

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

Grid Reliability and Resilience Pricing

Docket No. RM18-1

Comments of Public Citizen, Inc.

On October 10, Public Citizen filed a Motion to Intervene in this docket. Public Citizen is a public interest organization representing the interests of our more than 400,000 members and supporters across the country.

In a very rare use of its authority, the U.S. Department of Energy has proposed a rulemaking to radically redesign FERC-jurisdictional power markets to require consumers to spend billions of dollars to bail out dozens of uneconomic coal and nuclear power plants. The Department of Energy uses a bizarre attribute—the availability of an on-site, 90-day fuel supply—to designate which power plants qualify for the new cost-of-service subsidy. To justify this unprecedented intervention, the Department of Energy claims that the premature retirement of these baseload power plants presents a “crisis” in need of emergency action, and that unit-specific trait of on-site fuel supplies is the superior feature to provide reliability and “resilience.”

But there is no crisis. The Department of Energy proposed rulemaking is riddled with falsehoods and inaccuracies. There is no need to provide any form of subsidy to uneconomic power plants in the name of securing reliability or resilience. And on-site fuel supplies in no way measures a power plant’s value for system reliability or resilience.

Public Citizen is far from alone in criticizing the proposal, as it has generated widespread, bipartisan condemnation. However, much of the vitriol seems to focus on the nature of the DOE’s remedy, namely that it is structured as a cost-of-service bailout rather than a market-based solution. PJM, ISO-NE and other Regional Transmission Organizations will be swift in

their criticism of the cost-of-service structure, while at the same time proudly touting their own bailout programs quickly working their way through flawed internal stakeholder processes. A bailout has the same impact on consumers whether it is a cost-of-service design or some sort of fancy, economist-rendered “market” based solution. RTOs constant rejiggering of their capacity markets to accommodate the needs of their powerful members to earn more money for their aging power plants isn’t any better just because they dress up their bailouts in difficult-to-understand pseudo-economic jargon. RTO capacity auctions are as much of a pure “market” as the DOE’s cost-of-service proposal is. So it will be no celebration for consumers if the DOE cost-of-service remedy is simply substituted by an RTO capacity auction redesign that falsely calls itself as a more palatable “market” solution.

I. The Rulemaking Schedule is Flawed.

On October 2, the Commission issued a notice inviting public comments on the DOE proposed rulemaking. On October 11, the Commission issued an “Errata to the 10/2/17 Commission issued Notice Inviting Comment” that the proposed rulemaking under consideration in this docket was no longer the document that had been posted with the October 2 notice, but rather a version the DOE posted in the Federal Register. This new Federal Register version materially changed the rulemaking under consideration, as it featured comprehensive alterations. Instead of applying to all markets, as the October 2 version did, the October 11 reference to the new Federal Register notice only applied to those RTOs with capacity markets. This reflects a material change that required FERC to provide more time for the public to comment.

It is also unfortunate that the Commission decided to fast-track this flawed proposal, especially when there are so many other more deserving dockets in need of FERC’s attention.

For example, it has been 662 days since FERC issued an order on Public Citizen’s complaint of market manipulation by Dynegy, which the Commission said “will be addressed in a future Commission order.”¹ And it has been 595 days since 30 public interest organizations petitioned FERC for a rulemaking to create and fund the Office of Public Participations as required by law.²

II. The DOE’s Claim of a Reliability and Resilience “Crisis” is False.

As Public Citizen pointed out in recent Congressional testimony,³ the CEO of the North American Electric Reliability Corporation (NERC) told Congress in September that “[e]ven with all the changes underway, the bulk power system (BPS) remains highly reliable and resilient, showing improved reliable performance year over year.”⁴ Furthermore, the NERC’s State of Reliability 2017 identified no “crisis” of reliability or resiliency from expected nuclear and coal baseload retirements.⁵

The U.S. Department of Energy’s own August 2017 Staff Report concludes that “... BPS [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.” There is no crisis requiring emergency FERC action.

But the most egregious falsehood spun by the DOE in its justification for this rulemaking comes in Part F of its “Discussion of the Proposed Rule.” Titled, *NERC Warns That Premature Retirements of Fuel-Secure Generation Threaten the Reliability and Resiliency of the Bulk Power System*, the section claims NERC shares the DOE’s concerns that retirements of coal and

¹¹ Docket EL15-70, at 4, <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14087972>

²² FERC Docket No. RM16-9

³ www.citizen.org/system/files/case_documents/testimony-tyson-slocum-energy-and-commerce-committee-october-2017_0.pdf

⁴ www.nerc.com/news/Documents/HEC9-14-17%20Cauley%20Testimony%20Final.pdf

⁵ www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/SOR_2017_MASTER_20170613.pdf

other baseload power plants have created a crisis in need of an emergency fix. Bizarrely, the section contains numerous citations to a non-public document that the DOE failed to make a part of the record. In order to end the DOE's deliberate distortions, Public Citizen is posting the entire non-public NERC document as an appendix to this filing.

A Rhodium Group analysis of form OE-417 reports, filed with the U.S. Department of Energy by any utility that experiences a major disturbance in electricity delivery, shows that from 2012-16, fuel supply emergencies were the cause of only 0.00007% of the total number of hours disturbed.⁶ As the Group determines, the DOE rulemaking proposal is a solution in search of a problem.

The DOE rulemaking request argues that wholesale power markets are not adequately pricing the "resiliency attributes" of "fuel secure" generation. DOE then proposes to guarantee full cost-recovery for units that can demonstrate a 90-day on-site fuel supply, as the DOE claims that the continued operation of such units is essential for grid resilience. Conveniently for the nuclear and coal industries, only their units would qualify for such bailouts. Coal-fired power plants typically have such on-site reserves of coal piled next to their generation units, and nuclear power plants have onsite nuclear fuel to meet the standard.

Recent events contradict this arbitrary standard. Hurricane Harvey, which made landfall on coastal Texas in August 2017, dumped so much rain that "[t]he external coal pile at [NRG's] W.A. Parish became so saturated with rainwater that coal was unable to be delivered into the silos from the conveyer system. In response to that situation, we transferred W.A. Parish Unit 5 and Unit 6 to natural gas rather than coal as the fuel source. These units haven't used natural gas

⁶ *The Real Electricity Reliability Crisis*, October 3, 2017, <http://rhg.com/notes/the-real-electricity-reliability-crisis>

for operational purposes since 2009.”⁷ Having a 90-day on-site fuel source is therefore not an adequate measure of reliability or resilience.

Nuclear power and its on-site fuel supplies fare even worse during major storm events. Before Hurricane Irma even made landfall in Florida on September 10, 2017, both of the state’s nuclear power plants—Turkey Point and St. Lucie—were forced into unscheduled outages. And the U.S. Energy Information Administration noted that the state’s rapid recovery from Irma was due not to the presence of nuclear power plants, but rather due to investments made in smart grid technology and replacing wooden poles with concrete.⁸ This same EIA analysis attributes these upgrades with the significantly improved recovery in Florida from 2017’s Irma compared to 2005’s Wilma—and it is important to note that in 2005 nuclear power generated 13.1% of the state’s power, compared to 11.8% in 2015. As Florida became less reliant on nuclear power, it recovered post-hurricane faster.

It is of concern that the DOE is focusing on the reliability and resiliency attributes of individual classes of generation units instead of the system as a whole. Indeed, the Rocky Mountain Institute notes that evolving power markets do not require baseload, and the group posits that reliability is a system attribute, and not a unit attribute requiring baseload.⁹

Replacing older baseload generation with renewables, efficiency and other distributed generation resources provides greater reliability and resilience at lower costs.¹⁰

⁷ *Harvey's rain caused coal-to-gas switching*, September 27, 2017, www.platts.com/latest-news/electric-power/houston/harveys-rain-caused-coal-to-gas-switching-nrg-21081527

⁸ *Hurricane Irma cut power to nearly two-thirds of Florida's electricity customers*, September 20, 2017, www.eia.gov/todayinenergy/detail.php?id=32992

⁹ *The Grid Needs a Symphony, Not a Shouting Match*, June 12, 2017, <https://rmi.org/news/grid-needs-symphony-not-shouting-match/>

¹⁰ *The Importance of Distribution-Scale Solar for Grid Resilience*, Rocky Mountain Institute, September 22, 2017, <https://rmi.org/news/importance-distribution-scale-solar-grid-resilience/>

Earlier this year, the U.S. Energy Information Administration noted that 2016 experienced the largest net increase in generation capacity since 2011.¹¹ That means baseload retirements are being more than offset by new renewable and natural gas capacity additions. There is no crisis requiring emergency FERC action.

Consumer-funded bailouts of merchant generation are particularly egregious when one evaluates the poor executive management that contributed to the uneconomic performance of certain coal and natural gas generation. Both publically-traded and private equity power plant owners have engaged in aggressive, highly-leveraged strategies to acquire large fleets of coal and natural gas generation units that have rendered the companies unable to respond to increased competition. For example, *The Wall Street Journal* reported that one Independent Power Producer, Dynegy, is saddled with \$9 billion in debt “which has become a burden” on the company’s ability to adjust to competitive wholesale markets.¹²

Other large IPPs are also highly leveraged: both NRG and AES are carrying \$20 billion apiece in debt, while Calpine bears \$13.5 billion. FERC should not be re-writing market rules to bail out highly-leveraged, poorly run power companies. Generators need to live within their means, and learn how to compete with more nimble competition.

But it’s the utilities like Exelon and Dominion with nuclear power plants seeking handouts that is truly outrageous. In every instance involving every merchant nuclear power plant, ratepayers already paid for these power facilities. All merchant nuclear power facilities in the United States were built and paid for under cost-of-service regulation. When some states restructured the electric industry in the mid- and late-1990s, many utilities with nuclear units

¹¹ U.S. electric generating capacity increase in 2016 was largest net change since 2011, February 27, 2017, www.eia.gov/todayinenergy/detail.php?id=30112

¹² Matt Jarzemsky and Dana Mattioli, “Vistra Energy Makes Takeover Approach to Rival Power Producer Dynegy,” May 18, 2017.

sold them either to other companies or to affiliates at below-market prices. In every instance, the state restructuring required consumers to pay the difference between the sales price and the remaining cost-of-service debt still on the utility's books, known as the stranded costs.

Newly divested nuclear units quickly were able to earn huge profits from the onset of state restructuring until the fracking boom began in 2008-09. Pre-fracking, natural gas prices were volatile, expensive and set the marginal price in RTO markets. Nuclear units at the time had lower costs than the gas-set high marginal price, and were, in the words of Halliburton's CEO, "printing money like crazy." Indeed, in just one example, then-Connecticut Attorney General Richard Blumenthal estimated that Dominion's two merchant nuclear power plants in the state had earned an annual profit margin of 44% and 53%, respectively.¹³ Exelon or Dominion were not demanding to redesign wholesale power market rules when the companies were earning windfall profits on the same facilities that now are struggling against cheaper competition.

Public Citizen made this case when we opposed New York's absurd bailout of the state's upstate nuclear power plants:

...the biggest transition [in utility restructuring] was the assumption of risk: in the old, vertically-integrated model, electric utilities were franchised monopolies that had their profits tightly-regulated. This eliminated the ability to earn windfall profits, but it also jettisoned shareholder risk, which is why utilities were known for decades as safe, predictable investments for "widows and orphans." To be sure, inefficiencies abounded under this monopoly system particularly if state regulators did a poor job controlling costs or making poor long-term strategic decisions [see, for example Kemper and Vogtle]. But ratepayers were guaranteed electric rates directly tied to the cost of producing and delivering it, and utility shareholders were guaranteed a risk-averse investment. And, importantly, reliability was ensured under the old vertically-integrated model because the utilities had a legal obligation to serve their customers...[state restructuring replaced] the legal obligation to serve with a market-based, incentive approach to ensuring reliability. Power sellers were, for the first time, offered an opportunity to earn windfall profits, and in exchange they were supposed to invest those record earnings into new capacity investments in order to continue to earn long-term profits. Reliability would be incentivized with the lure of more profits to those that

¹³ Patricia Daddona, "State Attorney General Blumenthal targets electricity costs," *The Day* (New London, CT), February 23, 2006.

invested...It is, to put it mildly, an outrage to have allowed these companies to earn unregulated profits for years when market conditions were conducive for it, and then redesign the rules when market conditions change and transfer risk away from shareholders of the power plant owners and onto...captive...ratepayers.”¹⁴

The point of this history lesson is not to wax poetic about the good old days cost-of-service regulation, but rather to point out just how shameful it is for “market” advocates and self-interested companies to push FERC for billions of dollars in bailouts after earning such handsome unregulated profits for so many years. **It is not just and reasonable to allow unregulated profits when market conditions are conducive for it, and then force ratepayers to fund expensive “market fixes” to shoulder these same companies’ risks.**

III. Outside of this Rulemaking, the RTOs are pursuing “market” adjustments to capacity markets that will have the same distorting effect as the DOE cost-of-service remedy

While this rulemaking may unite some in their stated belief to “defend” the integrity of the markets from the cost-of-service bailout the DOE has proposed, we must remember that RTOs preside over less of a market construct and more of a constantly-changing suite of unbelievably complex rules influenced by the powerful RTO members that own power plants and transmission lines.

Since 2010, there have been 27 significant changes to PJM’s capacity market design¹⁵ that appear to be driven more by powerful stakeholder needs for more revenue than by system reliability or resilience.

¹⁴ *Comments of Public Citizen, Inc.*, New York Public Service Commission, Case Number 15-E-0302, July 22, 2016.

¹⁵ Congressional Testimony of Stefanie A. Brand, Director, New Jersey Division of Rate Counsel, Page 7, <http://docs.house.gov/meetings/IF/IF03/20171005/106470/HHRG-115-IF03-Wstate-BrandS-20171005-U3.pdf>

For example, let's take the about-face PJM performed in the wake of the 2014 Polar Vortex. On May 15, 2014—shortly after the reliability disruptions of the Polar Vortex—PJM wrote to FERC:

PJM is meeting reliability objectives by developing the resource portfolio mix that results from government policy directives at the state and federal level as well as the economics of competing resource options. The Commission's support of PJM's capacity market construct and the various recent reforms submitted by PJM have served as a valuable tool that enables PJM to specifically identify the resources available to meet future demand over the next three-year period.¹⁶

Later that year, the capacity auction saw disappointing financial returns for nuclear generators like Exelon. An executive with the company did an interview with its trade association the Nuclear Energy Institute on June 12, 2014, where the company complained that PJM's capacity market wasn't making the company enough money, and that major changes were needed.¹⁷

All of a sudden, just one year after PJM boasted how its capacity market design was “meeting reliability objectives,”—and after loud protests by one of PJM's most powerful members, Exelon—PJM entertained FERC with a completely different story in 2015:

[the PJM capacity market, or Reliability Pricing Model] RPM's current capacity market performance incentives and requirements are weak, and therefore require immediate reform...[if PJM's requested capacity market reforms are not adopted] it would mean that the PJM Region would let five more winters pass after 2014 without implementing a full remedy to the manifestly deficient performance requirements in the current rules.

How on earth did PJM whipsaw from boasting in 2014 how fantastic its capacity market was working to ensure reliability, to just one year later describing them as weak? Because PJM, like the other RTOs, are highly susceptible to the corrosive self-interest of its powerful utility and generator members at the expense of the public interest and consumers.

¹⁶ FERC Docket No. AD14-8, at Page 6, <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13547010>

¹⁷ www.nei.org/News-Media/News/News-Archives/Exelon-on-the-2014-PJM-Capacity-Market-Auction

While obviously the DOE Grid Resiliency Pricing Rule has grabbed the headlines, less attention has been paid to the fact that multiple RTOs are already at an advanced stage of proposing their own versions of the DOE rulemaking, again at the behest of powerful corporate RTO members. PJM was first out the gate with its memo advocating wholesale market changes echoing Perry's flawed assumptions. On June 15, 2017, PJM management produced a report, *Energy Price Formation and Valuing Flexibility* that advocates for "fundamental" changes in "price formation", including "Refining locational marginal price (LMP) formation to recognize the contribution of all resources, including large, inflexible units (often referred to as "baseload" resources)" and to address "the pernicious effect" cheap and efficient renewable energy "may have in hastening the premature retirement of economic thermal generation, whose continuing operation is needed to meet capacity requirements and provide reliability services to accommodate for the intermittency of renewable generation."¹⁸ PJM offers no data or proof to support this radical premise that consumers need to bail out inefficient generation to ensure reliability. But such a proposal is exactly in line with Exelon's demands to bail out its uneconomic nuclear power plants.

Imagine an alternative reality in which the discussion was: *Gosh, Steve Jobs and Bill Gates and their newfangled computers have the "pernicious effect...in hastening the premature retirement of economic" typewriter manufacturing.*

PJM, like the other RTOs, preside over a vast and highly complex "stakeholder" process. PJM's stakeholder process has at least 47 different Committees, Subcommittees and Task Forces where market reforms are proposed, debated, and voted upon for ultimate submission to PJM's Board to then send to the Commission for approval into regulation and law. Each year, there are

¹⁸ At Page 1, www.pjm.com/~media/library/reports-notice/special-reports/20170615-energy-market-price-formation.ashx

hundreds of such meetings that require significant financial and human resources to meaningfully participate.

One of PJM's newer stakeholder groups is the Capacity Construct/Public Policy Senior Task Force, which PJM helpfully refers to as CAPPSTF. One can peruse historical meeting minutes of this stakeholder group, which provide cursory information about what transpired in these electricity policy planning incubators. One detail that can be reviewed are the list of names and affiliations of participants in these meetings—a roster that is overwhelmingly comprised of power company executives, lobbyists and lawyers. Indeed, one of its recent meetings featured only three non-governmental public interest advocates (NRDC, Union of Concerned Scientists and Environmental Law & Policy Center). But it actually doesn't matter if there were three public interest attendees or 300, because PJM does not allow any non-governmental public interest groups the right to vote in any stakeholder process. So public interest groups can spend their limited resources developing proposals and making impassioned arguments, and only energy companies and other PJM members have the ability to vote on a proposal to advance the offer from the RTO to FERC.

The RTOs are therefore a venue where corporate lobbyists serve as stakeholder administrators to manage and shape tariff proposals that become law. At the same time, public interest advocates are barred from voting within PJM, creating the situation where corporations are granted wide access to shape our electricity laws while the public interest is shut out.

The corporate dominance of the stakeholder process extends to RTO management. Since all RTOs are membership organizations, they must be responsive to their members. And the most powerful, well-funded and well-organized members in the RTOs are energy companies. It is therefore little surprise that RTO management proposals tend to reflect the financial interests of

those powerful and influential members. As a result, RTO management ends up serving as a tool of advocacy on behalf of incumbent energy companies.

Even assuming that public interest groups could vote in PJM's stakeholder process, they would be diluted with other end users into a voting block that could garner no more than one-fifth of the eligible votes. That's because PJM, like the other RTOs, created arbitrary voting sectors that assign entities into five different voting blocs: Transmission Owner, Generation Owner, Other Supplier, Electric Distributor and End User. These sector voting classifications in no way resemble the true market representation for the entities; Rather, the voting sectors appear to be designed for the primary purpose of expanding the voting power of Transmission Owners and Generators, and diminishing the voting power of end users.

More egregious than PJM's discrimination against the public interest is FERC's continued tolerance of it. **No market reform developed by discriminating against the public interest should be considered to be just and reasonable.**

Respectfully submitted,

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