

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

Grid Reliability and Resilience Pricing

RM18-1-000

**JOINT ANSWER BY PUBLIC INTEREST ORGANIZATIONS IN RESPONSE TO
THE JOINT MOTION OF THE ENERGY INDUSTRY ASSOCIATIONS**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. § 385.213 (2016), and section 403(b) of the Department of Energy Organization Act, 42 U.S.C. § 7173, Earthjustice, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club (“Public Interest Organizations”) hereby respectfully submit this Answer in response to the October 2 Joint Motion of the Energy Industry Associations (the “Motion of the Energy Industry Associations”) requesting, *inter alia*, an extension of time to file comments on the Notice of Department of Energy Proposed Rulemaking (the “DOE Proposal”) submitted by the Secretary of Energy and docketed for consideration in the above-captioned proceeding by the Commission. For the reasons discussed below, the Public Interest Organizations support the Motion of the Energy Industry Associations,¹ and request that the Commission adopt a modified schedule providing *at minimum* a 90-day initial comment period and at least a 45-day reply comment period. The DOE Proposal would have sweeping economic consequences, is

¹ See *Joint Motion for Extension of Time and Request for Expedited Treatment of the Energy Industry Associations*, Dckt. No. RM18-1-000 (Oct. 3, 2017).

based on poorly defined concepts in conflict with foundational Commission practice, and relies on an unanalyzed and untested approach. If the proposal is not to be rejected immediately, consideration of it would require rigorous examination that cannot be accomplished in mere weeks.

I. Background

The Secretary of Energy submitted the DOE Proposal to the Commission on September 28, 2017.² The Secretary recommended that the Commission either issue the DOE Proposal immediately as an interim final rule, or take final action on the DOE Proposal within 60 days of the date of its publication in the Federal Register, while suggesting 45 days for public comment after publication in the Federal Register.³ On the next business day, October 2, 2017, the Commission published a Notice Inviting Comments, requiring that initial comments on the DOE Proposal be filed by October 23, 2017, and reply comments be filed by November 7, 2017.⁴ This schedule affords interested parties only 21 days to file initial comments, and 15 days for reply comments.

II. The Commission Should Afford Additional Time for Interested Parties to File Comments

The proposed 21-day period to file initial comments does not afford interested parties, including the undersigned Public Interest Organizations, adequate time to examine the substantial issues presented by the DOE Proposal and to file detailed and

² See *Notice Inviting Comments*, Dckt. No. RM18-1-000 (Oct. 2, 2017).

³ DoE Proposal at 1, available at <https://energy.gov/sites/prod/files/2017/09/f37/Notice%20of%20Proposed%20Rulemaking%20.pdf>.

⁴ See *Notice Inviting Comments*, Dckt. No. RM18-1-000 (Oct. 2, 2017).

considered comments in response. The DOE Proposal would completely reshape power markets across the country by undoing the Commission-preferred competitive market system for a large number of generators and replacing it with an unworkable centralized pricing system. The DOE Proposal's sparse rationale to avoid so-called "premature retirements"⁵ of certain baseload energy generating facilities overrides the market's ability to select the most efficient units, and carries far-reaching and uncertain implications.

The approach suggested by the DOE Proposal came as a complete surprise to most of the industry, has never before been discussed in any Commission stakeholder proceeding, and was not even raised as an idea meriting further inquiry in the Department of Energy Staff Report to the Secretary on Electricity Markets and Reliability ("Staff Report").⁶ The Commission's deliberations on the DOE Proposal would benefit from comments and analysis by non-governmental organizations, consumers, industry, and state and local regulatory authorities. Obtaining fully-informed comments from such a diverse group of stakeholders requires a comment period considerably longer than three weeks.

By any standard, the DOE Proposal qualifies as a "significant regulatory action" within the meaning of Executive Order 12,866, and thus a minimum of sixty days

⁵ DOE Proposal at 2.

⁶ Department of Energy Staff Report to the Secretary on Electricity Markets and Reliability (August 2017), at 126-129 (discussing Policy Recommendations and Areas for Further Research).

should be afforded for initial comments.⁷ The Administrative Conference of the United States (the “ACUS”) likewise recommends that agencies afford *at least* 60 days for public comment on significant regulatory actions, and afford at least 30 days for any other rulemaking, *regardless of its significance*.⁸ While both Executive Order 12,866 and the ACUS permit exceptions for extraordinary circumstances, no such extraordinary circumstances are present here. An extension would also be supported by precedent, as major proposals routinely have comment periods exceeding 100 days, while other proposals under section 403 have allowed over six months between publication in the Federal Register and final action.⁹

The October 4, 2017 request for additional information filed by Commission Office of Energy Policy and Innovation demonstrates the unreasonableness of the current timeline.¹⁰ The request lays out over five pages of categories of information requested, posing a series of questions that have not been adequately addressed by the DOE Proposal. One category of questions on “Implementation” asks essential questions about *how* the DOE Proposal would work – laying bare that the proceeding aims not to work the kinks out of a fully-fledged proposal, but instead to build from scratch the

⁷ See Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993).

⁸ See Adoption of Recommendations, 76 FR 48789 (Aug. 9, 2011).

⁹ See 75 FR 37884 (Jun. 17, 2010); 50 FR 48540 (Nov. 25, 1985).

¹⁰ Request for Information re section 403 of the Department of Energy Organization Act's proposed rule for final action by the Federal Energy Regulatory Commission under RM18-1. (Oct. 4, 2017).

basic elements of a wholly new way of operating the wholesale markets.¹¹ While the DOE Staff Report took over four months, with conclusions directly counter to the DOE Proposal, it never provided answers to the core questions stakeholders here are asked to address in 21 days.

In the DOE Proposal, the Secretary states that a 60-day period for consideration of the proposal is adequate because of “the extensive record the Commission has already developed on the subject matter” of the DOE Proposal, and because of the asserted ongoing retirements of the energy generating facilities that the rule aims to bolster.¹² But as discussed above, this simply is not true. There is no record discussing the reshaping of the power markets envisioned by the DOE Proposal. If there were, the Commission need not have issued such a lengthy request for additional information encompassing the most rudimentary aspects of the DOE Proposal. Further, as set forth more fully in the Energy Industry Associations’ motion, there is no evidence that the power system faces an imminent reliability crisis.¹³ Nor is there evidence that the Commission has considered fundamentally violating its own tenets of providing for market-driven processes through non-discriminatory means. And, critically, there is no

¹¹ For example, “[h]ow would eligible resources receiving cost of service compensation under the proposed rule be committed and dispatched in the energy market?” *Id.*

¹² DOE Proposal at 2.

¹³ *Joint Motion for Extension of Time and Request for Expedited Treatment of the Energy Industry Associations* at 2 (“publicly available information from DOE and NERC, as well as other experts, all demonstrate that no emergency exists . . .”).

evidence as to the costs of the DOE Proposal to consumers, either nationally or on a region-by-region basis, against which to compare the alleged benefits.

Public comment is not merely a necessary procedural step in the administrative process, it is a crucial input to achieving better policy. Stakeholders and other affected parties, including those with day-to-day experience on these matters like the RTOs/ISOs, as well as the states, whose policies' effectiveness are at stake, provide information and perspectives not readily available to the Commission. The public comment process, as the Executive Order and ACUS recommendation reflect, requires adequate time. Certainly, the retirement of certain facilities due to the operation of the wholesale electricity markets – a normal function of a competitive market that has been ongoing for decades – cannot justify shortcuts to the Commission's normal deliberative process, which is meant to "assure full consideration of the issues and an opportunity for interested persons to present their views."¹⁴ In short, the complexity of the issues presented by the DOE Proposal call for more, rather than less, time for parties to submit comments.

¹⁴ 42 U.S.C. § 7173(c).

III. Conclusion

For the foregoing reasons, the undersigned Public Interest Organizations respectfully request that the Commission modify its Notice Inviting Comments to adopt a 90-day initial comment period and a 45-day reply comment period.

Respectfully submitted,

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