



October 23, 2017

Submitted Via Electronic Filing

Federal Energy Regulatory Commission
Secretary of the Commission
888 First Street, NE
Washington D.C. 20426

Re: Comments of Clean Air Task Force on Grid Resiliency Pricing Rule, Docket No. RM17-3-000, 82 Fed. Reg. 46,940 (Oct. 10, 2017); and Grid Reliability and Resilience Pricing, Notice Inviting Comments, Docket No. RM18-1-000 (Oct. 2, 2017)

Dear Secretary Bose,

Clean Air Task Force (CATF) respectfully submits the following in response to the Federal Energy Regulatory Commission's (FERC) invitation on October 2, 2017 to submit comments on the Department of Energy's (DOE) proposed Grid Resiliency Pricing Rule, Docket No. RM17-3-000, 82 Fed. Reg. 46,940 (Oct. 10, 2017) [hereinafter "Proposed Rule"].

Founded in 1996, CATF seeks to help safeguard against the worst impacts of climate change by working to catalyze the rapid global development and deployment of low carbon energy and other climate-protecting technologies, through research and analysis and public advocacy leadership.

I. Introduction

While a reliable and resilient bulk electric grid is of course a laudable goal, the Proposed Rule is not a serious attempt to pursue that goal. Rather than take advantage of the multiple avenues available through the Federal Power Act to explore and address real reliability concerns, the DOE Secretary invokes a little used provision of the statute, section 403(a) of the DOE Reorganization Act, 42 U.S.C. § 7173, authorizing him to propose rules and policy statements of "general applicability."¹ Instead of a properly noticed and supported reliability docket that would provide for appropriate levels of public scrutiny on such an important issue, the Proposed Rule is clearly an attempt to promote coal-fired power plants through price supports for existing plants that would otherwise retire, some of which emit significant amounts of pollution that harm human health, and welfare, including the climate.

While a reliable and resilient grid can be supported by a fuel-diverse generating portfolio, this proposal is a blunt instrument where a more sophisticated tool is required and available for the task.

¹ Indeed, as our colleagues at the Harvard Environmental Policy Institute point out in their comments in this docket, because the Secretary's proposal does not even assert, and the Proposed Rule does not allege, that current rates are unjust, unreasonable, or unduly discriminatory, FERC may simply reject it without considering the merits at all. *See* Comments of the Harvard Environmental Policy Institute, Docket No. RM 18-1-000, at 1 & nn. 2 & 3 (Oct. 18, 2017).

The Proposed Rule is not even supported, never mind justified by the limited record, nor is it sufficiently analyzed with respect to its costs to the U.S. economy to constitute reasoned decision-making. There are ways in which FERC can respond to questions about reliability and resilience,² and whether existing tariffs are sufficient to support zero-emitting resources, that do not provide a blanket subsidy, as we explain below.

DOE presents an unsubstantiated warning that “[t]he resiliency of the nation’s electric grid is threatened by the premature retirements of power plants that can withstand major fuel supply disruptions.” 82 Fed. Reg. at 46,941. DOE proposes to provide additional compensation to any electric generation resource with a 90-day fuel supply on site, and that meets all applicable environmental rules, among other requirements. *Id.* The Proposed Rule identifies coal-fired and nuclear power plants as such “fuel-secure” generation, but there is no explanation why such a blanket subsidy is necessary, or in the public interest. *Id.* at 46,942.

The Proposed Rule directs FERC to take final action by December 11, 2017. *Id.* at 46,941. Nothing in the record, or in any publicly available information, however, suggests that this rule is necessary to system reliability, or if finalized would have the effect increasing the electric grid’s resilience.³ In fact, a recent report by the Rhodium Group found: “[o]f all the major power disruptions, nation-wide over the past five years, only 0.00007 percent were due to fuel supply problems. The vast majority were the result of severe weather knocking down power lines.”⁴

Further, to the extent that “just in time” delivery of fuel *is* threatened, power system operators can “implement[] appropriate market design changes that provide the necessary market signals for generators to be certain they are available to operate.”⁵ In fact, when owners decide to retire uncompetitive assets, that can result in consumer and public health benefits as it creates room in the market for the entrance of cleaner, more efficient and, increasingly, cheaper generation. *Hibbard*, at 4.

This does not mean that FERC should not explore possible reforms to current wholesale pricing policies. Current market designs may do a reasonable job with short-term energy and ancillary service markets; it is less clear that they send the right signals for major capital investment in new generation infrastructure. Some, for example, have argued that competitive wholesale markets provide insufficient incentives to support, over time, the kind of high-capital cost, clean generation such as wind, solar, advanced nuclear and fossil energy with carbon capture and storage, as well as energy storage, that would support deep reductions in carbon dioxide emissions from the power

² Notably, neither the Proposed Rule, nor the existing statutes or rules, defines resiliency, so the Commission is asked to base this rulemaking decision on a concept that is nowhere defined.

³ Indeed the Staff Report on which Secretary Perry relies notes that the problem with coal plant availability during the so-called Polar Vortex had to do with the available coal supplies freezing. See DOE, *Staff Report to the Secretary on Electricity Markets and Reliability*, at 98 (Aug. 2017) [hereinafter “Staff Report”].

⁴ Trevor Houser, *et al.*, Rhodium Group, “The Real Electricity Crisis,” (Oct. 3, 2017), <http://rhg.com/notes/the-real-electricity-reliability-crisis>.

⁵ Paul Hibbard, *et al.*, *Analysis Group, Electricity Markets, Reliability and the Evolving U.S. Power System*, at 60 (June 2017), available at:

http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_markets_reliability_final_june_2017.pdf [hereinafter “Hibbard”] (discussing market penalties for failure to deliver capacity and methods to secure sufficient natural gas delivery).

sector.⁶ Addressing this question, however, would require FERC to open a properly noticed docket exploring the question whether wholesale price adjustments that value zero-carbon, zero-air-pollution energy and capacity is necessary, through the established Federal Power Act mechanisms for wholesale rate revisions. It would also be appropriate for FERC in that or another proceeding to define a safe harbor for actions by regional transmission organizations (RTO) or other FERC-jurisdictional entities, now in place or proposed in the future, that support new and existing zero carbon generation.

II. Legal Background – DOE, FERC, NERC and Reliability.

- a. FERC shall give no undue preference, in ratemaking, to particular energy resources.

Section 205 of the Federal Power Act provides that “all rates and charges...in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission...shall be just and reasonable,” and “no undue preference or advantage” shall be given “to any person” in setting those rates. This statutory framework precludes FERC from favoring particular energy resources. A preference is undue where similarly situated resources are treated differently, or where different classes of resources are unreasonably treated the same. *Black Oak Energy v. FERC*, 725 F.3d 230, 238 (D.C. Cir. 2013). FERC must offer a “valid reason for the disparity.” *Id.* at 240. These decisions will be reviewed under an arbitrary and capricious standard.

FERC may only properly discriminate as between resource types when there are legitimate differences. *See N.J. Bd. of Pub. Utils. v. Md. Pub. Serv. Comm’n*, 744 F.3d 74 (3rd Cir. 2014) (treating renewable resources differently is appropriate because they have different characteristics that can legitimately be valued differently). In light of the significant public health and environmental damages associated with climate change resulting from anthropogenic energy-related carbon dioxide emissions – a third of which are emitted by power plants – differentiating between generating sources based on their emissions is justifiable. On the other hand, because “reliability is a technology neutral concept,” *Hibbard*, at 48, it cannot be a proper basis for discriminating between generating sources.

- b. Agency rulemakings must be supported by a substantial record including analysis of costs and benefits.

It is axiomatic that a federal agency, including DOE and FERC, must amass a substantial record and “examine the relevant data and articulate a satisfactory explanation for its [rulemaking] action including a rational connection between the facts found and the choice made.” *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29, 43 (1983). A failure to substantiate an existing or impending reliability crisis and explain how providing additional compensation to generation sources with on-site 90-day fuel supplies will remedy the problem renders this Proposed Rule arbitrary and capricious.

- i. Executive Order 12,866 requires analysis of the costs and benefits of economically significant Agency actions, including the DOE’S Proposed Rule.

⁶ See, e.g. Malcolm Keay, *Oxford Institute of Energy Studies, Electricity Markets Are Broken: Can They Be Fixed?*, (Jan. 2016), available at: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Electricity-markets-are-broken-can-they-be-fixed-EL-17.pdf>.

President Clinton issued Executive Order 12,866 to ensure that agencies promulgate regulations only when made necessary by law or “compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.” Exec. Order No. 12,866, § 1(a) 58 Fed. Reg. 51,735 (Oct. 4, 1993). To this end, the Order requires agencies perform cost-benefit analysis of proposed regulations and their alternatives – “including the alternative of not regulating.” *Id.* Unless otherwise required by statute, agencies should seek to “maximize net benefits” in their regulatory decision-making, a term whose definition includes potential environmental and public health effects. *Id.*

Though FERC is an independent regulatory agency, and thus exempt from requirements of the Order, DOE is not an independent regulatory agency and thus is bound by the Order. *See id.* at § (3) and 44 U.S.C. § 3502(5) (listing FERC as an independent regulatory agency). Accordingly, the Secretary should have considered and released the cost-benefit implications of the rulemaking proposal made to FERC for review and final action.

However, in confirmation with past practice, FERC should evaluate the health and environmental impacts of the Proposed Rule and make it available for comment if it intends to finalize a rule. FERC has created Environmental Impact Statements for environmentally significant regulations for electric rate filings in the past, notwithstanding its categorical exemption from National Environmental Policy Act (NEPA) requirements for such actions. *See* 61 Fed. Reg. 21540, at 21670 & 21,673 (May 10, 1996).

- ii. Other statutory authorities are available for addressing real bulk-system reliability issues.

FERC and the DOE Secretary must conduct reliability studies, which include not only investigating questions of service needs and cost effectiveness, but which must also consider “the environmental and other effects” of any recommended investments to maintain reliability. 16 U.S.C. §824a-2(a)(1) & (2). In addition, developing, implementing and enforcing reliability or system resilience measures and standards is the responsibility of the certified Electric Reliability Organization (ERO), in coordination with the RTOs, under FERC’s jurisdiction, pursuant to section 215 of the Federal Power Act, 16 U.S.C. § 824o. The North American Electric Reliability Corporation (NERC), an independent, non-profit organization, is the certified ERO responsible for undertaking periodic assessments of the bulk power system, and filing proposed reliability standards with FERC. Order Certifying North American Electric Reliability Corporation as the ERO, (Certification Order), 116 FERC ¶ 61,062 (2006); 16 U.S.C. § 824o(g), (d).

Where NERC identifies the need, or when FERC acts on its own motion or a complaint filed by others, a docket under Federal Power Act section 206, 16 U.S.C. § 824e(a), may be opened to investigate the need to change reliability standards, or revise tariffs to correct wholesale market barriers to system reliability. 16 U.S.C. § 824o(d)(5), (6). Just as with any ratemaking proceeding, the question before FERC is whether the existing reliability standard is unjust, unreasonable, unduly discriminatory or preferential, or not in the public interest.

Additionally, and appropriately, given the regional variation in generation mix in the U.S., the RTOs also are required to ensure, through their tariffs, the retention of generating units needed for reliability, within the constraints of just, reasonable, and non-discriminatory or preferential rates in

the public interest. *See, e.g.*, Order Instituting Section 206 Proceeding: New York Independent System Operator, Inc., 80 Fed. Reg. 10676, 10677 (Feb. 27, 2015) (finding the NY-ISO tariff “unjust and unreasonable because it [did] not contain provisions governing the retention of and compensation to generating units needed for reliability[, and] ... requir[ing] NYISO to submit to the Commission within 120 days of the date of this order fully supported proposed tariff provisions governing the retention of and compensation to generating units required for reliability.”). As part of a section 206 proceeding, FERC and the RTO may consider issues related to rate recovery for environmental costs, and may consider environmental benefits of a particular rate structure as well as part of the public interest evaluation. *Cf. ZeroZone, Inc. v. DOE*, 832 F.3d 654, 677 n.24 (7th Cir. 2016) (noting the relationship between economic impacts of a DOE regulation and environmental benefits or harms).

States also have authority and responsibility over generating resources, and to protect reliability within their boundaries. *See* 16 U.S.C. § 824o(i)(3). Citing, among other reasons, intrastate reliability concerns, some states have enacted Zero Emission Credit (ZEC) provisions, or standards, in order to internalize, in retail rates, the value of the climate and public health benefits, and for such units as are baseload units, the reliability cushion they provide. *See* Illinois Stat. SB 2814 Enrolled, §§ 1, 1.5 (findings), & 5 (amending Illinois Power Agency Act §§ 1-5, 1-10, 1-20, 1-25, 1-56, and 1-75 to incorporate *inter alia*, a ZEC program); *see also* N.Y. Pub. Serv. Comm’n, Case 15-E-0302, Proceeding on Mot. of the Comm’n to Implement a Large-Scale Renewable Program & a Clean Energy Standard, *consolidated with* Case 16-E-0270, Pet. of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna & Nine Mile Point Nuclear Power Plants, ORDER ADOPTING A CLEAN ENERGY STANDARD (Aug. 1, 2016)).

III. If Finalized, The Proposed Rule Will Impose Significant Environmental and Public Health Costs

Providing a blanket subsidy for existing coal units that would otherwise retire will have significant public health and environmental costs to the U.S. economy. Those costs and benefits would have been made clear to commenters, had DOE provided a Regulatory Impact Analysis under E.O. 12,866 with its proposal of this economically significant rule.

- a. Executive Order 12,866 requires an assessment of the costs and benefits of any economically significant rule. The Secretary’s proposal is such a rule, as it fundamentally affects the economics of the U.S. energy system.

Executive Order 12,866 requires the Secretary to consider the cost-benefit implications of his rulemaking proposal, including net consequences to the environment and public health. *See* Exec. Ord. 12866, at § 1; 58 Fed. Reg. 51,735. The Order requires additional and more stringent internal oversight requirements for “significant regulatory actions,” defined as those which “have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy. . . or environment [and] public health.” Exec. Ord., at § 3(f)(1). The Secretary is clearly obliged to produce a cost-benefit analysis that comports with the requirements and inter-agency review procedures set forth in the Order. Further, when amending the exact same regulations proposed for amendment here, FERC has prepared Environmental Impact Statements. *See* 61 Fed. Reg. 21540, at 21670 & 21,673 (May 10, 1996).

The Proposed Rule itself states “the sheer size and impact of the electricity market on our economy cannot be overstated. . . driv[ing] an \$18.6 trillion U.S. gross domestic product and significantly influenc[ing] global economic activity totaling roughly \$80 trillion.” 82 Fed. Reg. at 46,942. The potential economic, environmental, and health impacts for the Secretary’s Proposed Rule are estimated to be \$14 billion annually.⁷

- b. Unjustifiably extending the lives of uneconomic coal plants will have a significant public health and environmental impact.

Among the costs that DOE should have considered and included as part of the record it forwarded to the Commission, are the costs to human health and the environment of prolonging the life of coal-fired units that otherwise would be retired. It is exactly that outcome – price supports for coal plants – that is the focus and underlying premise of the Proposed Rule. In particular, supporting the continued operation of coal plants that would otherwise retire will mean continued significant climate pollution emissions – even were those plants to be upgraded to enable them to meet environmental standards.

Existing coal plants make up about 30 percent of all U.S. domestic energy-related emissions of carbon dioxide. The Clean Power Plan’s accompanying Regulatory Impact Analysis valued the global benefits of expected emissions reductions from existing U.S. coal-fired power plants under the Clean Power Plan at between \$21 billion and \$40 billion annually in 2030 (\$2011). EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, at ES-20 (Aug. 2015). Even using this Administration’s cramped view of the value of those emissions,⁸ see, e.g. Exec. Order 13,783, at § 5(c), 82 Fed. Reg. 16,093 (Mar. 31, 2017) (withdrawing the Technical Support Documents on the Social Cost of Carbon and instead directing the use of a decades old approach found in “Circular A-4”), those emissions present significant social costs to the U.S.. For example, the recently published notice of proposed repeal of the Clean Power Plan is accompanied by a Regulatory Impacts Analysis that notes the foregone carbon benefits associated with the repeal – *domestic only* – to be \$2.72 billion (\$2011) annually. EPA, *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*, at 44, tbl. 3-8 (Oct. 2017). If the Clean Power Plan repeal is finalized, there will be no carbon dioxide standards in place for the existing coal plants that the Secretary intends to subsidize through this rule.

In addition, exhaustively peer-reviewed, published studies document that the health impacts from fine particulate matter (PM2.5) and ground-level ozone pollution include premature deaths, hospital admissions, emergency room visits, asthma attacks, and lost work and school days.⁹ The Clean Air

⁷ See Sierra Club, “New Analysis Finds Dramatic Costs of Perry’s Directive to FERC,” (Oct. 16, 2017),

<http://www.sierraclub.org/press-releases/2017/10/new-analysis-finds-dramatic-costs-perrys-directive-ferc>.

⁸ Trevor Houser, et al., Rhodium Group, “The Real Electricity Crisis,” (Oct. 3, 2017), <http://rhg.com/notes/the-real-electricity-reliability-crisis>.

⁹ See, e.g., Hoek G, et al., *Long-term air pollution exposure and cardio-respiratory mortality: a review*, 12 ENVTL. Health 43 (2013); Pope A, et al., *Fine-Particulate Air Pollution and Life Expectancy in the United States*, 360 NEW ENG. J. MED. 376 (2009); Abbey, D. E., et al., *Chronic Respiratory Symptoms Associated with Estimated Long-Term Ambient Concentrations of Fine Particulates Less Than 2.5 Microns in Aerodynamic Diameter (PM2.5) and Other Air Pollutants*, 5 J. EXPO. ANAL. ENVIRON. EPIDEMIOL. 137-159 (1995); Moolgavkar, S. H., *Air Pollution and Hospital Admissions for Chronic Obstructive Pulmonary Disease in Three Metropolitan Areas in the United States*, 12 INHALATION TOXICOLOGY 75-90 (2000); Ito, K., et al., *Health Effect Institute, Associations of Particulate Matter Components with Daily Mortality and Morbidity in Urban Populations*, (2000), available at: <https://www.healtheffects.org/publication/association-particulate-matter-components-daily-mortality-and-morbidity-urban>; Sheppard, L., et al., *Effects of ambient air pollution on nonelderly asthma hospital admissions in Seattle, Washington*,

Task Force, using Environmental Protection Agency (EPA) and Energy Information Administration air emissions data and EPA-approved methodology based on this health literature, estimates that PM2.5 pollution from air emissions at U.S. coal plants results in 7,500 premature deaths, 5,630 hospital admissions, 11,915 heart attacks, and 126,400 asthma attacks in the U.S. each year.¹⁰ The Sierra Club recently estimated that about 50 gigawatts of coal plant capacity, representing about one-fifth of U.S. capacity,¹¹ could be subsidized by the Proposed Rule.¹² Keeping those coal plants online when they would otherwise retire would mean continued pollution and the related public health costs from the well-documented adverse health effects that result from exposure to PM2.5 and ground-level ozone.

These health damages represent costs to the economy, as well as deeply personal costs to Americans, whether or not they can easily be reduced to dollar figures.¹³ Such public health costs will be experienced *despite* the Proposed Rule's directive that any price-supported plant must be in compliance with existing applicable environmental standards 82 Fed. Reg., at 46,948 (as proposed in new 10 C.F.R. § 35.28(g)(10)(i)(D) to limit applicability for subsidy to those facilities in compliance with existing environmental standards). This is so because even coal plants that comply with current environmental regulations emit significant amounts of sulfur dioxide and nitrogen oxides, the chemical precursors to PM2.5 and ground-level ozone. Furthermore, it is no excuse that some of the victims of this pollution live in areas that meet the current National Ambient Air Quality Standard (NAAQS) for PM2.5 because the vast weight of expert opinion supports the position that there is no threshold exposure level below which exposures to PM2.5 and ozone have no public health impacts.¹⁴ Achieving the goals of this rulemaking would mean keeping online or resurrecting coal plants that otherwise would be retired. As a result, this rule could significantly increase PM2.5 and ozone precursors beyond the levels that would occur if the retirements took place. DOE should have considered the costs of the resulting health impacts before proposing the rule.

IV. FERC Should Decline to Adopt the Proposed Rule

As noted *supra*, note 1, by our colleagues at the Harvard Environmental Policy Initiative, FERC has no legal obligation even to consider the Proposed Rule, and therefore should simply decline to finalize it. It is not styled properly to support the Commission's exercise of its power over wholesale rates, nor may the Commission direct the RTOs to act based on the minimal record and form of the Proposed Rule.

- a. The Proposed Rule is not supported by the minimal record.

The Secretary's Proposed Rule — essentially a blanket price subsidy for coal-fired and nuclear power plants — stands at odds with the analytical thrust of the Staff Report he largely relies on. Contrary to

1987-1994. 10 EPIDEMIOLOGY. 23-30 (1999); Norris, G., *et al.*, *An association between fine particles and asthma emergency department visits for children in Seattle*, 107 ENVIRON. HEALTH PERSPECT. 489-93 (1999); *see also*, EPA, OAR, *Final Report to Congress on Benefits and Costs of the Clean Air Act, 1970 to 1990*, EPA 410-R-97-002, at I-23 (Oct. 1997).

¹⁰ Clean Air Task Force, *Regulation Works*, (July 2015) available at:

<http://www.catf.us/resources/publications/files/RGGI-Report.pdf>.

¹¹ EIA, *Annual Energy Outlook 2017*, (Jan. 5, 2017) available at: [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf).

¹² *See* Sierra Club, "New Analysis Finds Dramatic Costs of Perry's Directive to FERC," (Oct. 16, 2017),

<http://www.sierraclub.org/press-releases/2017/10/new-analysis-finds-dramatic-costs-perrys-directive-ferc>.

¹³ EPA, OAR, "Final Report to Congress on Benefits and Costs of the Clean Air Act, 1970 to 1990," EPA 410-R-97-002, at I-23 (Oct. 1997).

¹⁴ *See supra* note 10.

the Secretary's representations, the Staff Report concludes that "centrally-organized markets have achieved reliable wholesale electricity delivery with economic efficiencies in their short-term operations." *Staff Report*, at 10. The Report goes on to identify market forces as the leading contributor to the retirement of traditional coal-fired and nuclear plants, such as the low cost and high efficiency of gas fired energy generation and low growth in electricity demand. *Id.* The Staff Report neither problematizes this economic shift nor characterizes the retirement of coal-fired and nuclear plants as "premature," noting to the contrary that the term "premature" is "highly subjective." *Id.* at 7. ("Not every power plant retirement is cause for alarm." *Id.* at 9.) The Report indicates instead that the retirement of at least some coal plants is timely. One of the recommendations calls for retraining and redeploying workers laid-off from retiring coal-fired plants, *id.* at 127, suggesting that the Report's authors believe it more prudent to alleviate localized side-effects of the emerging energy economy rather than use extraordinary measures to reverse the diminishing of coal's role in the energy grid.

The Secretary also draws the wrong lessons from the Staff Report's discussion of the 2014 Polar Vortex. Many different types of energy resources faced stress during the Polar Vortex, including coal plants "which could not operate due to conveyor belts and coal piles freezing." *Id.* at 98. High electricity demand, incapacitated coal plants, and outages in other fuels forced operators to make use of older coal plants scheduled for retirement. *Id.* The Report, however, does not claim that the grid was imperiled *because* certain coal plants were scheduled for retirement. *Id.* Though the Secretary claims the Proposed Rule has been designed to head-off future grid stresses like those experienced during the Polar Vortex, it fails to address the very perils presented by extreme cold. The size of an on-site stockpile of coal or the continued operation of less-economic coal-fired units ensures little in the way of enhanced reliability where freezing temperatures have rendered conveyor belts inoperable or have frozen solid piles of coal.

Though the Staff Report does in part recommend improvements to energy price formation for "services supporting grid reliability," it stresses that the pricing mechanisms be "fuel and technology neutral." *Id.* at 126. The Report does not recommend that FERC arbitrarily favor a few fuel sources over others, keeping in mind that "every type of fuel and power generation source has known vulnerabilities that can compromise its ability to perform reliably." *Id.* at 91. The Secretary further distorts this recommendation by considering it in isolation from other policies recommended by the Report: disaster preparedness drills, more energy storage facilities for natural gas, and increased research and development activity to find new reliability and resilience technologies like open source software and better grid modeling. *Id.* at 126–127. Taken as a whole, the Staff Report counsels for a more balanced and nuanced approach to ensuring continued grid reliability, than is provided by the Proposed Rule.

Nor do the three other reports relied on by the Secretary provide support for the Proposed Rule. The Quadrennial Energy Review notes that extreme weather is "the leading cause of power outages in the United States," and that climate change exacerbates extreme weather patterns. *See* Quadrennial Energy Review Task Force, *Transforming the Nation's Electricity System: The Second Installment of the QER*, at 4-2 (Jan. 2017). Ironically, because the increase in extreme weather events is linked to increased global temperatures tied to high concentrations in atmospheric carbon dioxide, the Proposed Rule would have the effect of worsening the problem it is assertedly trying to fix, because coal-fired plants, which would benefit immensely from the rule, emit large quantities of greenhouse gases. Second, the IHS Markit study reports that there is no ongoing reliability crisis, claiming instead that "the diverse US power supply portfolio has proven resilient to significant deviations from normal

operating conditions in the past.” IHS Markit, *Ensuring Resilient and Efficient Electricity Generation*, at 4 (Sep. 2017). The IHS Markit study and NERC’s Synopsis make the somewhat unremarkable recommendation that, given present-day market trends toward natural gas and renewable sources like wind and solar, regulators need to *start planning* now on how address reliability shortcomings with those technologies – by, say, increased investment in transmission and natural gas infrastructure, NERC, *Synopsis of NERC Reliability Assessments*, at 6 (May 9, 2017); IHS Markit, at 4; *see also Hibbard*, at 50. A recommendation to begin planning transmission and infrastructure investment does not provide any support for DOE’s drastic proposal to subsidize all baseload generation resources with on-site fuel supplies.

The record upon which DOE relies is scant and does not support the Proposed Rule. DOE fails to “articulate a satisfactory explanation for [the Proposed Rule] including a rational connection between the facts found and the choice made.” *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29, 43 (1983) (internal citations omitted). Without “underlying support - to which a court can properly defer,” any finalized rule would be struck down as arbitrary and capricious. *Keyspan-Ravenswood v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007); *see also Chem. Mfrs. Ass’n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994) (unsupported conclusory statements imply that the agency is committed to a path regardless of the facts).

- b. The appropriate remedy for resilience or reliability concerns lies with the RTOs to design on a case-by-case basis.

When reliability issues arise, the appropriate response is a well-designed tariff adjustment – taken after sufficient public input, and tailored by the RTO to the particular issues within their jurisdiction. The Proposed Rule, however, fails to recognize that reliability issues are often highly localized. This is so for a variety of reasons. *See generally Hibbard*, at 62 (describing the local nature of reliability impacts from plant closures). The Staff Report raises the possibility of localized reliability risks in areas dependent on natural gas following fuel supply chain disruptions. *Staff Report*, at 92. The *Report* then provides a number of preventive measures for such exigencies, including improvements in local natural gas storage and making sure a flexible array of grid resources is available for operators on the ground. *Id.*

For example, in New England, the majority of electric generation comes from gas-fired sources. The RTO, ISO-NE, has taken steps to adjust its market to the changing generation mix and heavy reliance on natural gas: ISO-NE 1) works closely with the region’s pipeline operators; 2) uses state of the art gas pipeline capacity forecasting tools; and 3) undertook market design changes to ensure resources would deliver its commitments and maintain fuel assurance. *Hibbard*, at 59-60.

Additionally, in the face of exactly the changing generation mix, DOE describes in the Proposed Rule, resources under PJM Interconnection’s jurisdiction were “making capacity commitments but not providing electricity when it was needed.” *Advanced Energy Mgmt. Alliance v. FERC*, 860 F. 3d. 656, 660 (D.C. Cir. 2017) (describing aging fleet retirements and replacement with new gas plants). “The penalties for a capacity resource that did not provide electricity were slight and easily avoided.” *Id.* FERC approved, and the Court upheld, PJM’s proposal to utilize “various market mechanisms to ensure the resources would actually deliver service when it is needed...include[ing]...steep penalties for resources that did not meet their capacity commitment, with very limited exceptions.” *Id.*

Instead of providing blanket price supports to resources with on-site fuel, which will only increase electricity prices without improving reliability,¹⁵ the RTOs have appropriately designed technology-neutral approaches to ensure resiliency and reliability within their jurisdiction. The Proposed Rule is arbitrary and capricious, in part, because it fails to consider these “significant and viable and obvious alternatives,” *Nat’l Shooting Sports Found. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013).

- c. A Federal Power Act section 206 proceeding is the appropriate place for FERC to address any significant reliability issues as may require tariff adjustments, including federal valuation of zero-emitting baseload resources.

NERC’s most recent annual report on reliability and resilience recommends that the “States and FERC should immediately review the economic *and policy* issues impacting fuel secure baseload generation in an effort to limit early closure of existing assets.” *Synopsis of NERC Reliability Assessments*, at 3 (emphasis added). Such an evaluation is appropriately made in a section 206 proceeding. Bypassing an in-depth analysis of reliability and resilience needs under the established statutory framework provided by the Federal Power Act, and ignoring NERC’s recommendations, the DOE Secretary instead proposes the rule at issue here. FERC should reject this attempt to sidestep a full analysis of such an important policy decision, and decline to adopt the DOE proposal.

If there is indeed evidence of a pervasive reliability issue nationwide that regional authorities are incapable of addressing – evidence which has not been offered by DOE in its proposed rule – then the appropriate response would be the opening of a properly noticed 206 docket, to assess such evidence as does exist, and design appropriate policy responses. Such a proceeding should be undertaken on a reasonable schedule to enable input from all stakeholders.

This does not mean that FERC should not explore wholesale market design changes that support reasonable long-term investment in in new generation. Current market designs do a reasonable job with short-term energy and ancillary service markets; it is less clear that they send the right signals for major capital investment in new generation infrastructure. Some, for example, have argued that competitive wholesale markets provide insufficient incentive to support, over time, the kind of high capital cost clean generation such as wind, solar, advanced nuclear and fossil energy with carbon capture and storage, as well as energy storage, that would support deep reductions in carbon dioxide emissions from the power sector.¹⁶ Addressing this question, however, would require FERC to open a properly noticed docket exploring the question whether wholesale price adjustments that value zero-carbon, zero-air-pollution energy and capacity are necessary, through the established Federal Power Act mechanisms for wholesale rate revisions. It would also be appropriate for FERC in that or another proceeding to define a safe harbor for actions by RTOs or other FERC-jurisdictional entities now in place or proposed in the future that support new and existing zero carbon generation.

¹⁵ James Bushnell, Energy Institute Blog, “To Save Coal, Will Trump Kill Electricity Competition?,” (Oct. 16, 2017) <https://energyathaas.wordpress.com/2017/10/16/to-save-coal-will-trump-kill-electricity-competition/>.

¹⁶ See, e.g., M. Keay, Oxford Institute of Energy Studies, “Electricity Markets Are Broken: Can They Be Fixed?,” (Jan. 2016), <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/02/Electricity-markets-are-broken-can-they-be-fixed-EL-17.pdf>.

V. If FERC Does Finalize the Proposed Rule, it may not properly do so without Re-noticing the Rule and extending the comment period.

This rulemaking was not sufficiently noticed or supported to be a lawful proposal to amend wholesale rates. *See* Harvard Environmental Policy Institute Comments, at 1 n.2, *supra* note 1 (citing *FERC v. Sierra Pac. Power*, 350 U.S. 348, 372 (1956)). Additionally, FERC must provide “reasonable time limits” and “assure full consideration of issues and an opportunity for interested persons to present their views,” even under the DOE authority cited by the Secretary. 42 U.S.C. § 7173(b)-(c) Further, Executive Order 12,866 § 6a provides that “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.” Exec. Ord. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

On September 28, 2017, the Secretary announced the Proposed Rule and forwarded it to the Commission,¹⁷ and on October 2, 2017, FERC opened a mere 21-day comment period on the Proposal. If the Commission intends to amend regulations to allow cost recovery for eligible resources, it must re-notice this as a section 206 proceeding and extend the comment period.

Due to the insufficient record, which does not support the Proposed Rule, along with the improper notice and comment period, we request that FERC reject the rule. Thank you for the opportunity to submit these comments.

Respectfully submitted,

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¹⁷ Letter to FERC Comm’rs Chatterjee, LaFleur, & Powelson from DOE Secretary Rick Perry, (Sept. 28, 2017).