an ownership interest in Minnesota Power’s Boswell Unit #4 and (with TAPS member Madison Gas and Electric) an ownership interest in WE Energies’ Elm Road Generating Station units, each of which would meet the ninety-day on-site fuel supply requirement. In addition, WPPI has a long-term contract for a portion of NextEra’s Point Beach nuclear plant.

⁵⁸ Given the broad scope of the cost-of-service bar to compensation under the NOPR, LSEs should also be permitted to satisfy self-supply by demonstrating that their other resources provide a comparable contribution to resiliency. For example, an LSE should have the opportunity to demonstrate that it has made an equivalent contribution to resiliency by its investment in or long-term purchase from other resources (e.g., dual fuel (gas/oil with storage); geothermal).

⁵⁹ *See, e.g.*, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,

D. The Implementation Schedule Proposed in the NOPR is Unworkable

Even assuming that adoption of the NOPR were reasonable and otherwise consistent with the Commission's statutory obligations, the associated compliance and implementation timeframes proposed by the Secretary would violate the Commission's FPA obligations. Given the complexity of the RTO-administered markets, it will take significant time for RTOs to figure out how to implement any rule issued in this proceeding, particularly given the NOPR's lack of detail and confusing, contradictory language. Implementation could require significant changes to resource commitment and dispatch, how markets prices are set, and market settlement. The DOE's proposed fifteen days for compliance filings are simply insufficient for RTOs to develop any compliance plan, let alone one that is just and reasonable. The NOPR's accelerated compliance timeline would require RTOs to forgo entirely development of compliance proposals through their stakeholder processes, resulting in rushed, inferior proposals that lack meaningful input from and vetting by states and stakeholders, thereby spurring litigation and uncertainty.

The proposed implementation of RTO compliance proposals fifteen days thereafter also violates the FPA. Any compliance filings submitted by relevant RTOs in response to the NOPR will be made under FPA Section 206, and therefore cannot be

Order No. 888-A, 62 Fed. Reg. 12,274, 12,305 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, at 30,228 (1997) (discussing self-supply of reactive support by transmission customers), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Allegheny Power Sys., Inc.*, 80 FERC ¶ 61,143, at 61,542 (1997) (amount of Reactive Supply Service required to be purchased by the transmission customer can be reduced by the customer's own provision of its reactive supply needs), *reh'g denied*, 85 FERC ¶ 61,235 (1998).

made effective until after a Commission order approving the compliance filing as just and reasonable.⁶⁰ The proposed fifteen-day implementation period forecloses any opportunity for the Commission to make such a finding after noticing the filings and affording the usual time for comments and protests. As a result, potentially drastic market changes would go into effect, and what are sure to be significant costs would be allocated to and recovered from ratepayers with little, if any, Commission scrutiny. The Commission has never before abdicated its obligations under the FPA to assure rates are just and reasonable and to protect against excessive prices⁶¹ in this manner, and there is no reason to do so here.

And as a practical matter, it is not clear that RTOs are even capable of implementing the contemplated market changes within the time specified. Substantial software modifications may be needed, and the fully allocated costs to be recovered will also require filings with the Commission, subject to review.

In sum, any implementation process must conform to FPA requirements. The NOPR's proposed implementation schedule does not.

E. The Commission Should Not Adopt the NOPR as a Final Rule; Other, More Appropriate Actions Are Available

Rather than rush to issue a Final Rule based on an insufficient NOPR, the only “final action” on the NOPR that the Commission should take is to terminate this docket.

⁶⁰ See *Midwest Indep. Sys. Operator, Inc.*, 137 FERC ¶ 61,212, P 37 (2011) (subsequent history omitted) (distinguishing between filings made in compliance with a Final Rule pursuant to Section 206 and general tariff filings made under FPA Section 205, 16 U.S.C. § 824d); see also, *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-95 (D.C. Cir. 1984) (explaining that a compliance rate filed pursuant to FPA Section 206 does not take effect until the Commission accepts the compliance rate); *Pub. Serv. Co. of N.M v. FERC*, 832 F.2d 1201 (10th Cir. 1987) (same).

⁶¹ *FERC v. EPSA*, 136 S. Ct. 760, 764, 781 (2016).

Any Commission concerns that its jurisdictional electricity markets may not be accurately pricing generation resources necessary to maintain the resiliency of the BPS could more appropriately be addressed by better defining potential issues and developing a clear picture of where gaps or deficiencies exist. For example:

- The Commission could direct each of the three affected RTOs (PJM, NYISO, and ISO-NE) to evaluate resiliency issues in its region and report to the Commission regarding what resilience means for that region (taking into account relevant state definitions), and where potential resiliency risks exist that are unaddressed by the RTO or by the states within its footprint. Those RTOs could also be directed to report on efforts to-date to measure resiliency and evaluate the sufficiency of compensation for needed resiliency attributes, as well as on existing utility practices and RTO programs already underway to address resiliency issues.
- The Commission could hold regional technical conferences to investigate resiliency issues in each of the three affected regions.
- The Commission could direct its staff to conduct workshops and develop whitepapers to develop a definition of resiliency; develop methodologies to identify resiliency needs; and explore ways to address such needs, including by identifying any existing gaps in generator compensation.

In the event that these baseline problem-definition efforts identify resiliency issues that need to be addressed, the Commission could consider further action, e.g., issuing a notice of inquiry to explore and assess potential solutions.

CONCLUSION

The Commission should not adopt the Proposed Rule within sixty days as contemplated by the NOPR. Nothing in Section 403 of the Department of Energy Organization Act would support, much less require, such unlawful action by this Commission, which is entrusted with carrying out its FPA responsibilities as an independent agency, consistent with the APA. The Commission should terminate this docket. Any further evaluation of potential resiliency issues in the three eastern RTOs could be pursued by initiating steps to understand and define those issues and, if then

warranted, exploring solutions targeted at addressing the issues in a manner that ensures just, reasonable, and not unduly discriminatory or preferential rates.

Respectfully submitted,

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