

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

The Department of Energy's Proposed Grid Resiliency Pricing Rule )  
Docket No. RM18-1-000 )  
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**Comments of the Harvard Environmental Policy Initiative**

The Harvard Environmental Policy Initiative<sup>1</sup> submits these comments on a threshold legal deficiency of the Department of Energy's (DOE) Notice of Proposed Rulemaking (NOPR). Critically, the NOPR does not propose that wholesale rates are currently unjust and unreasonable or unduly discriminatory. This glaring omission dooms DOE's proposal under section 206 of the Federal Power Act and allows the Commission to issue a swift rejection without weighing in on the merits.

The NOPR's observation that wholesale markets do not price "resiliency" does not substitute for an explicit proposed finding that current rates are unjust and unreasonable. DOE does not define "resiliency," nor has the Commission ever used that word in connection with wholesale rates. DOE's bare assertion that rates do not account for undefined attributes does not provide adequate notice necessary for meaningful public comments.

The Commission has no legal obligation to accommodate DOE's NOPR. Its simplest path forward is to reject the NOPR because it is fundamentally inadequate to provide the basis for a final rule.

**The NOPR Does Not Propose that Current Rates Are Unjust and Unreasonable and Therefore Fails to Provide Notice to Market Participants and an Opportunity for Meaningful Comments**

"The condition precedent to the Commission's exercise of its power under s 206(a) is a finding that the existing rate is 'unjust, unreasonable, unduly discriminatory or preferential'."<sup>2</sup> "[C]ourts have repeatedly held that FERC has no power to force [RTOs] to file particular rates unless it first finds the existing filed rates unlawful."<sup>3</sup>

Indeed, every Commission-proposed rule about wholesale rates that directs RTOs/ISOs to amend their tariffs includes a clear statement proposing that current rates are unjust and unreasonable, as

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<sup>1</sup> The Harvard Environmental Policy Initiative is an independent policy organization that produces legal analysis on a range of environmental and energy issues. The Policy Initiative informs public debate and promotes a practical approach to legal issues, always looking to ensure that policies work harder for people, communities, and the environment.

<sup>2</sup> Fed. Power Comm'n. v. Sierra Pac. Power ("Sierra"), 350 U.S. 348, 372 (1956).

<sup>3</sup> Atlantic City Elec. v. FERC, 295 F.3d 1, 10 (D.C. Cir. 2002) (the original quote says "public utilities" and not RTOs, but the D.C. Circuit recently clarified that RTOs "qualify as utilities for purposes of the Federal Power Act." NRG Power Marketing, LLC v. FERC, Per Curiam Order, D.C. Cir. Docket No. 15-01452 (Sep. 20, 2017)).

well as several paragraphs explaining that proposed finding.<sup>4</sup> The Commission’s justification for that proposed finding is essential. As the D.C. Circuit recently explained, “[w]ithout further explanation, a bare conclusion that an existing rate is unjust and unreasonable is nothing more than ‘a talismanic phrase that does not advance reasoned decision making.’”<sup>5</sup>

DOE’s omission undermines one of the pillars of the Federal Power Act. Section 206 provides utilities and consumers with “statutory protection” from arbitrary rate changes.<sup>6</sup> The protective scheme requires the Commission to meet a “dual burden”<sup>7</sup> to mandate a tariff change — it must “make an explicit finding that the existing rate is unlawful before setting a new rate.”<sup>8</sup> Adequate notice of that finding is essential for effectuating this core purpose of the Federal Power Act.<sup>9</sup>

DOE’s failure to propose and explain a finding about current rates denies market participants adequate notice and renders its NOPR incapable of meeting the bare legal minimum for a proposed rule. Under the Administrative Procedure Act, a NOPR must “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully”<sup>10</sup> (emphasis added). The “rationale” for a section 206 rule is that current rates are unjust and unreasonable. A NOPR without this proposed finding fails to provide interested parties with an opportunity to comment meaningfully on the proposal’s foundation.

Because it neglects to propose a central element of the rule, DOE’s NOPR also does not “fairly apprise interested parties of all significant subjects and issues involved” in the proposal.<sup>11</sup> Instead, the NOPR implicitly requires interested parties to recognize the critical importance of the justness and reasonableness of current rates and then piece together a proposed finding from the NOPR’s isolated statements about “wholesale pricing.” The NOPR thus demands that interested parties have a better understanding of the law than the proposing agency and invites them to speculate on

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<sup>4</sup> 158 FERC ¶ 61,047 at PP 1, 4, 5, 31–34, 77, 79, 80 (2017); 157 FERC ¶ 61,213 at PP 3, 34–43 (2017); 157 FERC ¶ 61,121 at PP 7, 11–14 (2016); 154 FERC ¶ 61,038 at PP 2, 43–47 (2016); 152 FERC ¶ 61,218 at PP 2–3, 14, 26–33, 47–50 (2015); 134 FERC ¶ 61,124 at PP 3, 26–31 (2011); 130 FERC ¶ 61,213 at PP 9–10, 13 (2010); 122 FERC ¶ 61,167 at PP 107–109 (2008) (explaining need for scarcity pricing reform; this NOPR also outlined reforms to demand response participation that were premised on the Commission’s authority to remedy undue discrimination by “ensur[ing] comparable treatment of all resources,” at PP 37–45).

<sup>5</sup> *Emera Maine v. FERC*, 854 F.3d 9, 27 (D.C. Cir. 2017) (citing *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1, 12–13 (D.C. Cir. 2015)).

<sup>6</sup> *City of Winnfield v. FERC*, 744 F.2d 871, 874 (D.C. Cir. 1984); *Sierra*, 350 U.S. at 355 (“... the purpose of the power given the Commission by s 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities . . .”).

<sup>7</sup> *FirstEnergy Servs. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (citing *Boston Edison Co. v. FERC*, 233 F.3d 60, 64 (1st Cir. 2000); *Kan. Gas & Elec. Co. v. FERC*, 758 F.2d 713, 716 (D.C. Cir. 1985)).

<sup>8</sup> *Emera Maine*, 854 F.3d at 24.

<sup>9</sup> See generally *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 116 (D.C. Cir. 2017) (discussing the importance of “early notice” of rate changes); see also *City of Winnfield*, 744 F.2d at 876.

<sup>10</sup> *Honeywell International, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

<sup>11</sup> *NVE Inc. v. Dep’t of Health and Human Servs.*, 436 F.3d 182, 191 (3rd Cir. 2006) (quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3rd Cir. 1977)).

a matter that the agency should have stated explicitly. The Commission may not rely on interested parties to fill the gaps in DOE's document on this threshold issue.<sup>12</sup>

Moreover, the NOPR is too vague to provide interested parties with a reasoned basis for speculating about any deficiencies in current rates. DOE asserts that “wholesale power markets are not adequately pricing resiliency attributes of fuel-secure power,”<sup>13</sup> and that “there is a growing recognition” that markets “do not necessarily pay generators for all the attributes that they provide to the grid, including resiliency.” Even construed generously, given their context in a document labeled a NOPR, DOE's statements are indecipherable because the NOPR does not define “resiliency,” the concept apparently at the heart of DOE's proposal. Commission staff highlights this omission in its Request for Information in this docket. Its first request is simply, “what is resilience, [and] how is it measured . . . ?”<sup>14</sup>

Past Commission statements and DOE documents provide no clues about how “resiliency” might be connected to wholesale rates. Several recent DOE documents do define resilience, as that term relates to the power sector,<sup>15</sup> but the NOPR does not reference these documents. DOE's Quadrennial Energy Review (QER), quoted in the NOPR, also provides a loose definition of resilience (that is not cited in the NOPR) but finds that “there are no commonly used metrics for measuring grid resilience” and “there has been no coordinated industry or government initiative to develop a consensus on or implement standardized resilience metrics.”<sup>16</sup> Although a handful of Commission orders mention “resiliency,” those orders are about NERC reliability standards, with the most detailed discussion in orders about “physical security” of critical infrastructure facilities.

Interested parties in this proceeding can only guess whether any of DOE's prior definitions are relevant, whether DOE's failure to cite those definitions constitutes implicit rejection of all them,

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<sup>12</sup> Wagner Electric Co. v. Volpe, 466 F.2d 1013, 1019 (3rd Cir. 1972) (“The fact that some knowledgeable manufacturers appreciated the intimate relationship between the permissible failure rate provisions and the performance criteria [in the NOPR], and so responded, is not relevant. Others possibly not so knowledgeable also were interested persons within the meaning of [the Administrative Procedure Act].”).

<sup>13</sup> DOE NOPR, 82 Fed Reg. 46,940, 46,942 (Oct. 10, 2017).

<sup>14</sup> FERC Office of Energy Policy and Innovation, Request for Information, Docket RM18-1 (Oct. 4, 2017).

<sup>15</sup> Dep't of Energy, Office of Energy Policy and Systems Analysis, Resilience of the U.S. Electricity System: A Multi-Hazard Perspective (Aug. 2016), <https://energy.gov/sites/prod/files/2017/01/f34/Resilience%20of%20the%20U.S.%20Electricity%20System%20A%20Multi-Hazard%20Perspective.pdf>; Kristina LaCommare, et al., Evaluating Proposed Investments in Power System Reliability and Resilience: Preliminary Results from Interviews with Public Utility Commission Staff (Berkeley, CA: Lawrence Berkeley National Laboratory, 2016), <https://energy.gov/epa/downloads/evaluating-proposed-investments-power-system-reliability-and-resilience-preliminary>; M. Finster, et al., Front-Line Resilience Perspectives: The Electric Grid (Lemont, IL: Argonne National Laboratory, November 2016), <https://energy.gov/epa/downloads/front-line-resilience-perspectives-electric-grid>; J. Phillips, et al., State Energy Resilience Framework (Lemont, IL: Argonne National Laboratory, Dec. 2016), <https://energy.gov/epa/downloads/state-energy-resilience-framework>; DOE Office of Electricity Delivery and Energy Reliability, Hardening and Resiliency: U.S. Energy Industry Response to Recent Hurricane Seasons (Aug. 2010), <http://www.oe.netl.doe.gov/docs/HR-Report-final-081710.pdf>.

<sup>16</sup> Quadrennial Energy Review 1.2 at S-13.

whether the NOPR agrees with the QER's conclusion that there are no metrics that define resilience, or whether the NOPR is shoehorning NERC-related definitions to a proposal about wholesale rates.

It is too late to salvage the NOPR by building a record on this decisive issue. In a NOPR, an agency's must "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."<sup>17</sup> An agency "must 'describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.'"<sup>18</sup> The NOPR does not propose even a single definition, let alone a "range of alternatives."<sup>19</sup>

DOE's vagueness on the definition of "resiliency" is indefensible. A 2011 Third Circuit decision about a Federal Communications Commission media ownership rule is directly on point. In that case, the court held that the FCC's "vague" further notice of proposed rulemaking (FNPR) and "irregular" comment period did not satisfy Administrative Procedure Act requirements. The court summarized that

It was not clear from the FNPR which characteristics the Commission was considering or why. The phrase "characteristics of markets" was too open-ended to allow for meaningful comment . . . many central elements of the rule are [unexplained and undefined, including] the amount of "local news" produced by an individual station . . . "major media voices," including what counts as a major newspaper; how "market concentration" is measured; whether a station is "failing"; [and] whether a station exercises "independent news judgment."<sup>20</sup>

DOE's unsupported observations that rates "do not necessarily" recognize unspecified "attributes . . . including resiliency" are similarly "too-open ended to allow for meaningful comment" and cannot provide a basis for finalizing a finding about the justness and reasonableness of current rates. These empty assertions cannot substitute for an explicit proposed finding and a coherent explanation of that finding about current rates.

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<sup>17</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 454 (3rd Cir. 2011) (quoting *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977)).

<sup>18</sup> *Prometheus Radio Project*, 652 F.3d at 450 (quoting *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994)).

<sup>19</sup> Secretary Perry admitted to Congress that he was not aware if "there are better options" to DOE's NOPR, testifying that the NOPR "[i]s not the be all, end all." Gavin Bade, "Perry on DOE NOPR Pricetag: 'What's the Cost of Freedom?'" *UtilityDive* (Oct. 12, 2017), <http://www.utilitydive.com/news/perry-on-doe-nopr-pricetag-whats-the-cost-of-freedom/507174/>.

<sup>20</sup> *Prometheus Radio Project*, 652 F.3d at 450.

**CONCLUSION**

DOE's NOPR includes neither a proposed finding about the justness and reasonableness of wholesale rates nor any discernible explanation of how current rates are deficient. Under the Federal Power Act and the Administrative Procedure Act, the Commission cannot finalize a legally defensible rule based on the NOPR.

Respectfully Submitted,

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