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October 23, 2017

Submitted Via Electronic Mail

Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Proposed Grid Resiliency Pricing Rule, Docket No. RM18-1-000

Dear Commissioners Chatterjee, LaFleur, and Powelson:

The Green Energy Institute at Lewis & Clark Law School respectfully urges the Federal Energy Regulatory Commission (FERC) to refrain from adopting the proposed Grid Resiliency Pricing Rule,¹ which represents an unprecedented attempt to distort competition within the nation's wholesale electricity markets and arbitrarily mandate preferential treatment of generating resources powered by coal and nuclear fuels.

In the proposed rule, the U.S. Department of Energy (DOE) urges FERC to impose rules on Regional Transmission Organizations and Independent System Operators (RTO/ISOs) to entitle the owners of eligible coal-fired and nuclear generating units to full cost recovery and a guaranteed rate of return on power sold through competitive wholesale markets. The proposed imposition of such cost recovery provisions on specific classes of generators participating in the wholesale power markets conflicts with the Federal Power Act's (FPA) mandate that all wholesale electricity rates be "just and reasonable." If FERC chooses to adopt the proposed rule, it would introduce distortions into wholesale markets that would ultimately require consumers to over-compensate a small subset of corporations for power produced by inefficient generating resources.

The FPA grants FERC exclusive authority to regulate wholesale electricity sales and directs FERC to ensure that wholesale power rates are "just and reasonable" and not unduly discriminatory or preferential.² In accordance with these directives, FERC has authorized

¹ Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (proposed Oct. 10, 2017) (to be codified at 18 C.F.R. pt. 35).

² Fed. Power Act § 206(a), 16 U.S.C. § 824e(a) (2012).

RTO/ISOs to establish competitive wholesale power markets through which power suppliers sell their output for market-based rates that are presumed “just and reasonable” so long as no market participants exercise significant market power over other participants. The DOE’s proposed rule aims to give certain market participants a competitive advantage over other participants, which would jeopardize the presumption that market-based rates are just and reasonable. The proposed rule would also impose an undue preference for certain resources based on arbitrary characteristics, and would thus discriminate against other classes of resources selling power through the wholesale markets. In its Notice of Proposed Rulemaking (NOPR), DOE asserts that certain characteristics, such as an ability to store 90 days of fuel on site, are necessary to preserve reliability and resiliency in the power grid. However, the preamble to the proposed rule fails to provide sufficient factual support for this assertion, and the NOPR fails to reference findings made by reputable institutions that contradict the claims presented by DOE.

The Green Energy Institute’s comments discuss our opposition to the proposed rule. First, Part A explains that the owners of generating resources eligible for cost-plus rates under the proposed rule are already entitled to earn “just and reasonable” market-based rates for power sold through the RTO/ISO-managed wholesale markets, and explains that reductions in competitiveness resulting from natural market forces do not equate to a lack of access to just and reasonable rates under the FPA. Part B describes how the proposed rule is unduly preferential because it would disproportionately benefit four individual corporations that retain highly concentrated ownership of the nation’s coal and nuclear power plants, and then describes how the proposed rule is unduly discriminatory against resources that have been shown to support reliability and resiliency but do not meet the eligibility requirements presented in the proposed rule. Part C discusses how the proposed rule would result in unjust and unreasonable wholesale rates by overcompensating coal and nuclear power plants for their output and exerting anti-competitive pressure on the market that would likely suppress rates for power produced by non-eligible resources. Part D explains that the proposed rule would likely have a significant impact on the quality of the human environment, and thus requires an environmental assessment in accordance with the National Environmental Policy Act. Part E explains that the proposed rule fails to provide an adequate opportunity for meaningful public input as required by the Administrative Procedure Act and the Department of Energy Organization Act because the proposed rule imposes unreasonable time limits for public participation and fails to provide an adequate factual basis for the proposal or an adequate explanation of how the proposed rule will actually support grid reliability and resiliency.

A. Owners of Eligible Facilities are Already Entitled to Just and Reasonable Rates

The proposed rule directs FERC to exercise its authority under sections 205 and 206 of the Federal Power Act (FPA) to establish “just and reasonable” rates for wholesale electricity produced by generating resources with specific characteristics. However, the proposal fails to adequately establish that current regulatory requirements are preventing these generating resources from receiving just and reasonable rates for the power they produce.

Sections 205 and 206 of the FPA direct FERC to ensure that wholesale power rates, along with the rules and practices “affecting” such rates, are just and reasonable and not unduly

discriminatory or preferential.³ In recent decades, FERC has transitioned away from cost-of-service based wholesale ratemaking and instead allowed utilities to participate in competitive wholesale markets. Within the competitive wholesale markets subject to the proposed rule, FERC presumes that market-based rates are just and reasonable so long as neither buyers nor sellers possess significant market power. The Commission and the independent system operators (ISOs) and regional transmission organizations (RTOs) it regulates have adopted rules and regulations to prevent market participants from exercising significant market power and monitor for market manipulation.⁴ Therefore, absent some form of distortion within the market, the wholesale rates earned by an electric generating resource located within a FERC-approved RTO or ISO are presumed “just and reasonable” under the FPA.

Competition within wholesale markets encourages market participants to operate efficiently and provide service at affordable prices. To encourage competition, as the Supreme Court recently noted, FERC has worked to “to break down regulatory and economic barriers that hinder a free market in wholesale electricity.”⁵ Within the wholesale markets managed by the RTOs and ISOs, market prices are established through supply and demand and thus should cover suppliers’ marginal costs.⁶ If supply exceeds demand, generating resources that operate less efficiently or have higher operating costs may have difficulty selling their output. This does not mean that these suppliers are prevented from receiving just and reasonable rates for their output; the FPA’s “just and reasonable” requirement does not mandate or guarantee that all market participants will earn a profit. As the Supreme Court has repeatedly held, regulation does not ensure that a regulated business will make a profit, and just and reasonable rates cannot be expected to “restore values that have been lost by the operation of economic forces.”⁷

While it is true that many inefficient, high-cost power plants have retired in recent years or are scheduled to retire in coming years, these retirements are the result of natural economic forces. Coal and nuclear power plants are generally less efficient, more expensive to operate, and subject to higher fuel costs than other generating resources, such as natural gas-fired power plants. As a result, these plants have become less economically competitive in wholesale markets. The DOE’s technical grid study found that a majority of coal plants that retired between 2010 and 2016 were inefficient (i.e. had higher heat rates than non-retiring plants), operated with a capacity factor below 50%, and were older than the remaining coal fleet, with an average age of 54 years.⁸ As a result, these plants were less economically competitive than other generating resources and were therefore dispatched less frequently than other resources.⁹ According to one

³ *Id.* §§ 205, 206, 16 U.S.C. §§ 824d(a), 824e(a).

⁴ *See, e.g.,* Montana Consumer Council v. FERC, 659 F.3d 910, 919 (D.C. Cir. 2011) (“By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.”)

⁵ FERC v. Electric Power Supply Ass’n, 136 S.Ct. 760, 768 (2016) (quoting Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 536 (2008)).

⁶ *See id.* at 768–69.

⁷ *See* Federal Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944); Market St. Railway Co. v. Railroad Comm’n of State of Cal., 324 U.S. 548, 567 (1945).

⁸ U.S. DEPT. OF ENERGY, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY 22–23 (2017), available at https://energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf [hereinafter DOE STAFF REPORT].

⁹ *Id.* at 23.

of the authors of the DOE grid study, these findings indicated that wholesale competition was serving its intended purpose—enabling newer, more efficient, lower-cost generation to outcompete aging, inefficient, higher-cost generation.¹⁰ Thus, the recent coal plant retirements were the result of natural market forces, and not a lack of access to just and reasonable rates.

B. The Proposed Rule is Unduly Preferential and Discriminatory

Section 206 of the FPA prohibits FERC from adopting rules, regulations, or practices that result in “unduly discriminatory or preferential” wholesale power rates.¹¹ The proposed rule contravenes this statutory provision by directing FERC to adopt regulations requiring that RTO/ISOs establish rates entitling certain types of wholesale generators to full cost recovery and “a fair return on equity,” while denying the same cost recovery to other market participants. This proposal is unduly preferential in contravention of FPA § 206 because it would dramatically and disproportionately benefit four specific market participants within the PJM Interconnection. This proposal is also unduly discriminatory because it fails to extend the same benefits to hundreds of independent power producers and other ancillary service providers, regardless of whether these resources contribute to grid reliability or resiliency.

1. The Proposed Rule is Unduly Preferential to a Small Subset of Market Participants

The proposed rule ostensibly aims to protect grid reliability during emergency periods by compensating generators for “certain reliability and resilience attributes.”¹² However, the proposal arbitrarily concludes that only coal-fired and nuclear-powered generating resources are capable of supporting grid reliability and asserts that the retirement of uneconomical coal and nuclear power plants presents a threat to the resiliency of the grid. The proposal also limits the applicability of its cost recovery provisions to eligible “fuel-secure” resources that are not already subject to cost-of-service ratemaking at the state or local level and are located within an RTO/ISO that operates both day-ahead and real-time wholesale markets.

As a result of the proposal’s eligibility conditions, the proposed rule would primarily apply in the PJM Interconnection. PJM is one of the largest competitive wholesale power markets in the world, with thousands of electricity generating units operating within its territory, including more than a hundred coal-fired generating units and dozens of nuclear powered generating units. On the whole, PJM supports a diverse pool of market participants, with hundreds of electric utilities and independent power producers selling into the market. However, the ownership of PJM’s coal and nuclear plants is far less diverse than the ownership of its other generating resources. Four corporate entities—American Electric Power, Exelon Corporation, FirstEnergy Corporation, and NRG Energy—own nearly 75% of the coal and nuclear nameplate generating capacity located within PJM.¹³ More significantly, the coal and nuclear capacity owned by these four corporations represents 37% of PJM’s total generating capacity from all resources.

¹⁰ Alison Silverstein, *If I’d Written the DOE Grid Study Recommendations*, UTILITYDIVE.COM, Oct. 2, 2017, <http://www.utilitydive.com/news/silverstein-if-id-written-the-doe-grid-study-recommendations/506274/>.

¹¹ Fed. Power Act § 206, 16 U.S.C. § 824e(a).

¹² Grid Resiliency Pricing Rule, 82 Fed. Reg. at 46,941.

¹³ U.S. ENERGY INFO. ADMIN, FORM EIA-923 (2017), available at <https://www.eia.gov/electricity/data/eia923/>.

The proposed rule is unduly preferential because it bestows the vast majority of its benefits to four corporate entities operating in the PJM Interconnection. Coal and nuclear capacity provides approximately half of PJM's total generating capacity, which means that 50% of the generating capacity supplying power to the PJM market could be entitled to full cost recovery and a guaranteed rate of return under the proposed rule. However, due to the concentrated ownership of these resources, four corporate entities would enjoy nearly 75% of these cost recovery benefits. To avoid violating the FPA's prohibition against unduly preferential rates, FERC should carefully consider the concentrated ownership of the coal and nuclear facilities participating in the nation's wholesale markets and avoid adopting a final rule that bestows such substantial financial benefits on a handful of market participants.

2. The Proposed Rule is Unduly Discriminatory Against Non-Eligible Resources that Support Reliability and Resiliency Without Requiring Fuel Storage

While the proposed rule ostensibly aims to protect grid reliability during emergency periods, it arbitrarily restricts eligibility to resources that maintain on-site fuel storage, without providing adequate evidence to support the Secretary's assertion that on-site fuel reserves are necessary to preserve grid reliability and resiliency. This restriction on eligibility unduly discriminates against other types of resources and ancillary services, such as wind power, energy storage, and aggregated demand response, that have been demonstrated to support grid reliability and resilience following extreme weather events.

The preamble to the proposed rule strongly asserts that "fuel-secure" generation, including coal and nuclear power, is necessary to maintain reliability and resiliency within the grid, and that wholesale power rates fail to adequately compensate these resources for the "resiliency attributes" they provide. The preamble even goes so far as demanding that FERC take immediate action to halt the retirement of privately owned coal and nuclear resources and adopt regulations to give these resources an uncompetitive advantage in the wholesale market: "The continued loss of fuel-secure generation must be stopped. These generation resources are necessary to maintain the resiliency of the electric grid. FERC must adopt rules requiring the Commission-approved ISOs and RTOs to reduce the chronic distortion of the markets that is threatening the resilience of the Nation's electricity system."¹⁴ However, the preamble offers no examples or meaningful evidence to support its assertion that fuel-secure resources outperform other resources and services during emergency events.

The preamble continuously references the 2014 "Polar Vortex," during which abnormally cold temperatures stressed grid operations in the PJM Interchange, to illustrate the grid's vulnerability to extreme weather events.¹⁵ However, the preamble failed to reference PJM's own analysis regarding the reliability impacts from the Polar Vortex, which determined that "[e]quipment issues associated with *both* coal and natural gas units caused the greatest proportion of forced outages" during the event.¹⁶ Coal-fired generators accounted for 34% of the unavailable

¹⁴ Grid Resiliency Pricing Rule, 82 Fed. Reg. at 46,945.

¹⁵ *See id.*

¹⁶ PJM INTERCONNECTION, ANALYSIS OF OPERATIONAL EVENTS AND MARKET IMPACTS DURING THE JANUARY 2014 COLD WEATHER EVENTS 4 (2014), *available at* <http://www.pjm.com/~media/library/reports-notice/weather->

megawatts during the vortex, while natural gas-fired generators accounted for 47% of unavailable megawatts.¹⁷ Moreover, in describing the strategies it deployed to maintain reliability during the event, PJM cited consumer conservation and voluntary demand response by load management resources as being most effective at supporting reliability.¹⁸ Additionally, 4,000 megawatts of wind power was produced in PJM during the Vortex, which “had a positive impact on supply and contributed to PJM’s ability to maintain reliability.”¹⁹

On-site fuel reserves failed to support reliability both during the Polar Vortex, when some coal capacity was forced offline due to frozen coal piles, and during Hurricane Harvey, when flooded coal piles forced some plants to temporarily shift to natural gas.²⁰ During Hurricanes Harvey and Irma, the staff at coal and nuclear plants were required to evacuate, forcing those plants offline. And during Hurricanes Irma and Maria, grid disruptions primarily resulted from damage to transmission and distribution infrastructure, not generator outages. These examples indicate that while on-site fuel reserves may enable some plants to remain online in certain circumstances, these fuel reserves do not guarantee grid reliability during extreme weather events.

In contrast, resources that do not require fuel supplies and resources that work to reduce load on the system have been shown to support grid reliability and resiliency during and following extreme weather events. During California’s record heat wave in 2017, generation from renewable energy resources, demand response programs, energy storage, and regional coordination all enabled the grid to continue functioning.²¹ While these resources all have reliability-supporting attributes, they are not eligible for cost recovery under the proposed rule. The proposal arbitrarily discriminates against resources that do not require fuel stockpiles, even though resources that are reliant on access to fuel supplies are vulnerable to supply disruptions and stockpile damage during severe weather events. If FERC aims to compensate resources for their reliability and resiliency attributes, the Commission should conduct a comprehensive review of the reliability and resiliency benefits of all energy resources and ancillary services that have the potential to support grid functionality during extreme events. Once this assessment is complete, FERC should develop rules that compensate resources for their ability to support reliability and resiliency, rather than for arbitrary characteristics such as the ability to stockpile fuel.

C. The Proposed Rule Would Result in Unjust and Unreasonable Wholesale Rates

The proposed rule directs RTO/ISOs to establish tariffs that enable owners of eligible resources to earn “just and reasonable” rates for the electricity produced by those resources and fully recover all costs associated with those resources, along with a return on equity. “Compensable costs shall include, but not be limited to, operating and fuel expenses, costs of

related/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx (emphasis added).

¹⁷ *Id.* at 25.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 21.

²⁰ Robbie Orvis & Mike O’Boyle, *DOE Rulemaking Threatens to Destroy Wholesale Markets with No Tangible Benefit*, UTILITYDIVE.COM, Oct. 2, 2017, <http://www.utilitydive.com/news/doe-rulemaking-threatens-to-destroy-wholesale-markets-with-no-tangible-bene/506289/?platform=hootsuite>.

²¹ *Id.*

capital and debt, and a fair return on equity and investment.”²² These proposed cost recovery provisions aim to return to the cost-of-service ratemaking model employed by FERC before the shift to competitive market rates, and they more closely align with the ratemaking structures that apply to vertically integrated utilities operating in states with traditionally regulated electricity systems. The proposed rule fails to explain how these cost recovery provisions will function in the competitive wholesale markets or to clarify which entities will be responsible for compensating eligible resources for these extra costs. As proposed, the cost recovery provisions will almost certainly result in eligible resources receiving unjust and unreasonable rates that exceed the just and reasonable rates these facilities currently receive for their electricity sales. Depending on how it is implemented, the proposed rule could allow owners of eligible resources to receive double cost recovery, first through revenues collected from selling electricity in the power markets, and second through cost-plus rates set by FERC. In addition, these cost recovery provisions would almost certainly result in market distortions that cause other wholesale market participants to earn unjust and unreasonable rates for their electricity sales.

1. The Proposed Rule Would Allow Owners of Eligible Resources to Receive Unjust and Unreasonable Rates

The cost-of-service ratemaking model was designed to ensure that traditionally regulated vertically integrated utilities would receive just and reasonable rates for the electricity they produced and sold to their customers. Under the traditional ratemaking model, utilities are entitled to recover their operating expenses and the capital expenditures included in their rate base, while also earning a reasonable rate of return on their capital investments. Utilities recover these costs through electricity rates over a period of years, during which time the utilities’ rate-based assets are subject to depreciation. Once a rate-based asset, such as a power plant, is fully depreciated, the utility has recovered its capital investment in the asset and is no longer permitted to earn a rate of return on the value of that investment. This ensures that a utility’s customers are not forced to continue paying for an asset that they have effectively paid off, while still requiring those customers to compensate the utility for the operating costs it incurs while the depreciated asset remains in service.

Many of the “eligible” resources entitled to cost recovery under the proposed rule were put into service many decades ago, while their parent utility was still entitled to cost-of-service rates. For example, PJM opened its competitive wholesale energy market in 1997, and later that year FERC approved PJM as the first fully functioning ISO in the country.²³ FERC later approved PJM as the nation’s first fully functioning RTO in 2002.²⁴ According to U.S. Energy Information Administration data, more than 100 coal-fired generating units are currently operating in PJM, but only three of these units went into operation following the establishment of PJM’s bid-based wholesale market.²⁵ Several of PJM’s coal-fired units have been operating since the 1950s, and the vast majority entered into service in the 1960s and 1970s.²⁶ This means that many of PJM’s coal plants were entitled to cost recovery from ratepayers for thirty or even forty years before the

²² Grid Resiliency Pricing Rule, 82 Fed. Reg. at 46,948.

²³ PJM Interconnection, *PJM History*, PJM.COM, <http://www.pjm.com/about-pjm/who-we-are/pjm-history.aspx>

²⁴ *Id.*

²⁵ U.S. ENERGY INFO. ADMIN, FORM EIA-923 (2017), available at <https://www.eia.gov/electricity/data/eia923/>.

²⁶ *Id.*

plants began selling power through the wholesale market, and then received market rates for their output for another twenty years. PJM's market rules dictate that all suppliers earn the rate requested by the last (and thus most expensive) unit of electricity bid into the market (the market clearing price), so the market rate should reflect the marginal price of the power bid into the market, which presumably enables suppliers to earn a normal rate of return on investment.²⁷

Based on the age of PJM's coal fleet, it is highly likely that the owners of many, and perhaps even a significant majority, of the coal units operating in PJM have already fully recovered the costs associated with these units and earned a reasonable rate of return on these investments. Nevertheless, the proposed rule would entitle the owners of these plants to recover their "fully allocated costs and a fair return on equity." If the rates issued in accordance with the proposed rule's provisions result in plant owners recovering costs for facilities that have already fully depreciated, these rates would no longer be just and reasonable as mandated by sections 205 and 206 of the FPA. The Supreme Court has long held that a determination of whether rates are just and reasonable requires a balancing of both the supplier's and the purchaser's interests.²⁸ Accordingly, the Court has upheld rates as "just and reasonable" when the rates prevented a utility from recovering costs from consumers multiple times.²⁹ The Commission itself long ago recognized that "[n]o greater injustice to consumers could be done than to allow items as operating expenses and at a later date include them in the rate base, thereby placing multiple charges upon the consumers."³⁰ Moreover, in addition to providing eligible plant owners with cost-of-service rates that could allow them to double recovery of their capital costs, the draft rule implies that these facilities should also be entitled to earn market rates for the output they produce.³¹ Any rules or regulations that allow the owners of eligible facilities to earn market rates plus cost-of-service rates would almost certainly violate the FPA's just and reasonable requirement.

2. The Proposed Rule Could Distort Wholesale Market Activity, Resulting in Unjust and Unreasonable Rates for Other Market Participants

If eligible resources under the proposed rule are permitted to participate in day-ahead and real-time wholesale energy markets, their participation would likely distort prices within the markets and could lead to unjust or unreasonable rates for other market participants. While the ultimate market impacts would depend on the structure of the cost recovery mechanisms established by the RTO/ISOs, any cost recovery rules or mechanisms that enable eligible resources to bid their output into the market at lower costs than they would otherwise bid would serve to depress prices throughout the market by lowering the market clearing price. Under this scenario, generating resources that would otherwise be capable of bidding power into the market at a lower price than

²⁷ FERC v. Electric Power Supply Ass'n, 136 S.Ct. 760, 769 (2016).

²⁸ Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

²⁹ *Id.* at 602.

³⁰ *Id.* at 599. The rates at issue in *Hope* were established by the Federal Power Commission, the predecessor to FERC.

³¹ The draft rule states: "Each Commission-approved independent system operator or regional transmission organization shall establish a tariff that provides a just and reasonable rate for the (A) purchase of electric energy from an eligible reliability and resiliency resource *and* (B) recovery of costs and a return on equity for such resource dispatched during grid operations." Grid Resiliency Pricing Rule, 82 Fed. Reg. at 46,948. (emphasis added)

the eligible generators would now either earn reduced rates for their output or would be unable to clear their bids at all.

In competitive wholesale markets, suppliers bid their output into the market at their desired price, but every bid that clears the market receives the same market clearing price for each unit of power the supplier committed to provide. The market clearing price reflects the price of the highest bid that clears the market during a given period. This system encourages suppliers to keep their costs low to increase the likelihood that their bids will be accepted, or “clear” the market. Efficient, low-cost generation will clear the market first, while inefficient, high-cost generation will only clear the market when demand exceeds available supply.

As proposed, the draft rule has the potential to introduce anti-competitive conditions into wholesale power markets. If eligible generators under the proposed rule are guaranteed cost recovery and permitted to bid into the market, they will be incentivized to submit the lowest bids allowed under market rules to ensure that their bids will clear the market. When multiple eligible generators bid into the market, their bids will clear ahead of the bids submitted by other generating resources, which will suppress the market clearing price for all accepted bids. As the market clearing price drops below the marginal costs for non-eligible generators, these suppliers will withdraw from the market entirely. Because these market conditions will result due to regulatory pressures rather than natural market forces, the rates received by all non-eligible generators will no longer be presumptively just and reasonable. To prevent this outcome, if FERC decides to compensate eligible generators through cost-of-service rates, FERC must also direct the RTO/ISOs to adjust their market rules to prohibit owners of eligible resources from bidding into competitive markets.

D. FERC Must Conduct an Environmental Analysis Before Adopting a Final Rule

DOE’s conclusion that a categorical exemption will apply to any FERC actions taken pursuant to DOE’s NOPR is incorrect and misstates the applicable FERC regulation. Under the National Environmental Policy Act of 1969 (NEPA),³² federal agencies must, for every major federal action “significantly affecting the quality of the human environment,” prepare a detailed statement of the environmental impact of the proposed action.³³ The Council on Environmental Quality’s (CEQ) regulations permit agencies, through rulemaking, to establish categories of actions that do not “individually or cumulatively have a significant effect on the human environment.”³⁴ Importantly, however, the CEQ’s regulation also requires that agencies, when crafting their categorical exclusions, “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”³⁵ Thus, agencies may categorically exempt actions that do not “have a significant effect on the human environment” from NEPA review, so long as they also require an environmental assessment for any categorically exempt actions that *may* have a significant environmental effect.

³² 42 U.S.C. §§ 4321–4347 (2012).

³³ *Id.* § 4322.

³⁴ 40 C.F.R. § 1508.4.

³⁵ *Id.*

FERC’s regulations establish a categorical exclusion to NEPA’s environmental assessment requirements for “Electric rate filings submitted by public utilities under sections 205 and 206 of the Federal Power Act, the establishment of just and reasonable rates, and confirmation, approval, and disapproval of rate filings submitted by Federal power marketing agencies.”³⁶ This exclusion reflects FERC’s determination that ratemaking decisions generally do not have a significant effect on the human environment. However, FERC’s regulations also include an exception to its categorical exclusions that require FERC to prepare an environmental assessment “[w]here circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment.”³⁷ The regulations provide a list of circumstances that may constitute an exception to a categorical exclusion and trigger the need for a NEPA analysis.³⁸ The list includes actions that affect Indian land; wilderness areas; wild and scenic rivers; wetlands; units of the National Park System, National Refuges, or National Fish Hatcheries; anadromous fish or endangered species; or where the environmental effects are uncertain.³⁹ Under FERC’s exceptions to the categorical exclusion provision, FERC must—in accordance with 40 C.F.R. § 1508.4—“independently evaluate environmental information supplied in an application and in comments by the public.”⁴⁰ If FERC concludes that the categorically exempted action is “a major Federal action significantly affecting the quality of the human environment,” it *must* prepare an environmental analysis or environmental impact statement pursuant to NEPA.⁴¹

The DOE’s proposed rule will have a significant impact on the long-term composition of the nation’s fleet of generation units, likely prolonging the life of many of the most polluting, least-efficient units on a scale that will significantly affect the human environment generally, as well as the specific circumstances listed in 18 C.F.R. § 380.4(b). The NOPR adamantly argues that existing coal and nuclear plants should stay online indefinitely.⁴² However, much of the nation’s coal-fired generating capacity has been operating for more than fifty years, and these facilities are already responsible for creating a variety of human health impacts and contributing to environmental degradation. Coal combustion emits mercury, nitrogen oxides, sulfur dioxide, and particulate matter, all of which are pollutants known to be hazardous to human health. In

³⁶ 18 C.F.R. § 380.4(a)(15).

³⁷ *Id.* § 380.4(b)(1).

³⁸ *Id.* § 380.4(b)(2).

³⁹ *Id.*

⁴⁰ *Id.* § 380.4(b)(1).

⁴¹ *Id.* (“Where circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment, the Commission: . . . (ii) *Will* prepare an environmental assessment or an environmental impact statement.” (emphasis added)). *Psi Energy, Inc.*, 55 FERC ¶ 61254 (May 22, 1991), and *Monogahela Power Co.*, 39 FERC ¶ 61350 (June 25, 1987), are distinguishable as in both cases FERC was reviewing rate filings. Here, FERC is being called upon to “impose rules on Commission-approved independent system operators (ISOs) and regional transmission organizations (RTOs) to ensure certain reliability and resilience attributes of electric generation resources are fully valued.” Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940, 46,940–41 (Oct. 10, 2017). Another recent FERC NOPR, Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators, 81 Fed. Reg. 96,391 (Dec. 30, 2016), is cited in this NOPR in support of the proposition that FERC does not need to conduct any environmental analysis in this type of situation. 82 Fed. Reg. at 46,947 n.49. The 2016 NOPR likewise relies exclusively on the language of 18 C.F.R. § 380.4(a) and fails to analyze whether the NOPR falls within the exception exclusion provision of 18 C.F.R. § 380.4(b). 81 Fed. Reg. at 96,402 & nn. 124–125. Such circular reasoning is an insufficient justification for the proposition that the requirements of NEPA do not apply to this rulemaking process.

⁴² See Grid Resiliency Pricing Rule, 82 Fed. Reg. at 46,945.

addition, the indefinite operation of coal and nuclear facilities will require sustained production of coal and nuclear fuel supplies, which also have associated health and environmental impacts. For example, mountaintop removal mining destroys forest cover and degrades aquatic ecosystems. The waste from coal and nuclear plants also presents significant health and environmental risks, and long-term waste storage is vulnerable to natural disasters, such as earthquakes.

Pursuant to 18 C.F.R. § 380.4(b), FERC must independently evaluate whether this proposed rule will significantly affect the human environment. If FERC concludes that this proposed rule will have such an effect, it must prepare an environmental assessment or an environmental impact statement.

E. The Proposed Rule Does Not Provide an Adequate Opportunity for Meaningful Public Input

The time limits for final action established by the proposed rule do not provide adequate time to solicit and review public comments, and the draft rule lacks sufficient factual support to enable members of the public to meaningfully comment on the proposal. The proposed rule also fails to adequately explain how the proposed cost recovery mechanism will actually support grid reliability and resiliency, particularly if it results in price suppression for other reliability-supporting resources.

The Administrative Procedure Act (APA) requires agencies to “give interested persons an opportunity to participate in the rule making” by submitting public comments.⁴³ A “notice of proposed rulemaking must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.”⁴⁴ The Department of Energy Organization Act (DOE Act) similarly requires that any rulemaking to establish rates under the FPA must employ procedures that “assure full consideration of the issues and an opportunity for interested persons to present their views.”⁴⁵ The DOE Act also authorizes the Secretary of Energy to set “reasonable time limits” for FERC to act on any proposal issued by DOE.⁴⁶

The proposed rule lacks sufficient factual support or clarity to enable meaningful public comment, and the time limits established by DOE and FERC are unreasonably constrained and thus impede interested parties from presenting their views on the proposal. The NOPR asserts that both the factual basis for the proposed rule and the time limits imposed for final action are both reasonable, “[g]iven the extensive record the Commission has already developed on the subject matter of this Notice.”⁴⁷ This assertion fails to reconcile the lack of consistency between the Commission’s record and the findings and conclusions presented in the preamble to the proposed rule. For example, the NOPR asserts that coal-fired power plants are “indispensable for the reliability and resiliency of our electric grid,”⁴⁸ regardless of how old or inefficient these

⁴³ 5 U.S.C. § 553(c) (2012).

⁴⁴ *Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 225 (D.C. Cir. 2007).

⁴⁵ 42 U.S.C. § 7173(c) (2012).

⁴⁶ *Id.* § 7173(b).

⁴⁷ *Grid Resiliency Pricing Rule*, 82 Fed. Reg. at 46,941.

⁴⁸ *Id.*

plants may be, and repeatedly cites to the August 2017 DOE Staff Report to provide factual support for its assertions. However, one of the DOE Staff Report's key conclusions was that further study is required to evaluate market mechanisms for addressing grid reliability and resilience.⁴⁹ Similarly, while the preamble repeatedly references the 2014 Polar Vortex to exemplify potential reliability and resiliency impacts associated with a loss of "fuel secure" resources, the NOPR fails to cite to or address PJM's own findings regarding the reliability impacts associated with the Polar Vortex, which concluded that demand response and wind power supported grid reliability during the event, rather than coal and nuclear capacity.⁵⁰

Given the complexity and depth of the issues presented by the NOPR and the potential implications the proposed rule could have on the nation's competitive energy markets, the factual inconsistencies evident in the preamble to the proposed rule and the unreasonably short time limits established for the submission of public comments fail to provide a meaningful opportunity for public input. Thus, the NOPR fails to meet the public participation requirements established by the APA and the DOE Act. In addition, the proposed rule fails to adequately explain how the proposed cost recovery mechanisms for eligible coal and nuclear facilities will actually achieve the proposal's professed objective of maintaining grid reliability and resiliency, particularly if the proposed mechanisms create market distortions that suppress prices for other resources that have been shown to support reliability, such as renewables, energy storage, and demand response.

F. Conclusion

The Green Energy Institute respectfully urges FERC to decline to adopt the proposed rule. The proposed rule would violate FPA sections 205 and 206 by establishing unjust and unreasonable wholesale rates through mechanisms that are unduly preferential and unduly discriminatory. The proposed rule would also introduce anti-competitive market pressures that could undermine the continued viability of competitive wholesale markets. For the reasons presented in these comments, we strongly urge FERC to exercise its independent authority and protect the integrity of the wholesale power markets by declining to adopt the proposed Grid Resiliency and Pricing Rule.

Sincerely,

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⁴⁹ DOE STAFF REPORT, *supra* note 8, at 10.

⁵⁰ PJM INTERCONNECTION, *supra* note 16, at 5, 21.