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Via Electronic Mail: AskOE@hq.doe.gov

The Honorable James Richard Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Re: Objections to FirstEnergy Solutions Corp.’s Request for Emergency Order Pursuant to Federal Power Act Section 202(c)

Dear Secretary Perry:

The Attorneys General of Massachusetts, Connecticut, Illinois, Maryland, North Carolina, Oregon, Rhode Island, Virginia, Washington, and the District of Columbia submit these objections to the request dated March 29, 2018 by FirstEnergy Solutions Corp. and its subsidiaries (collectively “FirstEnergy”) to the Secretary of Energy (“Secretary”) for an emergency order under section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c) (“section 202(c)”) (the “Request”).¹ Specifically, the Request asks you to: i) find an emergency exists in the control area of the PJM Interconnection, L.L.C. (“PJM”) due to an alleged “system resiliency” risk, ii) order certain merchant nuclear and coal-fired generators with on-site fuel supply to enter into multi-year contracts with PJM, and iii) order PJM to pay those generators at above-market rates that provide for “full recovery of all costs necessary to ensure continued operations.”²

The undersigned Attorneys General have a significant interest in protecting public health and welfare and electric customers from the pollution, increased costs, and other harms associated with subsidizing uneconomic coal-fired and nuclear generators at above-market rates. Abusing section 202(c) in the manner requested by FirstEnergy would set a dangerous precedent that threatens all of our states, including those located outside of PJM’s service territory.

The Request is legally flawed, and you should unequivocally deny it. Because

¹ See Letter from Rick C. Giannantonio, General Counsel, FirstEnergy Solutions Corp. et al., to James Richard Perry, Sec’y of Energy, U.S. Dep’t of Energy [DOE] (Mar. 29, 2018) [hereinafter Request].

² *Id.* at 1, 31.

FirstEnergy fails to identify any “emergency,” the requested section 202(c) order would be unlawful and *ultra vires*. Furthermore, the requested order would undermine competitive regional power markets, burden customers with excessive costs, undercut state energy laws and policies, and exacerbate pollution and public health harms.

I. FirstEnergy’s Declining Profits and Generalized Market Grievances Do Not Constitute an “Emergency.”

Issuing a section 202(c) order to address the declining economics of certain generators would be a grave abuse of the Federal Power Act. Section 202(c) explicitly authorizes the Secretary to issue temporary orders only in wartime or other “emergency” situations resulting from “sudden” electricity demand spikes or supply shortages.³ The “sudden” “emergenc[ies]” contemplated in section 202(c) do not include inefficient generators’ failure to turn a profit or their orderly displacement by other resources—a natural consequence of competitive markets.

Though the Federal Power Act does not define the terms “emergency” or “sudden,” the plain meaning of these terms indicates that Congress intended section 202(c) authority to be invoked rarely, in response to acute events that demand immediate response. As the D.C. Circuit Court of Appeals has recognized, the text dictates that circumstances triggering a section 202(c) order are specific, unexpected, urgent, and temporary.⁴

The Department of Energy’s (“Department”) interpreting regulations and historical use of section 202(c) authority accord with the text’s plain meaning. The Department defines an “emergency” as, *inter alia*, an “unexpected” supply shortage, which “may be the result of weather conditions, acts of God, or unforeseen occurrences not reasonably within the power of the affected ‘entity’ to prevent.”⁵ The Department’s regulations further state that section 202(c) orders “are envisioned as meeting a *specific* inadequate power supply situation.”⁶ Accordingly, the Department has rarely exercised its section 202(c) authority. Past emergency orders typically have responded to acute crises such as blackouts or severe storms.⁷

The Request fails to show that any specific, unexpected, or urgent supply threat exists in PJM. The Request instead relies primarily on general predictions that some aging U.S. coal-fired and nuclear generators will retire over the next decade. The Request specifically identifies three

³ 16 U.S.C. § 824a(c)(1).

⁴ See *Richmond Power & Light v. FERC*, 574 F.2d 610, 615 (D.C. Cir. 1978) (stating that section 202(c) “speaks of ‘temporary’ emergencies, epitomized by wartime disturbances, and is aimed at situations in which demand for electricity exceeds supply”). See also *Fed. Power Comm’n v. Fla. Power & Light Co.*, 404 U.S. 453 n.1 (1972) (relating section 202(c) to “the exigencies of ‘war’”); *Duke Power Co. v. Fed. Power Comm’n*, 401 F.2d 930, 944 (D.C. Cir. 1968) (stating that section 202(c) “relate[s] exclusively to temporary interconnections during national emergencies”).

⁵ 10 C.F.R. § 205.371 (other examples may include a “sudden” demand spike, a fuel shortage, “regulatory action” prohibiting the use of certain generators, or “[e]xtended periods of insufficient . . . supply” due to planning failures).

⁶ *Id.* (emphasis added).

⁷ See, e.g., *DOE’s Use of Federal Power Act Emergency Authority*, DOE, <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use>.

PJM nuclear assets that are scheduled (but not certain) to retire several years from now, in 2020–2021. The Request also cites FirstEnergy’s long-anticipated bankruptcy filings and its general frustration with the fact that competitors are outperforming its generators in PJM markets.⁸ Long-term trends, possible future retirements, and FirstEnergy’s dissatisfaction with its declining profits do not constitute a “sudden” “emergency” within the meaning of section 202(c). Retirements of uncompetitive coal-fired and nuclear generators are the result of economics, the natural evolution of technology, and shifts in policy.⁹ Such trends are natural in a competitive market, and are far from the wartime disturbances or other unforeseen events contemplated in section 202(c).¹⁰ The Secretary’s use of section 202(c) authority to interfere with the operation of competitive electricity markets in order to privilege certain fuels or suppliers would represent a dramatic expansion of the Secretary’s emergency authority.¹¹

II. Impending and Uncertain Generator Retirements Pose No Immediate Threat.

As the Federal Energy Regulatory Commission (“Commission”) and PJM have confirmed, impending coal-fired and nuclear generator retirements pose no emergency threat to power supply in PJM or elsewhere.¹² PJM’s performance during recent extreme winter weather affirms this.¹³

The Request relies heavily on a single National Energy Technology Laboratory study (“NETL Study”) concluding that demand in PJM during the December 2017–January 2018 cold snap (the “Cold Snap”) “could not have been met without coal.”¹⁴ But the NETL Study’s analysis has critical defects. It mistakenly concludes that coal-fired generation was critical to reliability because coal-fired generation disproportionately increased during the Cold Snap. Actually, this increase was due to the fact that more expensive and less efficient plants, such as the coal-fired plants identified in the study, are only dispatched when demand is high—not due to any attributes particular to coal-fired generation.¹⁵ The NETL Study’s conclusion fails to

⁸ See Request at 7–8, 13, 20–22.

⁹ JUDY CHANG ET AL., BRATTLE GROUP, ADVANCING PAST “BASELOAD” TO A FLEXIBLE GRID 8–13 (2017), available at <https://tinyurl.com/y7wwalwt>.

¹⁰ See PAUL HIBBARD ET AL., ANALYSIS GROUP, ELECTRICITY MARKETS, RELIABILITY AND THE EVOLVING U.S. POWER SYSTEM 4–5 (2017), available at <https://tinyurl.com/ybx9psbf> (“The retirement of aging resources is a natural element of efficient and competitive market forces, and where markets are performing well, . . . mainly represent[s] the efficient exit of uncompetitive assets, resulting in long-run consumer benefits.”).

¹¹ See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (agency’s statutory interpretation is unreasonable where “it would bring about an enormous and transformative expansion in [the agency’s] regulatory authority without clear congressional authorization”).

¹² See generally *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018); Letter from Vincent P. Duane, PJM, to James Richard Perry, Sec’y of Energy (Mar. 30, 2018), available at <https://tinyurl.com/PJMletter> [hereinafter PJM Comments]. Accord DOE, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY 63, 100 (2017).

¹³ See *infra* text accompanying notes 18–19.

¹⁴ See NAT’L ENERGY TECH. LAB., RELIABILITY, RESILIENCE AND THE ONCOMING WAVE OF RETIRING BASELOAD UNITS, VOL. I: THE CRITICAL ROLE OF THERMAL UNITS DURING EXTREME WEATHER EVENTS 17 (2018).

¹⁵ See ALISON SILVERSTEIN, ROB GRAMLICH, & MICHAEL GOGGIN, GRID STRATEGIES LLC, A CUSTOMER-FOCUSED

account for a key fact: that certain resources were dispatched is not evidence the system lacked (or will lack during future events) other resources that could have been called upon instead to meet market demand and maintain reliability.

The Request cites the defective NETL Study as evidence that a whole category of coal-fired and nuclear generators should be subsidized by electric customers at above-market rates for a multi-year period (or perhaps indefinitely).¹⁶ FirstEnergy's depiction of system performance and needs is deeply flawed. The system's preparedness for, and relatively modest price spikes during, the Cold Snap reflect significant actions PJM and other Northeast and Mid-Atlantic grid operators have taken to improve winter reliability since the 2014 Polar Vortex.¹⁷ PJM has more than enough capacity to meet demand, even in extreme weather.¹⁸ Notably, coal-fired and nuclear generators were not immune from outages during the Cold Snap, while other resources such as hydro, wind, and natural gas played vital roles in maintaining reliability.¹⁹ There is no evidence that a system with fewer coal-fired and nuclear generators, following such generators' orderly exit from the markets, would perform worse during future extreme weather events.²⁰

The Request claims, without support, that “[u]nless immediate action is taken,” PJM is “likely” to experience “load-shedding (or worse).”²¹ Yet, PJM recently sent a letter to the Secretary “stat[ing] without reservation there is no immediate threat to system reliability” should the FirstEnergy units retire as announced, and further, should PJM identify any reliability issues, it has “a range of tools available . . . to induce assets to remain temporarily on-line.”²² Per its standard, Commission-approved procedures, PJM responded to FirstEnergy's announced retirements by analyzing system reliability. PJM concluded that impending generator

FRAMEWORK FOR ELECTRIC SYSTEM RESILIENCE 7 (2018), available at <https://tinyurl.com/y9b4347t> (“No single unit or type of generation is critical or resilient in itself. . . . There is no evident need to compensate generators or other assets for bulk power system resilience beyond the engineering-based reliability services already being procured.”).

¹⁶ See Request at 4–9, 32.

¹⁷ See, e.g., *January's Cold Weather Affects Electricity Generation Mix in Northeast, Mid-Atlantic*, U.S. ENERGY INFORMATION ADMIN. (Jan. 23, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=34632>.

¹⁸ See *Update: PJM System Performing in Winter Storm Grayson*, PJM INSIDE LINES (Jan. 4, 2018), <https://tinyurl.com/yangm9wj> (“During the cold weather, PJM has had adequate power supplies and maintained operating reserve margins. There have been no concerns with fuel availability.”).

¹⁹ See PJM INTERCONNECTION, PJM COLD SNAP PERFORMANCE DEC. 28, 2017 TO JAN. 7, 2018 13–21 (2018), available at <https://tinyurl.com/ycetjvag>; *Update 2 – Entergy Shuts Massachusetts Pilgrim Nuclear Plant During Blizzard*, REUTERS, Jan. 4, 2018, <https://tinyurl.com/y7smj9b3> (reporting that ISO New England's system performed well during the Cold Snap even with very little coal-fired generation and despite shutdown of the 688-megawatt Pilgrim nuclear power plant due to downed power lines).

²⁰ Cf. *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018) (Glick, C., concurring) (stating there was “no evidence in the record to suggest that temporarily delaying the retirement of uncompetitive coal and nuclear generators would meaningfully improve the resilience of the grid”).

²¹ Request at 9. See also *id.* at 27.

²² See PJM Comments at 1.

retirements pose no immediate threat.²³ In sum, there is no indication, in the Request or otherwise, that Secretarial action is necessary or appropriate at this time.²⁴

III. The Requested Order Would Increase Prices and Pollution and Undermine State Energy Policies, With No Clear Reliability Benefits.

FirstEnergy's requested order would impose substantial, unreasonable costs on electric customers and the public, with no demonstrable system benefits. The Request provides no assessment of customer costs or the value of the so-called "fuel security and diversity" benefits of coal-fired and nuclear generators.²⁵ As outlined in separate comments submitted to the Commission by certain of the undersigned Attorneys General together with state agencies and consumer advocates (attached hereto as *Exhibit A*), subsidizing uneconomic generators at above-market rates would raise prices and force customers to bear the very economic risks that wholesale markets were designed to avoid. Furthermore, the requested section 202(c) order would undermine state policies to protect public health and ratepayers, including choices to promote renewable and alternative energy generation. Prolonging the operation of uncompetitive coal-fired power plants that would otherwise be replaced by cleaner resources would harm air quality and threaten progress toward our states' climate and clean energy goals.²⁶

* * * *

In general, the undersigned Attorneys General vehemently oppose extraordinary federal measures in response to FirstEnergy's Request or other section 202(c) applications, or action under the Defense Production Act.²⁷

For all of the foregoing reasons, the undersigned Attorneys General respectfully urge the Secretary to **DENY** FirstEnergy's legally flawed Request.

Please do not hesitate to contact us should you wish to engage us further in this matter.

²³ See Transmission Expansion Advisory Comm., PJM, Generation Deactivation Notification Update (May 3, 2018), available at <https://tinyurl.com/y7pjxk9j>.

²⁴ Furthermore, the requested order could conflict with action already underway in Commission Docket No. AD18-7, which the Commission initiated to evaluate the so-called resilience of the bulk power system. See *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,012 (2018).

²⁵ See Request at 1.

²⁶ See Initial Comments of the Attorneys General of Massachusetts et al., FERC Docket No. RM18-1, at 43–52 (Oct. 23, 2017) (attached hereto as Exhibit A).

²⁷ See Letter from Senator Joe Manchin III to President Donald J. Trump (Apr. 18, 2018), available at <https://tinyurl.com/y7mdmjgx> ("urg[ing] [the Trump] Administration to consider using . . . the Defense Production Act of 1950 to prevent the impending retirement of numerous coal-fired and nuclear power plants").

Sincerely,

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Exhibit A:

**Initial Comments of the Attorneys General of Massachusetts et al.,
Federal Energy Regulatory Commission Docket No. RM18-1
(Oct. 23, 2017)**

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Grid Reliability and Resilience)
Pricing)**

Docket No. RM18-1-000

**INITIAL COMMENTS OF THE ATTORNEYS GENERAL OF MASSACHUSETTS,
CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND, NORTH CAROLINA,
OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, CONNECTICUT
DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, RHODE
ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS, AND
NEW HAMPSHIRE OFFICE OF THE CONSUMER ADVOCATE**

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The undersigned Attorneys General, state agencies, and state consumer advocates (the “State Commenters”) hereby submit these initial comments in response to the Federal Energy Regulatory Commission’s (the “Commission”) Notice, dated October 2, 2017, inviting comments on a proposed rule regarding “grid reliability and resilience pricing,” which was released by the Department of Energy (“DOE”) on September 29, 2017 and published in the Federal Register on October 10, 2017. 82 Fed. Reg. 46,940 (the “Proposal”).¹

The Proposal is unsupported by law, lacks any reasoned basis or grounding in any supporting factual record, contains no analysis of its costs, and would damage the country’s competitive power markets in a manner likely to impose unreasonable and unnecessary costs on electric customers and profoundly undermine state energy laws and policies. On behalf of our states and our residents, the State Commenters urge the Commission not to finalize the Proposal.²

SUMMARY

DOE asks the Commission to establish a new regulatory regime that requires electric customers to pay certain uneconomic generating resources their full cost of service, under new tariffs administered by the operators of the nation’s otherwise competitive wholesale markets. DOE asserts this is necessary to ensure system “resiliency,” a term that lacks any accepted or legal definition. Without providing *any* estimate of what the Proposal would cost electric customers, DOE urges the Commission to implement the Proposal before this coming winter, to

¹ On October 4, 2017, staff for the Commission issued a request seeking responses during the comment process to thirty questions about the Proposal.

² The State Commenters recognize the numerous state consumer advocates and state public utility commissions that are submitting complementary comments on behalf of ratepayers and other important constituencies.

avoid further retirements of coal and nuclear power plants that allegedly would retire without these payments.

DOE proposes these sweeping changes, but provides the Commission with no lawful basis to adopt the new tariff requirements. DOE does not analyze how its Proposal would affect the wholesale electricity markets, provides no assessment of the Proposal's costs, makes no attempt to define or quantify the Proposal's benefits, and provides no support for making such a dramatic change on an expedited basis. DOE fails to show (or even argue) that the current regulatory construct is unjust and unreasonable, a finding the Federal Power Act requires for the Commission to take the proposed action.

The State Commenters oppose the Proposal for several reasons, which are explained in the detailed comments below:

- The Proposal violates federal law by failing to incorporate a finding of unjust and unreasonable rates under section 206 of the Federal Power Act or to provide an assessment of the resulting costs, as is required for Commission action of this kind. *See* pp. 3-7.
- The Proposal violates the Administrative Procedure Act in two separate ways: (1) by failing to provide the public with adequate notice or reasonable time for meaningful input and (2) by failing to explain or provide record support for its drastic regulatory changes, which are inconsistent with the Commission's long-standing commitment to competitive wholesale electric markets as an essential mechanism under the Federal Power Act to ensure just and reasonable rates, as well as with its efforts to refine those markets through responsive and inclusive

processes in conjunction with Regional Transmission Organizations (“RTOs”) and their stakeholders. *See* pp. 7-20.

- The Proposal’s underlying assumption—that electric system reliability or “resilience” is in danger because aging, uneconomic resources are retiring—is wrong. Under the Commission’s leadership, the bulk power system is reliable today and will continue to be so in the future. Both DOE’s own recent Staff Report and other independent analyses confirm that the risks that supposedly justify the Proposal are manageable and do not justify emergency action favoring particular fuels, but rather counsel for study of continued development of fuel-neutral solutions. Moreover, as independent analyses and state experience show, there is no evidence supporting the conclusion that retirement of aging resources or fuel supply issues are jeopardizing electric system reliability, and, to the contrary, clean energy resources and new technologies, coupled with market mechanisms, can serve future needs. *See* pp. 20-43.
- Last, the Proposal will pose unnecessary and unacceptable risks of harm to the States and their residents. The Proposal would drive up ratepayer costs; thwart state energy policies that support competition, innovation, and reduced air pollution; and impede state progress in addressing the risks of climate change. *See* pp. 43-52.

DETAILED COMMENTS

I. Finalizing the Proposal Would Violate the Federal Power Act.

The Federal Power Act requires that “[a]ll rates and charges . . . by any public utility for or in connection with the transmission or sale of electric energy . . . and all rules and regulations

affecting or pertaining to such rates or charges” must be “just and reasonable” and not “undu[ly] preferen[tial].” 16 U.S.C. § 824d(a), (b).³ Where, as here, the Commission is considering imposing new tariff requirements on public utilities, the Commission must invoke section 206 and prove that existing rates are “unjust, unreasonable, unduly discriminatory or preferential,” and then “determine the just and reasonable rate.” 16 U.S.C. § 824e(a); *see* 16 U.S.C. § 824e(b); *Advanced Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 662–63 (D.C. Cir. 2017) (under section 206, Commission has “burden to prove the reasonableness of its change” in affirming Commission’s section 206 finding in *PJM Interconnection, LLC*, 151 FERC ¶ 61,208, *order on reh’g*, 155 FERC ¶ 61,157 (2016) (internal quotation omitted)). As the D.C. Circuit has ruled, the Commission “may unilaterally impose a new rate scheme on a utility or Regional Transmission Organization only under [section 206],” *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017), and “it will ordinarily be an abuse of the Commission’s discretion not to make the . . . finding [that existing rates are unjust or unreasonable under section 206] explicit.” *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 958 (D.C. Cir. 1983) (Scalia, J.); *see also Maine v. FERC*, 854 F.3d 9, 24-25 (D.C. Cir. 2017) (discussing the Commission’s burden under section 206).

The Proposal wholly fails to meet the section 206 standard for Commission action. Most glaringly, it does not articulate any finding that wholesale rates are now unjust, unreasonable, or unduly discriminatory or preferential. Instead it confirms that rates are, consistent with recent

³ The Proposal states that the Commission’s authority to adopt the proposed regulations arises from sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e. Proposal at 46,941. Section 205, however, applies to Commission evaluation of rate filings by public utilities, such as market rule changes proposed in the first instance by RTOs, and the Commission plays “an essentially passive and reactive role” in making decisions under that section. *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017) (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

Commission determinations on RTO market rules, currently just and reasonable. Proposal at 46,946 (“implementation of these reforms is important to ensure rates *remain* just and reasonable” (emphasis added)). As a matter of law, therefore, in light of the Proposal’s recognition that rates currently are just and reasonable, the Commission may not impose any new tariff requirements, since it cannot satisfy its section 206 burden.

In place of a section 206 finding, the Proposal rests on allegations of supposed “threats to grid reliability and resilience” from the “continued loss of fuel-secure generation [resources],” which the Proposal says are “necessary to maintain the resiliency of the electric grid.” Proposal at 46,945. Yet the term “resilience” and its sister terms “resiliency” and “fuel secur[ity]” have no clear definition in the Proposal or in law. *See infra* note 8. And even the term “reliability” provides no stand-alone support for taking action because, “when [the Commission] chooses to refer to non-cost factors in rate setting [under the Federal Power Act], it must . . . offer a reasoned explanation of how the [relevant] factor[s] justif[y] the resulting rates.” *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 13 (D.C. Cir. 2015) (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)).⁴ Because the Proposal fails to set forth any specific section 206 findings demonstrating why current wholesale rates are unjust and unreasonable as they relate to electric grid reliability and “resilience,” the Proposal does not satisfy the requirements of the Federal Power Act and should be rejected on that basis.

Likewise, the very purpose of the Proposal is to impose additional costs on RTOs and the load they serve, yet it makes *no* attempt to address, analyze, characterize, or quantify those

⁴ *See also PJM Interconnection*, 155 FERC ¶ 61,157, 2016 WL 2752930, at *94 (Chairman Bay, dissenting) (“talismanic invocation of reliability is, by itself, inadequate to establish reasoned decision making and just and reasonable rates”).

costs.⁵ Without that information, the Commission cannot make an informed decision that rates resulting from the Proposal will be just and reasonable, as the Federal Power Act requires. *See, e.g., TransCanada Power Mktg.*, 811 F.3d at 11 (without information about portion of reliability program’s costs attributable to profits and risk premiums, Commission “could not properly assess whether the Program’s rates were just and reasonable”); *cf. Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (“Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.”).

Not only does the Proposal fail to provide any lawful basis for imposing new tariffs, it also appears to be inconsistent with the requirements of other Federal Power Act standards. Because the Proposal presents the potential for favored resources to receive the windfall of “full” cost-of-service treatment for energy, capacity, and ancillary services that the markets could procure at a lower cost, the Proposal could result in “excessive prices” to the detriment of consumers, in violation of the “just and reasonable” standard and the purposes of the Federal Power Act. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 781 (2016) (“The statute aims to protect ‘against excessive prices’” (quoting *Penn. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).); *TransCanada Power Mktg.*, 811 F.3d at 12 (statute forbids “excessive profits”); *Pub. Sys. v. FERC*, 606 F.2d 973, 979 n.27 (D.C. Cir. 1979) (Federal Power Act “aim[s] to protect consumers from exorbitant prices and unfair business practices,” as reflected in “statutory

⁵ In recent Congressional testimony, Secretary Perry failed to respond to the question whether DOE analyzed the costs of the Proposal and stated that “[T]he cost effective argument on this is secondary to whether the lights are going to come on I think you take costs into account, but what’s the cost of freedom? . . . What is the cost to build a system to keep America free?” Gavin Bade, *Perry on DOE NOPR pricetag: ‘What’s the cost of freedom?’*, Utility Dive (Oct. 12, 2017), at <http://www.utilitydive.com/news/perry-on-doe-nopr-pricetag-whats-the-cost-of-freedom/507174/>.

requirement that rates be just, reasonable, and nondiscriminatory”). In addition, the Proposal would violate the Federal Power Act to the extent that it would have FERC unduly discriminate in wholesale ratemaking by arbitrarily favoring coal and nuclear power plants over other resources that could provide similar or superior system services or attributes at a lower cost. *See, e.g., Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1515 (D.C. Cir. 1984) (rates must “be non-discriminatory and non-preferential[,] as well as just and reasonable”).

II. The Proposal Violates the Commission’s Legal Rulemaking Obligations.

The Proposal is not lawful rulemaking. In both its content and in the expedited comment process the Commission is following to consider it, the Proposal is not designed to provide the “reasoned decision-making” required in the Federal Power Act context. The Proposal reflects no effort to gather a record of material facts, and therefore the Commission is compromised in its duty to “weigh[] competing views, select[] a compensation formula with adequate support in the record, and intelligibly explain[] the reasons for making [its] choice.” *Elec. Power Supply Ass’n*, 136 S. Ct. 784; *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must “articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made’” (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962))).

The Proposal lacks the substantive content or supporting factual record that would permit informed and responsive comments from the public. Moreover, the short period afforded for public comment on a regulatory change of such significant consequence as the Proposal allows insufficient time meaningfully to respond to Commission staff’s voluminous questions.⁶ More

⁶ A recent Commission rulemaking on a much narrower topic provided a combined 141 days for comments from the publication of three requests for comments in the Federal Register, with additional days between issuance of the Commission requests and Federal Register publication.

fundamentally, the Proposal does not recognize or explain the profound changes its proposed tariff requirements would make in the Commission’s approach to establishing just and reasonable rates, regulating the wholesale electric market, or the potentially significant impact on consumers. For these reasons, the Proposal should go no further.

A. The Proposal Lacks a Factual and Evidentiary Basis, and Adopting It Would Therefore Be Arbitrary and Capricious.

A threshold problem with the Proposal is that it has virtually no supporting factual record of its own. The Proposal is accompanied on the docket by a letter from DOE Secretary Rick Perry, a list of questions from Commission staff, and no other supporting information. While the preamble collects a variety of excerpts from official and other technical reports and from past and ongoing Commission proceedings, none of those references supports the statements in the preamble that allege the Proposal is necessary. In particular, there is no evidentiary support in the references for the Proposal’s central premise: that the “premature” retirement of certain “fuel-secure” power plants, coupled with other generators’ lack of a 90-day fuel supply, is harming electric system reliability or “resilience” and threatening national security. In fact, existing evidence contradicts this assumption, as discussed in more detail in Sections III through V below.

Although the Proposal purports to rely on the “extensive record” that the Commission and other agencies have developed on the subject matter, Proposal at 46,941, it includes no direct

See Essential Reliability Servs. & the Evolving Bulk-Power Sys. – Primary Frequency Response, Notice of Inquiry, 154 FERC ¶ 61,117 (Feb. 18, 2016) (60 days from Federal Register publication to provide comments, including responses to Commission questions); Notice of Proposed Rulemaking, 157 FERC ¶ 61,122 (Nov. 17, 2016) (60 days from Federal Register publication); Notice of Request for Supplemental Comments, 160 FERC ¶ 61,011 (Aug. 18, 2017) (21 days from Federal Register publication); *see also Winter 2013-2014 Operations & Mkt. Performance in Reg’l Transmission Orgs. & Indep. Sys. Operators*, 149 FERC ¶ 61,145 (Nov. 20, 2014) (90 days for RTO responses to questions).

explanation of what evidence in that record supports the need for the Proposal. For example, the Proposal quotes DOE’s January 2017 Quadrennial Energy Review (“January 2017 QER”)⁷, including an italicized statement that “the increased importance of system resilience to overall grid reliability *may* require adjustments to market mechanisms that enable better valuation.” Proposal at 46,943 (emphasis added). This general statement does not reference any emergency, crisis, or actual need to make significant market changes, nor does it identify fuel security as a key element of “resilience.”⁸ The January 2017 QER includes extensive recommendations to address electric system resilience, none of which includes establishing cost-of-service rates for the resources identified in the Proposal. *See, e.g.*, January 2017 QER at 4-1 to 4-55 (no mention of “fuel security”).

The Proposal then quotes a May 2017 letter to DOE from the North American Electric Reliability Corporation (“NERC”) stating that the changing operating characteristics of the bulk power system “must be well understood and properly managed.” That letter does not appear in this rulemaking docket, but is available online.⁹ While the NERC letter identifies retirement of certain generating assets as implicating reliability, it *does not* recommend assuring cost recovery for the resources identified in the Proposal. Instead, the letter requests that the Commission and states conduct a *review* of the economic and policy issues related to retirements. The Proposal

⁷ U.S. Department of Energy, Quadrennial Energy Review – Transforming the Nation’s Electricity System: The Second Installment of the QER (Jan. 2017), *available at* <https://energy.gov/sites/prod/files/2017/02/f34/Quadrennial%20Energy%20Review--Second%20Installment%20%28Full%20Report%29.pdf> (“January 2017 QER”).

⁸ The January 2017 QER states that “[t]here are no commonly used metrics for measuring grid resilience.” January 2017 QER at S-13. In other words, there currently is no quantifiable standard by which to determine either the qualities or the services that will be rewarded under the Proposal by full cost-of-service rates for the Proposal’s favored resources.

⁹ At https://www.eenews.net/assets/2017/10/03/document_ew_01.pdf.

then makes similar unfounded analytical leaps from DOE’s own August 2017 Staff Report¹⁰ to the conclusion that there is a “resiliency” emergency, which will be addressed in more detail below.

Finally, the Proposal includes a description of various Commission proceedings concerning reliability and price formation in wholesale markets dating to 2013. Despite this long record of Commission action, including various orders to strengthen the markets and set “just and reasonable” rates for RTOs and other market participants, the Proposal nonetheless concludes that the very reliability-related market issues the Commission has been addressing in the cited dockets are not being addressed adequately. Without citation or authority, the Proposal states that certain market deficiencies are “undermining reliability and resiliency,” Proposal at 46,944, that “the fundamental challenge of maintaining a resilient electric grid has not been sufficiently addressed by the Commission or the ISOs and RTOs,” and the “continued loss of fuel-secure generation must be stopped,” Proposal at 46,945. Importantly, this unsupported rationale is contradicted by DOE’s own findings as set forth in its August 2017 Staff Report, which concluded that wholesale electric markets “are currently functioning as designed—to ensure reliability and minimize the short term costs of wholesale electricity—despite pressures from flat demand growth, Federal and state policy interventions, and the massive economic shift in the relative economics of natural gas compared to other fuels.” DOE Staff Report at 10. Moreover, nowhere in that report does DOE recommend, or even identify as an option,

¹⁰ Department of Energy, Staff Report to the Secretary on Electricity Markets and Reliability (Aug. 2017), *available at* https://energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf (“DOE Staff Report”).

subsidizing the generation identified in the Proposal through a federal guarantee of full cost recovery. *See id.* at 126-27.

The lack of factual support for the Proposal extends to the details of its proposed tariffs, including their applicability solely in regions within a Commission-approved ISO or RTO with a day-ahead market, real-time market, and capacity market,¹¹ its 90-day fuel requirement for eligible resources, and its exclusion of resources subject to cost-of-service regulation by states. *See* Proposal at 46,948. Cost-of-service ratemaking, ordinarily reserved for monopoly services, involves specific accounting rules, including specifying the sources of data, accounting for taxes, the treatment of transaction-related costs, asset retirement, lobbying and advertising expenses, and allocation of costs among jurisdictions and functions.¹² The Proposal contains no discussion of, or support for, the inclusion of any of these specific provisions.

In sum, the preamble to the Proposal and the references that it cites include no factual support for the Proposal in general and lack support for its specific provisions to implement cost-of-service ratemaking. These blatant defects make any effort to finalize the Proposal arbitrary and capricious and thus violate the requirements for Commission decision-making under the Federal Power Act, the Administrative Procedure Act, and governing case law. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784; *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

¹¹ The versions of the Proposal attached to Secretary Perry's letter to the Commission and posted in this rulemaking docket do not contain this last limitation, but the version published in the Federal Register does. *See* 82 Fed. Reg. 46,940, 46,948 (Oct. 10, 2017). According to an errata notice, the Commission is seeking comment on the version in the Federal Register.

¹² *See, e.g.*, Commission Staff's Guidance on Formula Rate Updates (2014), available at <https://www.ferc.gov/industries/electric/indus-act/oatt-reform/staff-guidance.pdf>; *see also, e.g.*, PJM Interconnection, PJM Open Access Transmission Tariff, Docket No. ER17-2232-000, at 1580-1608, available at <http://www.pjm.com/directory/merged-tariffs/oatt.pdf> (annual transmission rates for Commonwealth Edison Company Network Integration Transmission Service).

B. The Proposal Is Fatally Lacking in the Meaningful Detail Necessary for Public Notice and Informed Public Comments.

The Proposal seeks to remake the wholesale electric markets to assure that certain resources fully recover from ratepayers their costs and guaranteed returns on their investments, despite the fact that those resources are no longer economically competitive. But the Proposal gives only the most generic guidance on how that recovery should occur and on what terms. Indeed, the proposed regulatory language is less than one page and provides no definitions of key terms like “resiliency,” “emergency,” “90-day fuel supply,” “fuel-assurance,” or “fully allocated costs and a fair return on equity.” *See* Proposal at 46,948. The preamble states the Proposal’s “crisis” rationale in conclusory fashion, without any record citations or evidence to indicate that the proposed action is necessary. *See* Proposal at 46,941-42.

This is not fair public notice. The Proposal is deficient on its face for failing to “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (citation omitted). Further, it would be improper for the Commission to develop a *post-hoc* rationale for the Proposal through assembly of a record during the comment period or thereafter; the rulemaking proposal itself must provide notice of the *agency’s* rationale and record support. *See* Hon. Harry T. Edwards et al., *Federal Standards of Review: Review of District Court Decisions and Agency Actions* ch. XIII.E (2013) (citing *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 462 (D.C. Cir. 2012)); *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (“By requiring the ‘most critical factual material’ used by the agency be subjected to informed comment, the [Administrative Procedure Act] provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to

enhance the quality of judicial review.”). In this case, DOE drafted the Proposal, and the Proposal’s deficiencies are attributable to DOE. It is the Commission’s duty to decline to proceed with such a sweeping rulemaking on notice that is so deficient and vague.

C. Both DOE’s Directives and the Commission’s Timeline for Considering the Proposal Prevent Participants from Commenting Fully on the Many Complex Issues Raised by the Proposal.

The deadline for initial comments on the Proposal is set for 21 days following the Commission’s public notice, 19 days after Commission staff posted a detailed list of thirty questions about the Proposal, and a mere 12 days following the publication of the Proposal in the Federal Register, with reply comments due only 14 days later. This timeline closes the comment period on the Proposal in less than the 30-day post-publication period that is typically the bare minimum afforded for federal rulemaking, and far less than the 90 to 180 day comment periods, often preceded by Advance Notices of Proposed Rulemaking and their own comment periods, that major rulemaking proposals often require.¹³ The Commission’s denial of the many requests for an extension of the comment period, without supporting reasons, has compounded the prejudice to commenters. Moreover, given the vast volume of public comments expected on the Proposal, the Commission should allow more than a mere 14 days to file comments replying to the expected deluge of initial comments.

In this regard, DOE’s directive to take final action on the Proposal within 60 days also

¹³ See *supra* note 6; cf. Executive Order No. 12,866, 58 Fed. Reg. 51,735, § 6(a) (1993) (“[E]ach 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.”); Office of the Federal Register, A Guide to the Rulemaking Process (2011), at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (“In general, agencies will specify a comment period ranging from 30 to 60 days. . . For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more.”).

improperly impinges on the Commission’s responsibility to act in a deliberative and independent manner in accordance with the Department of Energy Organization Act. *See, e.g.*, 42 U.S.C. § 7173(b) (Commission has “exclusive jurisdiction” with respect to any proposal and shall act within “reasonable time limits”); *id.* § 7173(c) (Commission’s use of rulemaking procedures to set rates under Federal Power Act procedures “shall assure full consideration of the issues and an opportunity for interested persons to present their views”); *id.* § 7171(d) (“In the performance of their functions, the members, employees or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee or agent of any other part of” DOE.).

D. The Proposal Fails to Articulate a Reasoned Basis for Its Sweeping Changes to the Country’s Electricity Markets.

In guaranteeing “full” cost recovery for a group of preferred resources, regardless of market outcomes, the Proposal would decisively break from the Commission’s longstanding reliance on competitive wholesale markets to secure just and reasonable rates. As the Supreme Court has recently recognized, the Commission “undertakes to ensure ‘just and reasonable’ wholesale rates by enhancing competition—attempting . . . ‘to break down regulatory and economic barriers that hinder a free market in wholesale electricity.’” *Elec. Power Supply Ass’n*, 136 S. Ct. at 768 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008)); *see also* *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 371 n. 226 (2004) (“The Commission favors market design remedies, where possible, to provide needed revenues to support reliability-based generators and other needed investments.”).

The Proposal contravenes decades of Commission precedent establishing and strengthening competition in the country’s wholesale electric markets. Pursuant to Order 888, the

Commission required open access to transmission services, the foundation necessary for competitive wholesale electric markets in the United States. Order No. 888, *Promoting Wholesale Competition Through Open-Access Non-discriminatory Transmission Servs. by Pub. Utils.*, 61 Fed. Reg. 21,540 (May 10, 1996), *aff'd in part, rev'd in part*, 225 F. 3d. 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). Prior to the Commission's restructuring of the market under Order 888 and its successors, electricity delivery and supply were treated as monopoly services.¹⁴ Rates were based on cost-of-service rate-of-return ratemaking, which in some cases resulted in inefficient investment decisions and excessive costs.¹⁵ There was little competition among generators and no market discipline brought to bear on a generator's prices or costs. In many cases, ratepayers were saddled with the full costs of expensive and often over-budget power plants, and bore the downside risks that vertically integrated utilities incurred. *See* National Renewable Energy Laboratory, *Competitive Electricity Market Regulation in the United States: A Primer* at 9 (2016), at <https://www.nrel.gov/docs/fy17osti/67106.pdf> (hereinafter, "Competitive Electricity Market Regulation") (citing utility "overbuilding of [generation] capacity and the concomitant capital costs, [which] triggered rate increases," "utility mismanagement," and "lax regulatory oversight").¹⁶

¹⁴ In many states, electricity delivery and supply remain bundled and subject to cost-of-service regulation. However, the Proposal would exclude those resources from the rule. Proposal at 46,948, proposed rule § 35.28(g)(10)(i)(E).

¹⁵ The seminal work addressing the perverse incentives favoring inefficient investment ("gold-plating") as a result of cost-of-service regulation is the paper by Harvey Averch and Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, AM. ECON. REV., Vol. 52, No. 5, pp. 1052-1069 (Dec. 1962). The "Averch-Johnson" effect has been widely discussed in regulatory decisions at both the state and federal levels.

¹⁶ These features are not inevitable results of cost-of-service regulation of utility assets within the context of least-cost integrated resource planning and careful review of regulated utilities and

In issuing Order 888, the Commission’s express goal was “to ensure that customers have the benefits of competitively priced generation.” 61 Fed. Reg. at 21,550. Since its initial issuance of Order 888, the Commission has not wavered from its commitment to open wholesale electric markets and “the promise of an increasingly competitive commodity market in electric power, in which significant benefits to consumers can be achieved.” *Id.* at 21,569. Many states, including certain states represented by the State Commenters, amended their state laws to replace the pricing of electricity through regulation with reliance on Commission-regulated wholesale electric markets to set the price of electricity.¹⁷

As part of the its implementation of competitive wholesale electric markets, the Commission consistently has promoted greater competition to benefit electric customers and, among other reforms, strongly has encouraged the organization of regional markets administered by independent system operators, which now serve two-thirds of the nation’s electric customers. *See* Competitive Electricity Market Regulation at 9; *see also* Order No. 2000, *Regional Transmission Orgs.*, 89 FERC ¶ 61,285 (Dec. 20, 1999).¹⁸ According to the Commission, “[e]ffective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting

their costs by utility commissions, as evidenced by the successful regulatory regimes that govern transmission at the federal level and distribution (and in some states, generation) at the state level. The success of state regulation depends on the application of appropriate rules and fair procedures to govern the establishment of rates.

¹⁷ In the PJM region, for example, the price for electricity rose in the 2000s and began to fall in 2009 as new technologies developed and competition imposed discipline on market participants. *See* Monitoring Analytics LLC, State of the Market Report for PJM, Vol. 1, at 17, Table 9 (Mar. 2017), *available at* http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2016/2016-som-pjm-volume1.pdf.

¹⁸ *Order on reh’g*, Order No. 2000-A, 65 Fed. Reg. 810 (2000), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.” Order No. 719, *Wholesale Competition in Regions with Organized Elec. Mkts.*, 125 FERC ¶ 61,071 at P 1 (Oct. 17, 2008); *see also Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163 at P 371 n.226 (“The Commission favors market design remedies, where possible, to provide needed revenues to support reliability-based generators and other needed investments.”). As a matter of Commission precedent, “[i]mproving the competitiveness of organized wholesale energy markets is therefore integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable, and not unduly discriminatory or preferential rates.” Order No. 719 at P 1.

The Proposal turns this principle on its head by guaranteeing “full” cost recovery for certain preferred generation resources. *See* Proposal at 46,945 (“The rule allows the full recovery of costs of certain eligible units physically located within the Commission-approved organized markets [and] requires the organized markets to establish just and reasonable rate tariffs for the recovery of costs and a fair rate of return.”). Because those resources, unlike their competitors, would no longer need to recover their costs in the market, giving them “full” federally-guaranteed cost recovery would be a significant departure from the Commission’s policy of promoting competitive, fuel-neutral, non-discriminatory, and efficient wholesale markets. It could be justified, as part of the Commission’s statutory responsibilities, only, if ever, upon a clear showing of necessity to ensure electric system reliability. That showing has not been

made.¹⁹ Instead, electric customers would invariably have to pay those costs, regardless of how high they are, and customers will bear the investment risks now borne by resource owners.

The Proposal is profoundly different from state credit-based programs that incentivize utilities' procurement of particular resources. Those state programs neither guarantee full cost recovery, nor remove categories of resources from the competitive wholesale market. Rather, those programs are one means by which states exercise their traditional authority to regulate electric generation. *See* Section VI.B, *supra*.

As the Proposal is unmoored from specific and demonstrable reliability concerns or other legal authority, its preferential treatment of uncompetitive resources would also depart from the Commission's statutory obligation and longstanding position that wholesale electric markets should ensure an open and level playing field for generating and other resources. 16 U.S.C. §§ 824d(a), (b); *see, e.g., Indianapolis Power & Light Co.*, 158 FERC ¶ 61,107 at P 69 (2017) (market rules that "unnecessarily restrict[] competition" by excluding certain resources are "unjust, unreasonable, and unduly discriminatory or preferential"); Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, 134 FERC ¶ 61,187 at P 59

¹⁹ The nation's RTOs are committed to preserving and strengthening competitive electric markets that ensure reliability. In the wake of the Proposal, this view was reaffirmed by ISO New England ("ISO-NE"), which has overseen and successfully managed substantial retirements of coal and nuclear resources in recent years. *See* Notice, ISO-NE, *Study on Regional Fuel Security to be Delayed Pending Resolution of DOE Proposal on Grid Resiliency Pricing* at 1 (Oct. 13, 2017), available at https://www.iso-ne.com/static-assets/documents/2017/10/20171013_fuel_security_analysis_delay_final.pdf ("ISO-NE Delay Notice") ("Competitive markets have worked effectively in New England to bring forward the resources needed to ensure reliable power system operations while reducing power system emissions and wholesale power prices. Reliability services can be provided by a wide range of resources and technologies, including those that have onsite fuel, and the ISO believes that the most efficient solution is to procure those services through a competitive market whenever feasible. Providing full cost recovery for certain technologies and not others will ultimately undermine the competitive wholesale market construct and lead to cost-of-service for all resources.").

(2011) (“removing barriers to demand response participation” in markets “facilitates greater competition”).²⁰

Such an irrational and unexplained departure from the Commission’s precedents would be unlawful. Under the Administrative Procedure Act, when an agency reverses existing policy, it must show a change in circumstances and policy and provide strong reasons for disregarding prior factual and policy conclusions. As the D.C. Circuit has recently explained, when reversing existing policy:

[T]he Supreme Court has held that “the [Administrative Procedure Act] requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.” . . . “It is not that further justification is demanded by the mere fact of policy change[,] but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” . . . “Put another way, ‘it would be arbitrary and capricious to ignore such matters.’”

U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 708-09 (D.C. Cir. 2016) (citing *Elec. Power Supply Ass’n*, 136 S. Ct. at 784), *reh’g denied*, 855 F.3d 381 (D.C. Cir. 2017), *petitions for cert. filed* (U.S. Sept. 27, 2017) (No. 17-498 et al.); *see also* 5 U.S.C. § 706; *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 894, 897 (D.C. Cir. 1999) (“arbitrary and capricious” for Commission to “without an explanation . . . depart[] from its own precedent” (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 57)); *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 16 (D.C. Cir. 2005) (remanding for further explanation where Commission failed to adequately explain new

²⁰ *Order on reh’g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh’g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev’d & remanded sub nom. FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016).

policy). The Proposal thus fails to address factual or policy changes that would justify a radical shift away from market pricing, does not recognize the consequences to parties that have placed “serious reliance” upon the wholesale market rules, and fails to meet the standard for reversing existing Commission policy.

III. The Proposal Is Unnecessary to Support System Reliability.

On its own terms, the Proposal is a solution for a problem that does not exist. First and foremost, there is no evidence that electric system reliability is in any present danger. As discussed below, DOE’s own staff report confirmed this reality earlier this year, *see* DOE Staff Report at 10 & *infra* Section IV.B, as did Commission staff in an October 19, 2017 report to the Commission providing its assessment of energy market conditions during the upcoming winter.²¹

Nor do the ongoing retirements of resources with on-site fuel present an emergency requiring immediate out-of-market Commission actions. With the Commission’s approval, numerous regional markets operate capacity and other markets to ensure that they have adequate generation resources to meet peak customer demand plus a reserve margin, and thus ensure system reliability over time. FERC Staff Report No. AD13-7-000, *Centralized Capacity Mkt. Design Elements*, at 2 (Aug. 2013), at <http://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf> (“[T]he primary goal of each of these markets is the same: ensure resource adequacy at just and reasonable rates through a market-based mechanism that is not unduly discriminatory or preferential as to the procurement of resources.”). The capacity markets provide additional payments to generators and other resources to supplement energy revenues, in recognition of the fact that energy revenues alone may not be sufficient for some generators to

²¹ FERC Staff, Winter 2017-18 Energy Market Assessment (Oct. 19, 2017), *available at* <https://www.ferc.gov/market-oversight/reports-analyses/mkt-views/2017/10-19-17-A-3.pdf> (“Winter Energy Market Assessment”).

recover their costs and remain viable. *Id.* The Commission has reviewed the capacity market rules regularly in response to complaints and tariff filings, and, in recent years the Commission has approved modifications to capacity markets so that they compensate capacity based on availability and performance at times of high demand. *See, e.g., PJM Interconnection*, 155 FERC ¶ 61,157 at P 29 (Tying “resource compensation to a resource’s actual performance, is consistent with fundamental principles of fairness. Resources should be compensated in proportion to their performance.”).

The Proposal applies only to the RTOs that have established these capacity markets, apparently amounting to a judgment that those markets have wholly failed to meet their objectives and should be scrapped. Proposal at 46,948. To the contrary, these capacity markets are successful in procuring needed capacity to ensure system reliability in the regions where they operate.²²

- In 2016, ISO New England’s (“ISO-NE”) tenth annual capacity auction included stringent requirements to ensure resource performance at times of system stress, concluded at lower price than the previous auction, and procured sufficient resources, including three new conventional power plants, as well as capacity from solar and offshore and onshore wind facilities, to meet projected New England demand in 2019-2020.²³
- In PJM Interconnection’s (“PJM”) most recent capacity auction held in May 2017 and applicable in 2020-2021, the reserve margin for the entire RTO was 23.3%, that is, 6.7% higher than the target reserve margin of 16.6%. In other words, existing PJM resources exceed peak demand by 23.3%, demonstrating that there is sufficient reliable generation available to serve all customers in the PJM region. Moreover, in PJM capacity auctions covering 2017/2018 through 2020/2021, new generation and generation uprates (increased capacity) ranging from 2,823.8 megawatts (“MW”) to 6,267.3 MW cleared the auction. PJM further reports that

²² For information on capacity markets not discussed here, see the comments filed in this docket by certain State Commenters’ respective state utilities regulators.

²³ Press Release, ISO-NE, *Finalized Capacity Auction Results Confirm 10th FCA Procured Sufficient Resources, at a Lower Price, for 2019–2020* (Feb. 29, 2016), at https://www.iso-ne.com/static-assets/documents/2016/02/20160229_fca10_finalresults.pdf.

from 2007/2008 to 2020/2021, the net increase in installed capacity, including generation retirements and additions, demand response, and energy efficiency, equals 22,701 MW in the PJM region.²⁴

- In the Midcontinent Independent System Operator (“MISO”) region, the most recent offers of capacity exceeded the reserve margin by 5.5%, resulting in a region-wide price of \$1.50 per MW-day, reflecting the existence of more than sufficient generation resources to meet regional demand.²⁵

The fact that certain older, uneconomic resources do not clear the auctions and are retiring is not evidence that capacity markets are failing; to the contrary, these markets have ensured replacement of retiring resources with new capacity in a manner that has met regional installed capacity and reserve requirements and maintained system reliability.²⁶ Against this backdrop, there is no need for the Proposal, or anything similar, to safeguard system reliability.²⁷

²⁴ PJM, *2020/2021 RPM Base Residual Auction Results* at 2-3, 19 (2017), available at <http://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx>.

²⁵ MISO, *2017/2018 Planning Resource Auction Results* at 5 (2017), available at <https://www.misoenergy.org/Library/Repository/Meeting%20Material/Stakeholder/RASC/2017/20170510/20170510%20RASC%20Item%2002a%202017-18%20PRA%20Summary.pdf>.

²⁶ See, e.g., *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138, at P 9 (2017) (“One purpose of capacity markets is to send appropriate price signals regarding where and when new resources are needed.”); *Long Island Power Auth. v. N.Y. Indep. Sys. Operator, Inc.*, 120 FERC ¶ 61,071, at P 14 (2007) (“the [capacity] market would benefit customers by encouraging the construction of new capacity”); *N.Y. Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201, at P 36 (2003) (“NYISO’s analyses adequately demonstrate that the proposal will benefit customers because it will encourage the construction of new generation.”), *aff’d sub nom Elec. Conservation Res. Council v. FERC*, 407 F.3d 1232 (2005); *ISO New England Inc.*, 148 FERC ¶ 61,201, 2014 WL 4637550, at *4 (2014) (LaFleur, concurring) (“Forward Capacity Market (FCM) plays a vital role in ensuring reliability in New England. [It] is the mechanism that ensures future system reliability by procuring capacity resources sufficient to meet New England’s resource adequacy needs.”).

²⁷ The Commission has preexisting tools to address short-term reliability issues that may arise from the retirement of a particular resource, including approval of reliability-must-run agreements with generators, which “should be of a limited duration so as to not perpetuate out-of-market solutions that have the potential, if not undertaken in an open and transparent manner, to undermine price formation” in the wholesale market. *N.Y. Indep. Sys. Operator, Inc.*, 150 F.E.R.C. ¶ 61,116 at P 2 (2015).

It is hard to envision how the Proposal could co-exist with capacity and other markets. With no incentive to recover fixed costs through markets, favored resources theoretically could recover both market and cost-based revenues, or rely exclusively on cost-based revenues and exit the market altogether, causing future auctions to fail. The Proposal would unacceptably undermine if not destroy the many years of hard work by the Commission, the RTOs, and market participants and stakeholders (including the States) to refine and adjust the capacity and other market constructs employed by the country's RTOs. The Commission should instead continue its longstanding efforts to work with RTOs and stakeholders to improve capacity and other markets.

Moreover, the Commission, the nation's RTOs, and other reliability organizations have already developed both markets and cost-based rates to compensate providers of power-related services that are necessary for reliability, such as black-start capabilities and spinning reserves. *See, e.g.*, Competitive Electricity Market Regulation at 14-15. These services have been addressed in established, deliberative processes that provide the opportunity for stakeholders, including generators, utilities, consumers, and the Commission, to participate in ensuring that the nation's electric grid meets the Commission-approved reliability standards promulgated under section 215 of the Federal Power Act, 16 U.S.C. § 824(o), which was enacted as part of the Energy Policy Act of 2005.

In contrast to the more inclusive processes approved by the Commission to address market issues, the Proposal reflects a top-down approach that departs from the decision-making process undertaken by the nation's RTOs, in collaboration with the States and other stakeholders. *See, e.g.*, Order No. 719 at P 477 (finalizing requirements for RTOs and ISOs that reaffirm importance of "responsiveness" by RTOs and ISOs, i.e., "willingness, as evidenced in its practices and procedures, to directly receive concerns and recommendations from customers and

other stakeholders, and to fully consider and take actions in response to the issues that are raised”). In the refinement of capacity markets and in many other areas, regional markets have institutionalized reliability and system planning within extensive stakeholder processes under the Commission’s oversight.²⁸

In past approaches to address the very fuel supply issues that the Proposal purportedly seeks to cure, the Commission has followed a more deliberative and bottom-up process to investigate potential market improvements. In 2016, for example, the Commission approved changes to the PJM capacity market as a part of its “broader effort, by the RTOs, market participants, and the Commission, to adapt the nation's wholesale electric markets to the underlying changes in how electricity is generated and ensure that reliability is sustained during and after that transition.” *PJM Interconnection*, 155 FERC ¶ 61,157, at P 25. The Commission stated:

[I]n recent years, the Commission has convened technical conferences specifically addressing the operation of wholesale capacity markets and the increasing importance of coordination between the electric and natural gas industries for the reliability of the nation's electricity supply. Those efforts have resulted in both regional market changes, such as ISO New England, Inc.’s Pay for Performance capacity market reforms (upon which PJM’s Capacity Performance program is modeled), and national changes to communication and coordination processes between the natural gas and electric industries.

²⁸ In general, stakeholder processes are recognized as vital contributors to the development of regional market rules. Mark James et al., *How the RTO Stakeholder Process Affects Market Efficiency*, R Street Policy Study No. 112, at 19 (October 2017), available at <http://www.rstreet.org/wp-content/uploads/2017/10/112.pdf> (“Stakeholder-governance processes are essential to the efficient development of market rules. Our research and interviews discovered a consensus that these processes are generally working well and serve the needs of the stakeholder community.”). State agencies, consumer advocates, and utility commissions generally have “seats at the table” and regularly participate in and influence these processes. *Id.* at 2, 11.

Id. See, e.g., Centralized Capacity Markets in Reg'l Transmission Organizations & Indep. Sys. Operators Winter 2013-2014 Operations & Mkt. Performance in Reg;l Transmission Orgs. & Indep. Sys. Operators, 149 FERC ¶ 61,145 at P 19 (2014) (providing “each RTO/ISO the opportunity to identify the fuel assurance issues most relevant to its markets and comprehensively describe the set of actions it has already undertaken or proposes to undertake to address these issues”).²⁹ Whether or not all stakeholders have agreed with the particular outcomes of these market initiatives, the joint efforts by RTOs, stakeholders, and the Commission to improve system reliability and market performance in the face of a changing resource mix reflect the fitness and durability of Commission oversight to address wholesale market challenges, including the alleged challenges described in the Proposal. The Proposal provides no reason for the Commission to depart from its practice of engaging market participants and other stakeholders through deliberative and inclusive inquiries that draw on

²⁹ RTOs continue to conduct analysis of these issues. ISO-NE is in the midst of completing a study regarding fuel security, and the Proposal has compelled it to indefinitely delay the study’s release and the subsequent stakeholder discussions of potential market changes to address any fuel security issues it identifies. *See ISO-NE Delay Notice, supra* note 19, at 2 (“The identification of appropriate market design improvements will be a complex undertaking and will require a systematic and deliberative regional process for examining the risks and potential solutions. The ISO planned to discuss the study results with stakeholders over the remainder of 2017 and into early 2018 and begin discussions of solutions after that process. The ISO’s goal has always been to work with stakeholders—market participants, regulators, policymakers, and others—to address New England’s unique fuel-security challenges through the wholesale market construct. However, the US DOE NOPR has raised the potential for significant changes to the wholesale electricity markets in the US. Therefore, the ISO has concluded that it is prudent to delay finalizing the study until the [Commission] has provided direction to the industry on how to interpret the DOE NOPR in the context of competitive wholesale markets. ISO New England intends to release the Operational Fuel-Security Analysis once the NOPR is sufficiently resolved.”).

RTO stakeholder processes that provide vital opportunities for the exchange of data and ideas prior to adopting market rule or pricing changes.³⁰

IV. The Proposal Is Contrary to the Findings of the Department of Energy Staff Report and Other Credible Analyses.

The Proposal relies heavily on the August 2017 DOE Staff Report on electric markets and reliability. *See* Proposal at 46,941. The bulk of the DOE Staff Report provides a summary of trends in the wholesale electric market, including the retirement of certain generation resources, the increasing use of low-cost natural gas, and the integration of variable energy resources like wind and solar.³¹ The report does not support the Proposal’s dire characterization of the power sector, finding rather that the electric system is currently reliable. In general, the report recommends additional work on issues that the Commission is currently addressing and further study and review of electric system resilience. In sum, although the State Commenters do not necessarily endorse the findings and policy recommendations in the report, it suffices here to point out that the report does not support the Proposal’s immediate and drastic regulatory intervention in the nation’s wholesale markets. Moreover, other credible analysis shows that the Proposal’s picture of an electric system under siege from “baseload” resource retirements,

³⁰ *See, e.g.*, PJM, Capacity Construct and Public Policy Senior Task Force, CCPPSTF Matrix (Oct. 16, 2017), available at <http://www.pjm.com/-/media/committees-groups/task-forces/ccppstf/20171016/20171016-ccppstf-matrix.ashx> (logging the development of interest identification, design criteria, key work activities, and capacity market rule change proposal packages relating to a two-tier capacity market to ensure adequate resources are procured by PJM’s Reliability Pricing Model).

³¹ The DOE Staff Report responded to three issues posed by Secretary Perry in an April 2017 memorandum, namely, “[t]he evolution of wholesale electricity markets”; “[w]hether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future”; and “[t]he extent to which continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.” DOE Staff Report at 1.

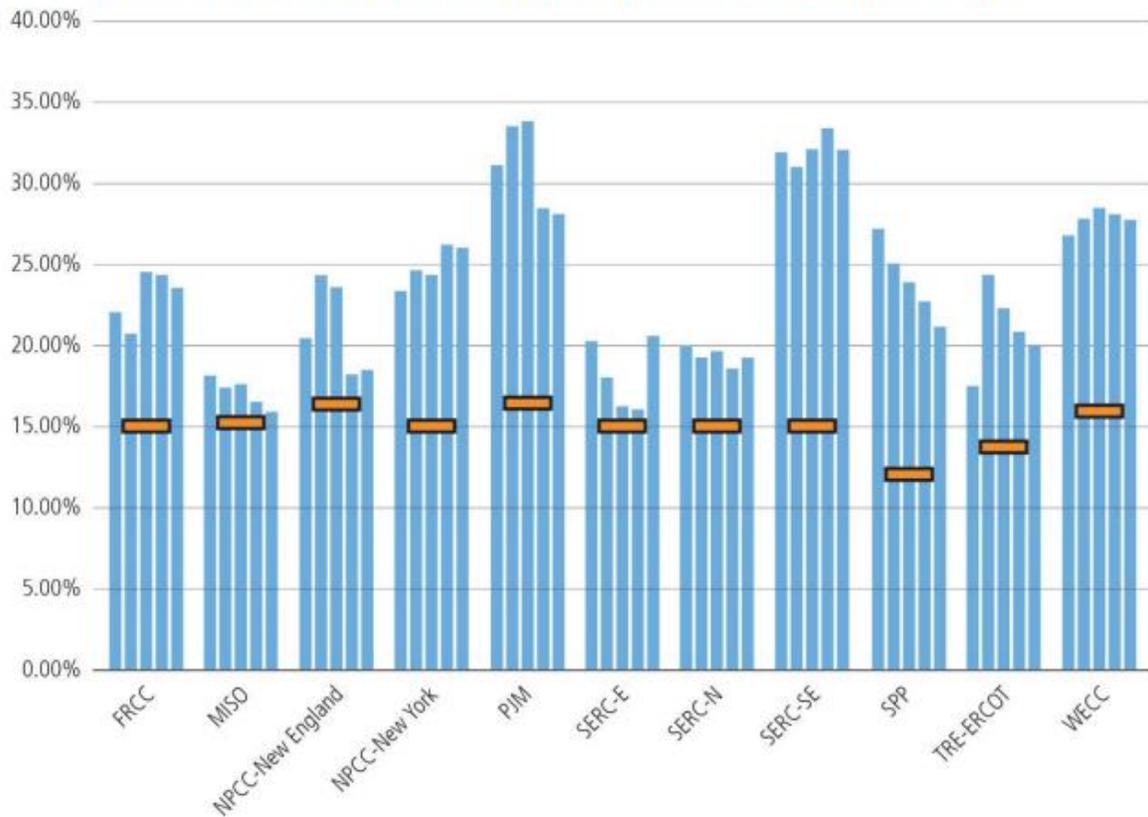
unreliable replacement resources, and extreme-weather disruptions to fuel supplies is simply not accurate.

A. The Staff Report Indicates that Electric System Reliability Is Adequate.

The DOE Staff Report expressly affirms the reality that the nation’s bulk power system has successfully managed changing market conditions in recent years, including significant levels of retirements of certain resources, and is currently reliable. Specifically, the report confirms:

- “[Bulk power system] reliability is adequate despite the retirement of a portion of baseload capacity and unique regional hurdles posed by the changing resource mix.” DOE Staff Report at 11.
- “[Bulk power system] reliability is adequate today despite the retirement of 11 percent of the generating capacity available in 2002, as significant additions from natural gas, wind, and solar have come online since then. Overall, at the end of 2016, the system had more dispatchable capacity capable of operating at high utilization rates than it did in 2002.” *Id.* at 63.
- “To date, wholesale markets have withstood a number of stresses. While markets have evolved since their introduction, they are currently functioning as designed—to ensure reliability and minimize the short-term costs of wholesale electricity—despite pressures from flat demand growth, Federal and state policy interventions, and the massive economic shift in the relative economics of natural gas compared to other fuels.” *Id.* at 10.
- Over the longer term, “NERC reports that all regions project more than sufficient planning reserve margins. . . . [P]lanning reserve margins exceed their respective regional targets despite the loss of traditional baseload capacity since 2002.” *Id.* at 65. The DOE Staff Report contains a chart, *id.* at 66, showing these planning reserve margins through 2022:

Figure 4.2. Five-Year Average Reserve Margins across Different Regions (2018–2022)²³¹



The Proposal does not reference these findings, which confirm there is significant capacity above the RTO reserve margins and contradict its assertion that “immediate action is necessary” to ensure reliability. The DOE Staff Report also does not support the Proposal’s assertion that “immediate action is necessary” because further power plant retirements will cause “severe consequences,” Proposal at 46,945. *See* DOE Staff Report at 8. The report recognizes that retirements are happening, and states that “[w]hile stakeholders may maintain that a power plant has been forced to retire prematurely based on one or more of the considerations above, the results of this study show that some observed power plant retirements were appropriate and consistent with markets as they are currently functioning.” *Id.*; *see also id.* at 11 (“Markets recognize and compensate reliability, and must evolve to continue to compensate reliability, but more work is needed to address resilience.”). The retirement of generation before the end of its

useful life may be an appropriate market response if the costs associated with that plant are sufficiently higher than those of their competitors.

B. The DOE Staff Report Recommends Further Analysis of Resilience and Wholesale Market Changes, Not an Immediate Regulatory Intervention.

To the extent the DOE Staff Report identifies issues and challenges in the wholesale electric markets, it urges continued work on valuing reliability services but primarily recommends further review, analysis, and study of system resilience, and actions consistent with those assessments. For example:

- The DOE Staff Report finds that “[a] continual comprehensive regional and national review is needed to determine how a portfolio of domestic energy resources can be developed to ensure grid reliability and resilience.” DOE Staff Report at 14.
- “Where feasible and within its statutory authority, [the Commission] should study and make recommendations regarding efforts to require valuation of new and existing [essential reliability services] by creating fuel-neutral markets and/or regulatory mechanisms that compensate grid participants for services that are necessary to support reliable grid operations. *Pricing mechanisms or regulations should be fuel and technology neutral* and centered on the reliability services provided.” *Id.* at 126 (emphasis added).
- In looking forward, the DOE Staff Report suggests that “[r]esource portfolios could be complemented with wholesale market and product designs that recognize and complement resource diversity by compensating providers for the value of [essential reliability services] on a *technology-neutral* basis. *More work is needed* to define, quantify, and value resilience.” *Id.* at 100 (emphasis added).
- “*RTOs and ISOs* should further define criteria for resilience, identify how to include resilience in business practices, and examine resilience-related impacts of their resource mix.” *Id.* at 126 (emphasis added).

In those respects in which the DOE Staff Report recommends that policymakers act quickly, it suggests that those actions should be market-based, fuel-neutral, and consistent with the processes followed for successful RTO-driven reforms of recent years:

New market structures may be necessary to reflect [changing] market dynamics . . . RTO/ISOs are considering ways to better

support system resilience objectives in the same way that they explicitly recognized and administratively incorporated reliability standards into dispatch practices in the past. For example, the variety of problems that arose during the Polar Vortex . . . caused PJM and ISO-NE to change their capacity market rules to ensure generator performance during scarcity conditions. In summary, the debates surrounding wholesale markets are complex and multifaceted, but *the institutions and the grid itself have historically proven flexible, strong, and able to adapt*. Questions about revenue sufficiency and resilience must be addressed quickly, before the fast-moving evolution of our power system outpaces our ability to understand and manage it responsibly.

Id. at 118 (emphasis added); *see also id.* at 126 (Commission “should expedite its efforts with states, RTO/ISOs, and other stakeholders to improve energy price formation in centrally-organized wholesale electricity markets. After several years of fact finding and technical conferences, the record now supports energy price formation reform, such as the proposals laid out by PJM and others”).

While citing improvement in energy price formation, the DOE Staff Report does not recommend that RTOs provide full cost recovery for favored resources, as the Proposal would require. Only in the report’s final section, “Areas for Further Research,” does it intimate that cost-of-service treatment for certain resources is a potential option to promote system resilience. *Id.* at 129. The report suggests that the states—not the federal government—should “explore the costs and benefits” of such an approach. *Id.*

C. Other Studies Demonstrate that the Proposal’s Focus on “Baseload” Resources and Fuel Supply Is Flawed.

The Commission should look to independent analyses of the electric markets, which confirm that actual power sector conditions and experience show that the premises of the Proposal’s approach of rescuing uneconomic generation resources with federal intervention are mistaken. For example, in June 2017 the international economics consulting firm Analysis Group

published a report, *Electricity Markets, Reliability and the Evolving U.S. Power System* (“Analysis Group Report”),³² which rebutted the Proposal’s understanding that recent changes in the wholesale electric markets and resource retirements are imperiling electric system reliability:

The retirement of aging resources is a natural element of efficient and competitive market forces, and where markets are performing well, these retirements mainly represent the efficient exit of uncompetitive assets, resulting in long-run consumer benefits Although some commentators have raised concerns that the declining financial viability of certain conventional power plant technologies (like coal and nuclear power plants) that operate as merchant units in several wholesale electricity markets may be jeopardizing electric system reliability, there is no evidence supporting that conclusion.

Analysis Group Report at 4-5. The report also cited the promise of advanced energy technologies in serving future reliability needs:

Many advanced energy technologies can and do provide reliability benefits by increasing the diversity of the system. The addition of newer, more technologically advanced and more efficient natural gas and renewable technologies is rendering the power systems in this country more, rather than less, diverse. These newer generating resources are also contributing to the varied reliability services—such [as] frequency and voltage management, ramping and load-following capabilities, provision of contingency and replacement reserves, black start capability, and sufficient electricity output to meet demand at all times—that electric grids require to provide electric service to consumers on an around-the-clock basis. As a result, increasing quantities of natural gas and renewable generation are increasing the diversity of the power system and supporting continued reliable operations.

Id. at 5. In this regard, the Proposal also ignores DOE’s own analyses of the reliability benefits of adding renewable energy to the grid. For example, a recent study by the National Renewable

³² Paul Hibbard et al., *Electricity Markets, Reliability and the Evolving U.S. Power System*, Analysis Group (June 2017), available at http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/ag_markets_reliability_final_june_2017.pdf.

Energy Laboratory (“NREL”) concluded that with high penetrations of wind and solar power, the Western grid can maintain reliability and stability during large grid disturbances; and, in fact, renewable energy can contribute to a more, not less, reliable power grid.³³ Other analyses similarly identify the capabilities of renewable resources and new technologies to support grid reliability and resilience, which the Proposal arbitrarily ignores.³⁴

Contrary to the Proposal’s misconceptions, fuel supply issues played essentially no role in recent customer outages. A recent analysis by the Rhodium Group analyzed DOE data on the causes of the 3.4 billion customer-hours of outages from 2012 to 2016. Of that time, only 2,382 hours, or 0.00007 percent of the total, was due to fuel supply problems. Of those, 2,333 hours

³³ National Renewable Energy Laboratory, *Western Grid Can Handle High Renewables in Challenging Conditions* (Fact Sheet) (Nov. 2015), available at <https://www.nrel.gov/docs/fy16osti/65302.pdf> and <https://www.nrel.gov/grid/wwsis.html>.

³⁴ The Brattle Group consultancy recently published a report reaching much the same conclusions. Judy Chang et al., *Advancing Past “Baseload” to a Flexible Grid*, Brattle Group, at iv (June 2017), available at http://www.brattle.com/system/publications/pdfs/000/005/456/original/Advancing_Past_Baseload_to_a_Flexible_Grid.pdf?1498482432 (“[G]iven the current trends of market fundamentals, public policy goals, and customer preferences, labeling any resources as “baseload” and compensating them on that basis alone does not help improve our electricity system’s reliability, efficiency, or effectiveness. System planners and operators have been and are continuing to improve mechanisms for mobilizing and compensating the flexibility services that are needed to maintain a cost-effective and reliable electricity system.”); *id.* at 13 (“Despite these significant retirements and the associated shift [in] resource mix, system operators have been able to meet the industry’s high and increasing reliability standards.”); *id.* at 23 (“The market designs for centralized wholesale markets in the U.S. are quite sophisticated and evolving to provide the necessary incentives to a broad range of resources that can contribute to system reliability.”); *id.* at 31 (“[T]echnologies, market fundamentals, policy priorities, and customer preferences are changing rapidly—all pointing to an increasingly broad range of different supply and demand resources; a more dynamic and versatile grid that can operationally integrate these resources and new technologies; and wholesale power markets that will increasingly reward both supply and demand resources for providing well-defined services and attributes such as energy, capacity, flexibility, and emissions reductions.”).

were due to fuel supply disruptions at a coal-fired power plant in northern Minnesota.³⁵ The most prevalent cause of outages is severe weather, with Hurricane Sandy accounting for nearly-one third of the total hours of power lost over that period. Puerto Rico’s nearly complete power outage in the wake of Hurricane Maria has already accounted for nearly twice the total number of outage hours for 2016.³⁶

D. The Proposal Is Not Responsive to the Circumstances of the Polar Vortex or Recent Extreme Weather Events.

The Proposal says that its proposed tariffs are necessary to address electric reliability issues that are illustrated by the widespread cold-weather event during the winter of 2014 known as the Polar Vortex, as well as other extreme weather events. The Proposal further suggests it should be finalized in time to protect against cold-weather events this coming winter. *See* Proposal at 46,945.³⁷ The Proposal’s account of electric system challenges during those events is deeply flawed, and the circumstances of those events do not support the Proposal.

With regard to the Polar Vortex, large swaths of the eastern and southern parts of the United States faced sustained and record-setting cold weather during that period. According to NERC’s post-mortem analysis, less than 0.1 percent of customer load was disrupted in the

³⁵ Trevor Houser et al., *The Real Electricity Reliability Crisis*, Rhodium Group (Oct. 3, 2017), at <http://rhg.com/notes/the-real-electricity-reliability-crisis>.

³⁶ *Id.*

³⁷ Commission staff’s recent report on energy market conditions during the upcoming winter utterly contradicts the supposed urgency of implementing the Proposal, concluding that “[a]ll regions are expected to maintain healthy reserve margins for the winter,” “[s]taff analysis identifies few major concerns,” “[t]he markets appear to be prepared to manage disruptive events” and “at this time we do not see major risk factors that would likely lead to significant market disruptions during this winter.” Winter Energy Market Assessment at 13, 19.

affected areas, and system operators “successfully maintained reliability. . . .”³⁸ In fact, the affected load was in South Carolina Electric and Gas service territory, which is not part of an organized wholesale market, and the outages were caused by frozen equipment at generators, *not* by fuel supply issues.³⁹ While much of the commentary regarding the Polar Vortex has focused on curtailment of natural gas supplies for electric generation, according to NERC, fuel supply issues accounted for less than half of the generator outages associated with the Polar Vortex. Instead, the majority were associated with the direct effects of cold weather on generation and transmission equipment. *Id.* at 4-5. For example, at the height of the cold weather, PJM reported that more than 15,000 MW of its coal and nuclear resources were offline.⁴⁰ In short, fuel supply was only one of several causes of electric system stress during the Polar Vortex,⁴¹ and there is no evidence that a system with fewer coal and nuclear resources would fare worse in the future,

³⁸ See NERC, *Polar Vortex Review* at iii (2014), at http://www.nerc.com/pa/rrm/January%202014%20Polar%20Vortex%20Review/Polar_Vortex_Review_29_Sept_2014_Final.pdf.

³⁹ *Id.* at iii, 2, 3.

⁴⁰ PJM Interconnection, *Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events* at 26 (May 8, 2014), available at <http://www.pjm.com/~media/library/reports-notice/weather-related/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx>. See also *id.* at 4 (“Equipment issues associated with both coal and natural gas units caused the greatest proportion of forced outages. Natural gas interruptions comprised approximately 25 percent of the total outages.”); *id.* at 24 (“All conventional forms of generation, including natural gas, coal and nuclear plants, were challenged by the extreme conditions.”). See also MISO, *2013-2014 MISO Cold Weather Operations Report* at 25 (Nov. 2014), available at <https://www.misoenergy.org/Library/Repository/Report/Seasonal%20Market%20Assessments/2013-2014%20Cold%20Weather%20Operations%20Report.pdf> (“[G]enerating units of all fuel types in MISO’s footprint were affected by weather-related forced outages during the January 2014 polar vortex.”).

⁴¹ Nor are fuel supply issues unique to natural gas facilities. See MISO, *supra* note 40, at 13 (noting that “at least one power plant in MISO’s footprint that has coal delivered to it via barge experienced problems due to iced-over rivers and lakes”).

especially given the many market reforms that have occurred since the Polar Vortex. Just as importantly, resources other than coal and nuclear played a significant role in maintaining system reliability, including energy efficiency, demand response, and renewables.⁴²

All generation sources face challenges from extreme weather.⁴³ Even with on-site fuel supplies, the Proposal's favored resources do not always have the ability to run in challenging weather events, based on recent experience. For instance, in Texas, following Hurricane Harvey's torrential flooding, the external coal pile at the 2,500 MW W.A. Parish coal power plant was "so saturated with rainwater that coal was unable to be delivered into the silos from the conveyer system," and two units at the facility were switched to natural gas.⁴⁴ In Florida, as Hurricane Irma approached in September, one of the state's two nuclear power plants shut down, and the other ran at reduced capacity.⁴⁵ These anecdotes demonstrate that the Proposal's

⁴² See, e.g., Susan Tierney et al., *Electric System Reliability and the EPA's Clean Power Plan: The Case of PJM*, Analysis Group, at 12-13 (Mar. 2015), available at http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/electric_system_reliability_and_epas_clean_power_plan_case_of_pjm.pdf (PJM utilized demand response and wind generation to meet demand, despite substantial loss of coal, nuclear, and natural gas capacity); Greg Hresko et al., *Wind Energy Saves Consumers Money During the Polar Vortex*, American Wind Energy Association, at 1 (Jan. 2015), available at <http://awea.files.cms-plus.com/AWEA%20Cold%20Snap%20Report%20Final%20-%20January%202015.pdf> ("[W]ind energy provided large quantities of critical electricity supply when it was needed most, keeping the lights on and reducing the impact of these price spikes").

⁴³ A profound irony of the Proposal is that it seeks to prolong operations at coal-fired power plants and also their substantial greenhouse gas emissions, which are worsening the risks of extreme weather events that are driven or exacerbated by climate change. The Proposal does not mention or acknowledge that its approach could increase greenhouse gas emissions. See Section VI.C, *infra*.

⁴⁴ See Mark Watson, *Harvey's Rain Caused Coal-to-Gas Switching*, Platts (Sept. 27, 2017), at <https://www.platts.com/latest-news/electric-power/houston/harveys-rain-caused-coal-to-gas-switching-nrg-21081527>.

⁴⁵ See *Hurricane Irma Caused Power Outages for Two out of Three Florida Customers*, Electric Light & Power (Sept. 20, 2017), at <http://www.elp.com/articles/2017/09/hurricane-irma-caused-power-outages-for-two-out-of-three-florida-customers.html> ("Hurricane Irma also affected Florida's two nuclear power plants, which are among the largest power plants in the state. Both

assumptions about the resilience of the favored resources are false, and that the resilience values of other resources warrant greater consideration.⁴⁶

V. The States' Experiences with Clean Energy Development and the Retirement of Aging, Uneconomic Generation Demonstrates There is No Pressing Reliability or Resilience Crisis Warranting Extraordinary Federal Intervention.

The Proposal's alarm regarding the growth of renewable resources (*see, e.g.*, Proposal at 46,943) is at odds with our States' success in integrating clean energy sources into the electric sector. For example:

- **California** has made rapid advances towards integration of renewable supply-side technologies and demand-side programs while simultaneously managing the retirement of baseload plants. Since 2003, procurement by California's large investor owned utilities⁴⁷ has resulted in 15,565 MW of installed renewable capacity under the Renewables Portfolio Standard ("RPS") program.⁴⁸ The average RPS portfolio for these utilities, which serve about 68% of California's electrical load, grew from 13.25% in 2003 to 32% in 2016.⁴⁹ On May 16, 2017, over 40% of California ISO ("CAISO") load was served with renewables (not including large hydro or behind-the-meter solar PV), and during peak renewables

reactors at the Turkey Point nuclear power plant in south Florida were shut down as a precaution before the storm arrived. The St. Lucie nuclear power plant remained operating, although at reduced levels.”).

⁴⁶ See Amory B. Lovins, *Does 'Fuel on Hand' Make Coal and Nuclear Power Plants More Valuable?*, *Forbes* (May 1, 2017), at <https://www.forbes.com/sites/amorylovins/2017/05/01/does-fuel-on-hand-make-coal-and-nuclear-power-plants-more-valuable/#4a0d9d5c69023>.

⁴⁷ Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison.

⁴⁸ Cal. Pub. Utils. Comm'n, *Renewables Portfolio Standard Quarterly Report* at 6 (4th quarter 2016), available at http://www.cpuc.ca.gov/uploadedFiles/CPUC_Website/Content/Utilities_and_Industries/Energy/Reports_and_White_Papers/Q4_2016_RPS_Report_to_the_Legislature_FINAL.pdf.

⁴⁹ Cal. Pub. Utils. Comm'n, *Biennial RPS Program Update* (Jan. 2016), available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=8323S>. See also Cal. Pub. Utils. Comm'n, Proceeding No. R.15-02-020, available at https://apps.cpuc.ca.gov/apex/f?p=401:56:0::NO:RP,57,RIR:P5_PROCEEDING_SELECT:R1502020 (containing investor-owned utilities' RPS compliance filings).

production that day, renewables supplied nearly 72% of CAISO's electricity.⁵⁰ Renewable technologies contributed significantly to meeting CAISO system load during a record breaking heat wave on September 1, 2017, with the vast majority of that contribution coming from solar photovoltaic installations.⁵¹

- In **Connecticut**, the state has implemented policies that have directly procured commitments of renewable energy generation and energy efficiency that equal the generation of a large power plant, at competitive pricing. Specifically, in 2016 alone, the state procured over 400 MW of state-solicited small scale renewable energy and energy efficiency resources, 170 MW of which will be located in Connecticut, and close to 400 MW of large-scale renewable energy projects split between Connecticut, Massachusetts, and Rhode Island. The price of these selected grid-scale bids dropped by nearly half compared to procurements in 2012 and 2013. Using its procurement authority thus far, Connecticut has solicited long-term contracts with clean energy resources to meet over 5% of its electric load. Connecticut has authority remaining to contract an additional approximate 17% of load with clean energy resources.⁵² These procurements have expressly focused on renewable resources that provide generation during peak load times, directly strengthening grid reliability and resilience.⁵³
- In **Illinois**, there is currently more than 4,000 MW of wind power installed, growing from just 50 MW in 2003.⁵⁴ Illinois wind farms produced 612,000 megawatt hours ("MWh") of electricity in July 2017, up 52% from the prior

⁵⁰ CAISO, *Renewables Watch for Operating Day May 16, 2017*, at http://content.caiso.com/green/renewrpt/20170516_DailyRenewablesWatch.pdf; Gavin Bade, *CAISO: Renewables Served 42% of California Demand on May 16, Setting Record*, Utility Dive (May 18, 2017), at <http://www.utilitydive.com/news/caiso-renewables-served-42-of-california-demand-on-may-16-setting-record/442926/>. Note that the RPS program measures compliance in MWh, whereas CAISO data measure load percentages in MW.

⁵¹ CAISO, *Renewables Watch for Operating Day September 01, 2017*, at http://content.caiso.com/green/renewrpt/20170901_DailyRenewablesWatch.pdf.

⁵² Connecticut Department of Energy and Environmental Protection, *2017 Comprehensive Energy Strategy, Draft Executive Summary* (July 26, 2017), available at http://www.ct.gov/deep/lib/deep/energy/ces/2017_draft_comprehensiveenergystrategy_execsummary.pdf.

⁵³ See *Affordable and Reliable Energy*, 2015 Conn. Legis. Serv. P.A. 15-107 (S.B. 1078) (enacted), available at <https://www.cga.ct.gov/2015/act/Pa/pdf/2015PA-00107-R00SB-01078-PA.PDF>.

⁵⁴ American Wind Energy Association, *Illinois Wind Facts*, available at <https://www.awea.org/resources/statefactsheets.aspx> (last visited Oct. 21, 2017).

year.⁵⁵ Over the last year, nuclear power remained essentially constant, and coal based generation decreased 8.8%, while still providing 6,417,000 MWh of energy in 2017.⁵⁶

- In **Maryland**, approximately 1,458 MW of generation capacity comes from renewable resources.⁵⁷ Maryland customers currently have access to over 750 MW of installed solar power, with 276.9 MW of installed solar energy having been added in 2016 alone.⁵⁸ Marylanders also have access to over 250 MW of installed wind power, and the state has taken significant steps toward the development of its offshore wind resources. In May 2017, the Maryland Public Service Commission awarded offshore wind renewable energy credits to two projects, which will pave the way for the construction of 368 MW of capacity off the coast of Maryland.
- **Massachusetts** renewable and clean energy projects have added or are in the process of adding a total of approximately 26,000,000 MWh of annual electricity for Massachusetts customers (expected to be over 50% of Massachusetts's annual electric load) under either statutory or regulatory mandates pursuant to the Green Communities Act, St. 2008, c. 169, §§ 83, 83A, 83C, and 83D, and the Renewable Portfolio Standards, Mass. Gen. Laws ch. 25A, § 11F.⁵⁹
- **Oregon** is the eighth-ranked state in the nation for installed wind capacity, with 3,213 MW in operation.⁶⁰ A total of forty-four projects span the state, with the first project installed in 1998. Individual utility-scale wind projects range from 10

⁵⁵ U.S. Energy Information Administration, Electric Power Monthly (Sept. 2017 release), available at https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_14_a.

⁵⁶ U.S. Energy Information Administration, Electric Power Monthly (Sept. 2017 release), available at https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_09_a (nuclear); https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_1_04_a (coal).

⁵⁷ See Maryland Department of Natural Resources, *Maryland Power Plants and the Environment: A Review of the Impacts of Power Plants and Transmission Lines on Maryland's Natural Resources*, DNR Publication No. 12-12132016-638 (Dec. 2016), available at http://www.pprp.info/ceir18/CEIR_18_Summary%20FINAL.pdf.

⁵⁸ See Solar Energy Industries Association, Solar State by State, at <https://www.seia.org/state-solar-policy/maryland-solar> (last visited Oct. 21, 2017).

⁵⁹ These projects include onshore and offshore wind, hydropower, and solar. Some of these projects are already in operation, some are under contract and awaiting regulatory approval prior to construction, some are constructed and waiting for interconnection, and others are in the bidding stage.

⁶⁰ American Wind Energy Association, Oregon Wind Facts, at <https://www.awea.org/resources/statefactsheets.aspx> (last visited Oct. 21, 2017).

MW to nearly 900 MW.⁶¹ As of mid-2017, the wind projects in Oregon powered the equivalent of over 660,000 homes.

- **Vermont** has over 200 MW of installed solar (about 5% of sales and 20% of peak load) and over 100 MW of installed wind (about 6% of sales), not to mention 200 MW of hydropower and approximately 100 MW of biopower (biomass and farm and landfill methane). The State's electric utilities are on course to meet their 55% renewable electricity by 2017 targets, and are required to meet 75% of sales with renewable electricity by 2032. *See* 30 Vt. Stat. Ann. § 8005(a)(1)(B). All utility and merchant generation in Vermont is subject to state siting regulation and must adhere to a number of criteria, including need, least-cost principles (for utility-owned generation, this entails an examination of whether the investment is the least-cost solution to demand when compared with energy conservation, efficiency, and load management), and maintenance of system stability and reliability. *See, e.g.,* 30 Vt. Stat. Ann. § 248(b). The State gradually lifted its net metering cap from 2% to 4% to 15% of load as no adverse negative impacts to system stability were observed, and now there is no set cap. *See* 30 Vt. Stat. Ann. § 8010 (Self-Generation and Net-Metering); Vt. Admin. Code 18-1-17:5.100 (Construction and Operation of Net Metering Systems).
- **Washington** is one of the top ten states in the nation for installed wind capacity, having successfully integrated over 3,000 MW of wind power since 2001.⁶² In 2016 alone, the energy produced from wind in Washington powered the equivalent of almost 750,000 homes.⁶³

In addition, many states and regional markets have successfully managed the retirement of coal and other uneconomic resources and are pursuing innovations that will benefit system reliability and resilience, including market-based compensation for demand response and investments in energy efficiency, energy storage, and other technologies. For example:

- As the DOE Staff Report noted with respect to energy storage, “**California** has directed its utilities to acquire 500 MW of energy storage by 2020; **Massachusetts** [has set a target for electric companies] to procure 200 MWh of energy storage by the end of 2019; **New York**'s legislators have proposed

⁶¹ Renewable Northwest Project, Renewable Energy Projects, *at* http://www.rnp.org/project_map?field_project_state_value%5B%5D=OR&tid%5B%5D=7&field_project_opstatus_value%5B%5D=Operating (last visited Oct. 21, 2017).

⁶² U.S. Energy Information Administration, Washington State Profile (2016), *at* <https://www.eia.gov/state/analysis.php?sid=WA>.

⁶³ American Wind Energy Association, Washington Wind Facts, *at* <https://www.awea.org/resources/statefactsheets.aspx> (last visited Oct. 21, 2017).

creation of an Energy Storage Deployment Program, with a 2030 procurement target; **Maryland** has adopted a 30 percent investment tax credit for storage facilities; and **Nevada**'s legislature has passed a storage incentive. These programs are generally technology-neutral and will support the use of storage at the grid-level or behind the meter (on the customer's premises)." DOE Staff Report at 74.

- **California**, through its Public Utilities Commission, has authorized a competitive procurement mechanism for demand response resources, known as the Demand Response Auction Mechanism ("DRAM") pilot. The objective of the DRAM is to ensure competitively priced, cost-effective and reliable demand response resources for the state. Demand response resources procured through the DRAM are required to bid their capacity into CAISO energy markets for market award dispatches, with approximately 184 MWs under contract for delivery in 2018. In addition, California has prioritized development of energy storage through a 1.325 gigawatt procurement mandate, reliability standards, creation of wholesale market products and rules with the Distributed Energy Resource Provider and Non-Generator Resource models, and approving storage contracts to meet local reliability needs and partially replace the San Onofre nuclear generating station. California regulators developed a roadmap to consider and eliminate unnecessary regulatory barriers to storage market participation and are in the process of developing rules by which a storage resource can serve multiple reliability functions.⁶⁴
- **Connecticut** has developed a first-in-the-nation statewide microgrid program to build local resiliency for electrical load in critical community operations. This program implementation now includes five operational microgrids and five in development.⁶⁵ Through its conservation and load management program, Connecticut invests approximately \$246 million annually in statewide energy efficiency programs that has saved residents and businesses 1.29 billion kWh of electricity, 19.6 million ccf of gas, and 976 thousand tons of carbon dioxide.⁶⁶ In addition, through its 2016 solicitations for clean energy resources, Connecticut solicited through a competitive process an additional 34 MW of energy efficiency at a competitive price.⁶⁷

⁶⁴ California Energy Commission, California Public Utilities Commission & CAISO, *Advancing and Maximizing the Value of Energy Storage Technology – A California Roadmap* (Dec. 2014), available at https://www.caiso.com/Documents/Advancing-MaximizingValueofEnergyStorageTechnology_CaliforniaRoadmap.pdf.

⁶⁵ See Connecticut Department of Energy & Environmental Protection, *supra* note 52.

⁶⁶ Connecticut Department of Energy & Environmental Protection, *Energy Efficiency*, available at <http://www.ct.gov/deep/cwp/view.asp?a=4405&Q=513716>.

⁶⁷ *Id.*

- Maryland** is encouraging energy efficiency through the State’s EmPOWER program, which was first enacted in 2008. *See* EmPOWER Maryland Energy Efficiency Act of 2008, H.B. 374, 2008 Gen. Assemb., Reg. Sess. (Md. 2008). Implementation of the EmPOWER program led to a 15% reduction in demand based on a 2007 baseline. During the 2017 legislative session, the Maryland General Assembly extended the EmPOWER program through 2023. *See* H.B. 514, 2017 Gen. Assemb., Reg. Sess. (Md. 2017). In addition, Maryland has started to explore energy storage using grid-connected battery systems as an important tool that will facilitate the integration of renewable energy, bolster grid reliability, and provide for flexibility in the grid. In 2017, the Maryland General Assembly adopted measures both to encourage the installation of energy storage through a dedicated tax credit⁶⁸ and to study methods to promote the deployment of energy storage on all parts of the electricity grid.⁶⁹ *See* S.B. 758, 2017 Gen. Assemb., Reg. Sess. (Md. 2017) (tax credit); H.B. 773, 2017 Gen. Assemb., Reg. Sess. (Md. 2017) (methods study). The Maryland Public Service Commission is also considering how energy storage may advance the goal of transforming state’s distribution system.⁷⁰
- In **Massachusetts**, 1,662 MW of coal generation capacity has been retired since 2008, leaving no coal fired power plants in the state. At the same time, Massachusetts has invested heavily in developing a robust clean energy industry, as detailed *infra*, and has become a national leader in energy efficiency. Further, it is actively exploring storage technologies, and the Department of Energy Resources issued a report last fall with the goal of spurring investment in 600 MW of grid-scale energy storage in Massachusetts by 2025.⁷¹
- Spurred by the 1988 bankruptcy of its largest utility as triggered by cost overruns and construction delays at the Seabrook nuclear power plant, **New Hampshire** was among the first states to opt for restructuring, *see* N.H. Laws 1996, ch. 129,

⁶⁸ Maryland’s new tax credit provides for up to \$5,000.00 for a system installed on a residential property and the lesser of \$75,000 or 30% of the cost of installation of a system installed on a commercial property.

⁶⁹ The law requires that Maryland’s Power Plant Research Program conduct a study—in collaboration with other state stakeholders—and submit a report by December 1, 2018, as to the regulatory reforms and market incentives necessary or beneficial to increase the use of energy storage devices in the state.

⁷⁰ *See* Maryland Public Service Commission, *In The Matter of Transforming Maryland’s Electric Distribution Systems to Ensure that Electric Service is Customer-Centered, Affordable, Reliable and Environmentally Sustainable in Maryland*, PC44, Notice of Public Conference, at 3 (Sept. 26, 2016).

⁷¹ Massachusetts Department of Energy Resources, *State of Charge: Massachusetts Energy Storage Initiative Study* (Sept. 16, 2016), available at <https://www.mass.gov/files/2017-07/state-of-charge-report.pdf>.

but lawmakers then paused the process as to the utility’s non-nuclear generation portfolio, including two coal-fired plants—Merrimack and Schiller Stations—because relying on these facilities was cheaper for end-users than purchasing power at wholesale. But technological and market realities evolved and, in 2015, the New Hampshire Legislature authorized the completion of the restructuring process, provided that the Public Utilities Commission made a “public interest” finding that considered general economic and specific ratepayer impacts. *See* N.H. Laws 2015, ch. 221:10, codified as N.H. RSA 369-B:3-a. On October 12, 2017, the utility filed the results of the asset divestiture auction.⁷² If approved, the proposed sale of Merrimack and Schiller stations would result in some \$600 million in stranded cost recovery for the utility, in exchange for which ratepayers would no longer be required to subsidize the operation of coal plants whose dispatch pattern in recent years has reduced them to occasionally used resources.

- The only operating coal plant in **Oregon** is in Boardman and is scheduled for closure in 2020. The plant owner, Portland General Electric, is testing the potential to convert the plant into a renewable energy generation facility using biomass for fuel.⁷³ Oregon investor-owned electric utilities are exploring energy storage because the passage of HB 2193 (2015) mandates energy storage be installed at each utility by 2020. Through a collaborative stakeholder process at the Oregon Public Utilities Commission (Docket UM 17510), the utilities are focusing on many potential benefits of energy storage, including increasing transmission and distribution reliability and increasing energy system resiliency.⁷⁴
- The capacity of **Vermont**’s solar installations alone is equivalent to one-fifth of the state’s peak load, and every new proposed project is required to meet interconnection standards to ensure it does not adversely affect system stability and reliability. While solar has shifted Vermont’s peak from mid-day to evening, the state’s peak has declined due to the state’s aggressive pursuit of conservation and energy efficiency, and utilities are adjusting to changes in load shape using traditional tools such as rate design, load shifting, and demand response as well as emerging tools such as real-time weather forecasting and advanced energy storage. Vermont currently has a large utility-owned battery storage project that

⁷² J.P Morgan Securities, LLC, *Public Service Company of New Hampshire d/b/a Eversource Energy Sale of Generating Facilities: Report of the Auction Advisor*, N.H. Pub. Utils. Comm’n Docket No. 17-254 (Oct. 12, 2017), available at http://puc.nh.gov/Regulatory/Docketbk/2017/17-124/LETTERS-MEMOS-TARIFFS/17-124_2017-10-12_JPMORGAN_AUCTION_RPT.PDF; *see also* New Hampshire Public Utilities Commission, Docket No. 17-124, available at <https://www.puc.nh.gov/Regulatory/Docketbk/2017/17-124.html>.

⁷³ Portland General Electric, Resource Planning, at <https://www.portlandgeneral.com/our-company/energy-strategy/resource-planning> (last visited Oct. 21, 2017).

⁷⁴ Oregon Public Utilities Commission, Docket UM-17510, available at <http://apps.puc.state.or.us/edockets/docket.asp?DocketID=19733>.

reduces utility peaks, integrates solar, and can enhance grid reliability by islanding a distribution circuit hosting the local emergency shelter in the event of a wider grid outage. That same utility is pursuing other solar-plus-storage projects and is also embarking on a pilot to deploy up to 10 MW of residential storage systems to provide grid services in the aggregate and reliability to individual customers.

VI. The Proposal Poses a Serious Threat of Harm to the States and Excessive Costs for Ratepayers.

The State Commenters are deeply concerned that, in its current form, the Proposal would cause significant harm to our States by compelling ratepayers to subsidize costly power generation resources without demonstrated need or benefit, undermining State energy laws and policies, and by putting public health and the environment at greater risk.

A. A Federal Mandate to Subsidize the “Fuel-Secure” Resources Will Significantly and Unnecessarily Raise Energy Costs for Consumers.

There is no question that the Proposal will burden ratepayers with additional costs and risks. Indeed, the Proposal makes no attempt to argue otherwise.⁷⁵ Rather, the whole point of the Proposal is to charge customers more money and to give that money to uneconomic generation resources so they do not retire. One early analysis estimates potential added customer costs in the billions of dollars per year.⁷⁶ Yet, the Proposal provides no assessment of, or justification for,

⁷⁵ As noted in Sections I, II.A, and II.B, *supra*, the Proposal provides no analysis regarding the customer costs. The absence of a cost analysis is cause enough for the Commission to reject it.

⁷⁶ See Robbie Orvis et al., *The Department of Energy’s Grid Resilience Pricing Proposal: A Cost Analysis*, Energy Innovation (Oct. 2017), available at http://energyinnovation.org/wp-content/uploads/2017/10/20171021_Resilience-NOPR-Cost-Research-Note-FINAL.pdf (annual cost to customers conservatively estimated at \$2.4 -10.6 billion); ICF International, Inc., *DOE Acts to Transform the Energy Landscape*, at 27 [Webinar] (Oct. 4, 2017), available at <https://www.icf.com/resources/webinars/2017/doe-nopr> (cost could reach \$3.8 billion per year); see also Jeff St. John, *FERC Commissioners and Staff Question DOE’s Push for Cost Recovery for Coal and Nuclear*, Greentech Media (Oct. 10, 2017), at <https://www.greentechmedia.com/articles/read/ferc-commissioners-and-staff-question-does-push-for-cost-recovery-for-coal#gs.lnQFaSg>.

those costs or the value of what customers will get in return. Indeed, no one has provided customers or their state representatives with any cost information nor consulted with them about whether they think a federal mandate to spend extra money to prevent the retirement of these uneconomic facilities is reasonable. Moreover, unlike other types of targeted incentives that the federal government and states provide under specific laws to advance public policies, customers will pay all of the direct costs associated with full cost recovery for the preferred, otherwise non-competitive generation, and will also bear all the monetary risks associated with the operation, maintenance, and capital of the subsidized generation. This burden on customers is precisely what the wholesale markets are designed to avoid. The Proposal would result in an extraordinary transfer of wealth from customers to generation owners with only undefined and unquantified customer benefits, if any, but certain adverse environmental and public health effects.⁷⁷

B. The Proposal Undermines State Energy Laws and Policies.

Of great concern to the State Commenters are the implications of the Proposal for our respective state laws and policies regarding energy, including State restructuring statutes and renewable energy and climate goals. Overall, it is clear that the Proposal directly subsidizes generation resources in a manner that intrudes on states' role as overseers of "the economic aspects of electrical generation," *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983); *see also* Federal Power Act, § 201(b)(1), 16 U.S.C. § 824(b)(1) (Commission lacks general jurisdiction over "facilities used for the generation of

⁷⁷ In this sense, the Proposal is quite different from recently-established state zero-emission-credit programs that provide additional incentives to nuclear generation under state law authorities. These programs tie resource compensation to certain measurable environmental attributes that benefit air quality, public health, and the states' achievement of greenhouse gas emission reduction goals. *See, e.g.*, Illinois Power Agency Act, § 1-75(d-5), 20 ILCS 3855/1-5 *et seq.* (2016).

electric energy”). In this regard, the Proposal effectively overrides the choices made by the states with restructured electric markets to allow those markets, along with other policy decisions by states to promote alternative energy sources and to secure reductions in power sector emissions, to guide capacity additions and retirements, and the choices made by states with traditional cost-of-service regulation to retire facilities in the best interest of ratepayers.⁷⁸ For example:⁷⁹

Regional Greenhouse Gas Initiative

- First implemented in 2009, the Regional Greenhouse Gas Initiative (“RGGI”) is a mandatory market-based program of nine states in the Northeast and Mid-Atlantic that seeks to reduce power sector greenhouse gas (“GHG”) emissions.⁸⁰ The RGGI states have established a regional cap on carbon dioxide (“CO₂”) emissions from electric generators and require power plants to possess a tradable CO₂ allowance for each ton of CO₂ they emit.⁸¹ The emissions cap is set at 84.3 million short tons in 2017, and declines 2.5 percent each year until 2020 to about 78.2 million tons. The RGGI states are working diligently to meet their commitments, and in August 2017, announced a further CO₂ reduction to 55.7 million tons by 2030. This represents a 65 percent drop from regional CO₂ levels in 2009.⁸² By subsidizing coal generation sources, the Proposal would directly impede the achievement of the RGGI states’ emissions reduction goals.

California

- California is implementing numerous statutory mandates to support greenhouse gas reductions and mitigate climate change. Significant recent examples include the following:

⁷⁸ This intrusion into state prerogatives is in conflict with the Commission’s recent decisions, including Order No. 1000, which mandates regional transmission planning to *accommodate* state energy policies. *See* Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842 (Aug. 11, 2011).

⁷⁹ For additional information, see the comments filed by certain State Commenters’ respective state utilities regulators in this docket.

⁸⁰ The nine states are: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

⁸¹ Regional Greenhouse Gas Initiative, Inc., *About the Regional Greenhouse Gas Initiative Fact Sheet* (June 2017), available at https://www.rggi.org/docs/Documents/RGGI_Fact_Sheet.pdf.

⁸² Alex Guillen, *RGGI States Plan Further 30 Percent Emissions Cut by 2030*, Politico (Aug. 23, 2017), at <http://www.politico.com/states/new-york/albany/whiteboard/2017/08/23/rggi-states-proposed-further-30-percent-emissions-cuts-by-2030-8613376>.

- SB 350 (De Leon),⁸³ which requires the state to establish GHG reduction planning targets through integrated resource planning for the electricity sector and increases the state's RPS to 50 percent by 2030.
- SB 32 (Pavley),⁸⁴ which codified an emissions reduction target of 40 percent below 1990 levels by 2030.
- SB 1383 (Lara),⁸⁵ which requires the development of a Short-Lived Climate Pollutant Strategy and sets forth specific 2030 targets:
 - 40 percent reduction in methane from 2013 levels;
 - 40 percent reduction in hydrofluorocarbon gases from 2013 levels; and
 - 50 percent reduction in anthropogenic black carbon.
- California has significantly reduced its coal capacity and as a result has seen significant greenhouse gas emissions reductions over the past decade.⁸⁶ The Proposal encourages an increased procurement of coal resources, which conflicts with California's energy goals and the direction the state has taken on maintaining a low-carbon grid.

Connecticut

- Connecticut introduced restructuring in 1998 in order to gain access to energy markets to benefit ratepayers.⁸⁷ Removing a significant part of the region's generation from competitive markets would frustrate that purpose and could prolong the life of coal-fired plants that would threaten timely achievement of Connecticut's Global Warming Solutions Act goals. The state's most recent inventory shows that the State has reduced greenhouse gas emissions 4 percent below 1990 levels and 14 percent below 2001 levels. Connecticut's statutory goal is to reduce emissions to 10% below 1990 levels by 2020 and 80% below 2001 levels by 2050. Conn. Gen. Stat. § 22a.200c.

⁸³ Available at

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB350.

⁸⁴ Available at

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32.

⁸⁵ Available at

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1383.

⁸⁶ California Air Resources Board, *2017 Edition California GHG Emissions Inventory: California Greenhouse Gas Emissions for 2000 to 2015 – Trends of Emissions and Other Indicators* (June 2017), available at

https://www.arb.ca.gov/cc/inventory/pubs/reports/2000_2015/ghg_inventory_trends_00-15.pdf.

⁸⁷ See Connecticut Department of Energy and Environmental Protection, *supra* note 52.

Illinois

- In Illinois, the Electric Service Customer Choice and Rate Relief Act of 1997, 220 ILCS 5/16-101A, ushered in a transition to a competitive market for electric generation with the goal of employing competitive forces to “create new opportunities for new products and services for customers and lower costs for users of electricity.” Illinois law maintains the core statutory goals of ensuring the provision of “safe, reliable, and affordable service” by relying on market forces to keep prices just and reasonable. The law in Illinois is based on “the competitiveness of supply and [] price-responsiveness of the demand for service.” 220 ILCS 5/16-101A(f).
- The Illinois Energy Efficiency Portfolio Standard requires the state’s largest utilities to invest in energy efficiency and demand response measures, which help customers save energy and reduce usage during periods of high demand on the grid. Illinois’s largest utility, Commonwealth Edison Company (“ComEd”), which serves Chicago and a large part of Northern Illinois, recently reported that energy efficiency efforts have helped save customers 21.5 million MWh of energy—enough to power more than 2.3 million homes for a year—and has created customer savings of \$2.3 billion on electric bills. State legislation enacted in 2016 directed an expansion of energy efficiency programs in Illinois. For example, under the law, ComEd now has a goal of increasing efficiency programs to ultimately produce a 21.5 percent reduction in energy use by 2030. These efficiency efforts in Illinois reduce demands on the system, thereby increasing reliability and resiliency and obviating the need for expensive policies such as those Proposal.
- Since the restructuring of Illinois’s electricity laws, the risks and rewards associated with generation have been managed by generation owners. For example, NRG acquired six coal plants in Illinois through its subsidiary Midwest Generation, and repowered one of them to natural gas, keeping it operating.⁸⁸ It also closed two urban coal plants, reducing air pollution in city neighborhoods with no effect on resource adequacy.⁸⁹ Dynegy currently owns twelve fossil fuel plants: eight are coal, three are natural gas and one is coal and gas.⁹⁰ Dynegy has

⁸⁸ *Illinois coal plant to close a unit in clean-air move*, Crain’s Chicago Business (Aug. 7, 2014), available at <http://www.chicagobusiness.com/article/20140807/NEWS11/140809839/illinois-coal-plant-to-close-a-unit-in-clean-air-move>.

⁸⁹ Julie Wernau, *Redevelopment ahead for Chicago’s two coal plant sites*, Chicago Tribune (Dec. 1, 2014), available at <http://www.chicagotribune.com/business/ct-crawford-fisk-sites-1130-biz-20141126-story.html>.

⁹⁰ Dynegy Inc., *Dynegy in Illinois* (Feb. 2017), available at <https://www.dynegy.com/sites/default/files/dynegy-factsheet-Illinois.pdf>.

closed or suspended operations of five other units in Illinois.⁹¹ Despite these closings, Dynegy has sufficient capacity to meet as much as 95% of the MISO Zone 4 local clearing requirement (5,561 MW vs. 5,836 MW in the latest capacity auction).⁹²

- Prolonging the life of coal-fired power plants that are facing market signals to retire may make it more difficult or expensive to achieve the Illinois Renewable Portfolio Standard, which requires that 25% of the state’s energy come from resources like wind and solar by 2025. Pursuant to state legislation enacted in 2016, the Illinois Power Agency is currently procuring one million renewable energy credits from new utility-scale wind and solar projects, which will provide energy at lower cost than energy from uneconomic coal plants.

Maryland

- In Maryland, the Electric Utility Industry Restructuring of 1999 required a transition to a competitive market for electric generation with the stated goals of, *inter alia*, establishing customer choice, providing economic benefits for all customer classes, and ensuring compliance with federal and state environmental standards. *See* S.B. 300, 1999 Gen. Assemb., Reg. Sess. (Md. 1999). Prolonging the life of coal-fired power plants in Maryland that might otherwise be close to retirement would threaten the progress achieved through RGGI, which Maryland is required to be a part of pursuant to Maryland’s Healthy Air Act, Environ. Art. §§ 2-1001 through 2-1005. Through Maryland’s participation in RGGI, Maryland has made a commitment to the use of renewable energy and achieving the State’s climate goals. Maryland also has a robust renewable portfolio standard (“RPS”), which was created by law in 2004. It is a two-tiered system with carve-outs for solar energy and offshore wind energy, and corresponding renewable energy credits (“RECs”) for each tier. Electric utilities and other electricity suppliers must submit RECs equal to a percentage specified in statute each year or else pay an alternative compliance payment (“ACP”) equivalent to their shortfall. Over the past few years, the requirements have been met almost entirely through RECs, with negligible reliance on ACPs. In 2016, Maryland increased its RPS, requiring utilities to derive 25 percent of their energy from renewable resources by 2020. *See* H.B. 1106, 2016 Gen. Assemb., Reg. Sess. (Md. 2016).

⁹¹ Jacob Barker, *Why is Dynegy idling Illinois coal plants? It’s more complicated than ‘the war on coal’*, St. Louis Post-Dispatch, (May 28, 2016), available at http://www.stltoday.com/business/local/why-is-dynegy-idling-illinois-coal-plants-it-s-more/article_7a1bd217-a83d-579b-93a8-d17b86de27c4.html.

⁹² MISO, *supra* note 25, at 9.

Massachusetts

- In 1997, the Massachusetts Legislature enacted the Electric Industry Restructuring Act to restructure its electric utility industry. *See* Mass. St. 1997, ch. 164. The general purpose of the Restructuring Act was to take electric utilities out of the generation portion of the electricity business. *See* Mass. Gen. Laws ch. 164, §1A(b)(2) (referencing the electric companies’ “requirement to divest generation facilities”). The Massachusetts Department of Public Utilities (“Department”) has held that its limited role over the generation component of electricity service following the Restructuring Act “represents a clear policy choice that electric generation resources are best developed in response to price signals from a competitive marketplace.” *Investigation by the Dep’t of Pub. Utils.*, Mass. D.P.U. 12-77, at 28 (2013). More importantly, by moving electricity generation outside of the Department’s jurisdiction and into the competitive marketplace, the Department found that the Restructuring Act “shifted the risks of generation development from consumers to generators, who are better positioned to manage those risks.” *Id.* This shift in risk allowed consumers to benefit from lower prices for electricity while also enjoying protection from the “construction, operational, and prices risks that were inherent in commodity rate regulation.” *Id.* Clearly, if the Commission were to impose on Massachusetts ratepayers a “cost-of-service” regime to support coal and nuclear generating resources, it would directly interfere with and contradict the Massachusetts legislature’s intent to shield ratepayers from the operational risks and investment decisions of all generating resources.
- Further, Massachusetts’s major investments in renewables and energy efficiency are deliberate efforts to create a clean energy industry and to address the risks of climate change. The Proposal is directly at odds with the energy policy chosen by Massachusetts. Massachusetts has adopted a broad portfolio of laws and regulations to reduce economy-wide greenhouse gas emissions by 25 percent by 2020 and 80 percent by 2050 from 1990 levels, including the Global Warming Solutions Act (2008), the Green Communities Act (2008), the Act to Promote Energy Diversity (2016), RGGI, and programs to promote low and zero-emission vehicles, among others. The clean energy industry is a powerful and growing economic engine for Massachusetts. The state has seen consistent growth across all aspects of the clean energy sector, from energy efficiency to alternative transportation, to renewable energy development. Clean energy contributes \$11.8 billion to the Massachusetts economy— a 2.5 percent share of the gross state product—and its employees account for 2.9 percent of the state’s labor market. Since 2010, the number of clean energy jobs has increased dramatically — 45,000 new clean energy jobs have been added, a 75 percent increase.⁹³ This success has

⁹³ Massachusetts Clean Energy Center, *2016 Massachusetts Clean Energy Industry Report*, at 3-4, 8 (Dec. 2016), available at http://files.masscec.com/2016%20MassCEC_CE_Report_Complete%20%281%29-2.pdf.

shown that states can grow their economies through investing in clean energy and reducing greenhouse gas emissions. The Proposal's attempt to force Massachusetts to subsidize nuclear and fossil fuel generating resources in contravention of its carefully developed renewable energy and climate policies is overreaching and inappropriate.

New Hampshire

- When New Hampshire became one of the first states to embrace wholesale and retail competition in the electric industry in 1996, it did so “to develop a more efficient industry structure and regulatory framework that results in a more productive economy by reducing costs to consumers while maintaining safe and reliable electric service with minimum adverse impacts on the environment.” N.H. RSA 374-F:1, I. The Legislature declared that competitive markets (as distinct from traditional cost-of-service regulation) “should provide electricity suppliers with incentives to operate efficiently and cleanly, open markets for new and improved technologies, provide electricity buyers and sellers with appropriate price signals, and improve public confidence in the electric utility industry.” *Id.* at II. The industry has evolved since 1996 and, accordingly, in 2008 New Hampshire authorized utilities to make (and to include in rate base) certain new investments related to generation—but, in contrast to the reliance on fossil and nuclear resources of the past, these new investments are limited to “renewable and clean distributed energy resources.” N.H. RSA 374-G:1 (noting that such investments “provide energy security and diversity by eliminating, displacing or better managing traditional fossil fuel energy deliveries from the centralized bulk power grid”).

Vermont

- Vermont has a number of state energy laws and policies that can only be achieved by reducing load, strategically electrifying the heating and transportation sectors, and meeting demand with renewable energy. *See, e.g.*, 30 Vt. Stat. Ann. § 202a(1), (2) (goals include efficiency, environmentally sound energy supply, and wise use of renewables). Tariffs that support non-renewable resources to the detriment of renewables will adversely impact the State's ability to meet its policy goal of 90% renewable energy across all sectors by 2050.⁹⁴ Such tariffs will also adversely impact Vermont's governing statutory requirements and goals to:
 - Reduce greenhouse gases 50% from 1990 levels by 2028 and 75% by 2050, 10 Vt. Stat. Ann. § 578(a);
 - Supply 25% of all energy use with in-state renewables by 2025, 10 Vt. Stat. Ann. § 580;

⁹⁴ *See* Vermont Department of Public Service, *Comprehensive Energy Plan 2016*, at 2, available at <https://goo.gl/8CxYjU> (90% goal).

- Increase the energy efficiency of 25% of homes by 2020, 10 Vt. Stat. Ann. § 581; and
- Meet 55% of electricity sales with renewable energy by 2017 and 75% by 2032, with 10% coming from small electric generators that are connected to and support Vermont’s distribution grid, 30 Vt. Stat. Ann. § 8005(a)(1), (2).

C. Federal Intervention to Prolong the Life of Coal-Fired Power Plants Will Exacerbate the Public Health and Environmental Harms Caused by Such Facilities.

The Proposal’s major aim appears to be to halt the market exit and retirement of aging coal-fired power plants. Yet, our states have significantly benefitted from the markets’ movement away from coal-fired power plants. With retirements, reduced utilization, and new pollution controls at coal-fired power plants nationwide, air pollution from the power sector has dropped, significantly improving air quality and public health, especially among the elderly, people with respiratory disease, and children.⁹⁵ These improvements include reductions in mercury and other toxic emissions; mercury emissions have fallen 69% since 2000.⁹⁶ In addition, reductions in coal use have helped reduce power sector greenhouse gas emissions that contribute to climate change by 20% since 2005.⁹⁷ The recent reductions in carbon pollution from the power sector—historically the country’s largest source of greenhouse gas emissions—are vital to

⁹⁵ See, e.g., U.S. Energy Information Administration, *Sulfur Dioxide Emissions from U.S. Power Plants have Fallen Faster than Coal Generation*, Today in Energy (Feb. 3, 2017), at <https://www.eia.gov/todayinenergy/detail.php?id=29812#> (citing 73% reduction in sulfur dioxide emissions from the power sector between 2006 and 2015); see also MJ Bradley & Associates, *Benchmarking Air Emissions of the 100 Largest Electric Power Producers in the United States*, at 2 (June 2017), available at <http://mjbradley.com/sites/default/files/Benchmarking-Air-Emissions-2017.pdf> (“In 2015, power plant [sulfur dioxide] and [nitrogen oxides] emissions were 87 percent and 79 percent lower, respectively, than they were in 1990.”).

⁹⁶ MJ Bradley & Associates, *supra* note 95, at 2.

⁹⁷ See, e.g., U.S. Energy Information Administration, *Carbon Dioxide Emissions from Electricity Generation in 2015 Were Lowest Since 1993*, Today in Energy (May 13, 2016), available at <https://www.eia.gov/todayinenergy/detail.php?id=26232>; MJ Bradley & Associates, *supra* note 95, at 2 (“In 2015, power plant [carbon dioxide] emissions were 20 percent below 2005 levels.”).

avoiding the worst effects of climate change⁹⁸ and therefore those reductions provide significant benefits to the states. Prolonging the operation—and air emissions—of coal-fired power plants that would otherwise retire and be replaced by cleaner energy resources would harm our states by threatening this progress in reducing harmful pollution and emissions and would aggravate and worsen the damage to our states that these facilities can cause.

As it did with Order 888, before taking final action on a rulemaking with such significant environmental impacts, the Commission must conduct a full environmental review of the Proposal under the National Environmental Policy Act by preparing an environmental impact statement. *See* 42 U.S.C. § 4332(C).

CONCLUSION

DOE issued the Proposal under section 403 of the Department of Energy Organization Act, a rarely used statutory provision that permits DOE to propose rules for consideration by the Commission. Pursuant to that authority, DOE directed the Commission to take final action on the Proposal within 60 days of its publication of the Federal Register, that is, by December 9, 2017. In light of the numerous pending proceedings before the Commission, in the regional markets,

⁹⁸ EPA has concluded that greenhouse gases, including carbon dioxide, endanger public health and welfare by causing more intense, frequent, and long-lasting heat waves; worse smog in cities; longer and more severe droughts; more intense storms such as hurricanes and floods; the spread of disease; and a dramatic rise in sea levels. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497, 66,524-66,525, 66,532-66,533 (Dec. 15, 2009). These effects harm our state residents, infrastructure, and industries, such as farming, tourism, and recreation, as well as the states' wildlife habitats. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,682 (Oct. 23, 2015). *See also Our Changing Planet: The U.S. Global Change Research Program for Fiscal Year 2017*, at 2 (Nov. 2016), available at <http://www.globalchange.gov/browse/reports/our-changing-planet-FY-2017> (climate-driven impacts include risks to human health; more frequent and intense storms that threaten food security, infrastructure, and livelihoods; sea level rise and coastal flooding; international stability; and U.S. national security).

and in states that seek to strengthen power system reliability and resource adequacy and to examine the fuel security issues raised by the Proposal, and given the lack of legal basis or factual support for any Commission action similar to the Proposal, the undersigned Attorneys General, state agencies, and state consumer advocates urge the Commission to take final action to decline further consideration of the Proposal and its recommended regulatory changes.

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