

BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Grid Reliability and Resilience Pricing )

Docket No. RM18-1-000

**REPLY COMMENTS OF AMERICAN MUNICIPAL POWER, INC.  
ON NOTICE OF PROPOSED RULEMAKING**

Pursuant to the October 2, 2017 Notice Inviting Comments,<sup>1</sup> American Municipal Power, Inc. (“AMP”) offers the following comments in reply to initial comments in the above referenced docket for the Federal Energy Regulatory Commission’s (“Commission”) consideration.

**I. Overview**

As evidenced by the breadth and number of initial comments on the rule proposed for final action by the Secretary of the Department of Energy issued on September 28, 2017,<sup>2</sup> there is significant interest in the important matter of ensuring access to reliable, resilient and affordable electricity. However, equally clear was the significant opposition to instituting rules to compel RTOs with administrative forward capacity constructs<sup>3</sup> to adopt a cost recovery mechanism benefiting only coal and nuclear generation resources, particularly on the expedited timeframe proposed.<sup>4</sup> In fact, the few supporters of the Secretary’s Proposal, as best as it can be understood, are a subset of market participants

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<sup>1</sup> *Grid Reliability and Resilience Pricing*, Notice Inviting Comments (Oct. 2, 2017).

<sup>2</sup> 42 U.S.C. § 7173 (2012).

<sup>3</sup> Whether the obligations the Proposal would impose also might fall on other RTOs is unclear from the NOPR.

<sup>4</sup> See, e.g., Comments of American Electric Power Company, Inc., Comments of the Transmission Access Policy Study Group, and Comments of the ISO/RTO Council.

whose commercial interests would be advanced by any policies or rules adopted as a result of this proceeding.<sup>5</sup> Several other commenters suggested that the Commission adopt alternative proposals to modify the RTO energy market rules or take other actions that are beyond what was contemplated by the DOE Proposal. The Commission cannot lawfully accept such proposals as part of this rulemaking process.

## **II. Reply Comments**

Like many commenters, the PJM Independent Market Monitor (“PJM IMM”) concludes that the DOE Proposal does not identify an emergency and “fails to identify any market design issue that needs a solution.” PJM IMM Comments at 2. As noted by AMP and many other commenters, the significant legal deficiency of failing to demonstrate that the current RTO tariffs are unjust and unreasonable alone should prevent the Commission from adopting the DOE Proposal. However, the legal deficiencies coupled with the practical reality that the DOE Proposal would not resolve the reliability concerns raised by the Secretary but would impose significant new costs on customers<sup>6</sup> should make this an easy call for the Commission – the Commission should not implement the Proposal.

Many commenters suggested that instead of compelling the RTOs to implement the DOE Proposal, the Commission should take alternative steps ranging from terminating the docket,<sup>7</sup> opening new dockets or continuing to pursue further study of

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<sup>5</sup> Not all generators who would stand to benefit from the Proposal support it. See, e.g. Dynegey Comments, EPSA Comments, AEP Comments, NRG Energy, Inc. Comments.

<sup>6</sup> The PJM IMM conducted analysis of the costs to load of the Proposal and concluded that, depending on how the Proposal is interpreted and implemented, the Proposal would increase costs to PJM load by a range of \$18 billion to \$288 billion over ten years. IMM Comments at 7.

<sup>7</sup> TAPS Comments at 2.

reliability issues and definitions in existing dockets,<sup>8</sup> to instituting 15 year reliability must run-like cost recovery agreements for coal and nuclear generators.<sup>9</sup> AMP addresses the alternative proposals that raise procedural or substantive legal concerns.

#### **A. Procedural Deficiencies of Alternative Proposals**

Many commenters recommended that the Commission take a more measured approach to resilience than required by the DOE Proposal, including directing additional study and input on the definition of resilience, reviewing the efforts already undertaken to address resilience, and the impact (if any) on the grid of the trend away from central-station baseload resources. Most commenters also urged the Commission to take such steps only after affording a reasonable timeframe that allows for careful technical, engineering and market analysis, and meaningful input of RTOs, stakeholders and other interested parties before a final rule is adopted. However, a handful of commenters argued for the immediate adoption of proposals that would be alternatives to, and beyond the scope of, the DOE Proposal.

Alternative proposals made in the comments to the DOE NOPR cannot be adopted by the Commission because they were not properly noticed as part of this rulemaking process.<sup>10</sup> An agency “must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.”<sup>11</sup> If the Commission were to issue

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<sup>8</sup> See, e.g., Comments of the Midcontinent Independent System Operator, Inc.

<sup>9</sup> FirstEnergy Comments at 45.

<sup>10</sup> APA § 553(b)(1) - (3) requires an agency to meet minimum requirements for notice of proposed rulemaking actions and a fair opportunity for public comment. The notice of a proposed rule must include “sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment” and the APA “requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.” *American Medical Ass’n v. Reno*, 57 F.3d 1129, 1133 (1995) (citing *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)).

<sup>11</sup> *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

a final rule under Federal Power Act (“FPA”) section 206 requiring the RTOs to modify their tariffs to implement proposals made in comments that diverge from the noticed DOE Proposal as part of this NOPR, it would violate the notice and comment requirements of the Administrative Procedure Act (“APA”) and the FPA because the DOE NOPR did not seek comment on such alternative proposals.

## **B. Substantive Deficiencies with Alternative Proposals**

### **1. FirstEnergy’s modified DOE Proposal**

FirstEnergy may be the only utility that fully embraced the DOE Proposal. However, even FirstEnergy proposed modifications to the Proposal. FirstEnergy’s proposed modifications provide specificity on how the DOE Proposal would be implemented, which happens to be similar to PJM’s existing reliability must run agreements and MISO’s existing system support resource agreements, without saying why such already-existing arrangements would not work for the purposes identified by FirstEnergy: keeping a “Resiliency Support Resources” (or “RSR”) in operation to provide energy and ancillary services “in times of need by the RTO.” FirstEnergy Comments at 4. FirstEnergy also included an RSR Agreement that the RTOs would be required to adopt unless the RTO wishes to include an agreement with terms and conditions “superior” to FirstEnergy’s proposed version. FirstEnergy Comments at 4. Although FirstEnergy’s description of the RSR Units providing energy and ancillary services in times of need by the RTO seems noble, closer review of the RSR Agreement reveals that the RSR Units may not actually be dispatched by the RTOs when needed as a result of the strict limitations in the provisions for operation of the RSR Units. Specifically, an RSR Unit may not be dispatched during a period of time when the generator may be liable for

performance penalties under the RTO's capacity program. FirstEnergy Comments at 50 (referencing the RSR Agreement, Section 8). In other words, during a capacity performance event in PJM, which is not necessarily predictable but would generally occur when the system is strained and the RSR Unit would be needed the most, the RSR Units are not available for dispatch by the RTOs.<sup>12</sup> The RSR Unit would similarly be unavailable for dispatch by the RTO if such dispatch would cause the RSR Unit to exceed its operational or environmental limitations. Accordingly, under FirstEnergy's proposal, the RSR Units would not actually be available for dispatch "in times of need by the RTO" and, thus, would likely not be available to meet the resilience and reliability goals described by the Secretary.

In spite of the lack of availability of the RSR Units to provide resilience and reliability during the periods of greatest need, FirstEnergy's comments included proposed tariff provisions that, if adopted by the Commission, would obligate RTOs to ensure that RSR Units receive "a payment each month equal to its full costs of operation and service less market revenues for capacity, energy, and ancillary services." FirstEnergy Comments at 4. FirstEnergy's proposed *pro forma* tariff changes and RSR Agreement would ensure that the RSR Unit "receives a payment each month equal to its full costs of operation and service (the "Monthly RSR Amount") less market revenues for capacity,

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<sup>12</sup> See PJM OATT at Attachment DD, section 5.5A. PJM capacity resources are "obligated to deliver energy during the relevant Delivery Year as scheduled and/or dispatched by the Office of Interconnection during the Performance Assessment Hours." "Performance Assessment Hours" are each whole or partial clock-hour for which an Emergency Action has been declared by PJM. Thus, anytime there is an emergency, the RSR Units would not be permitted to be dispatched by PJM.

energy, and ancillary services, net of fuel expense and variable operations and maintenance costs (“Market Compensation Adjustment”).” FirstEnergy Comments at 44. FirstEnergy would allow the RSR Unit owner to have the option to set the amount of the cost-based compensation level by either agreement with the RTO or by filing an unexecuted RSR Agreement that “provides for recovery of the RSR Unit’s fully allocated costs and a fair return on equity.” FirstEnergy Comments at 44. Particularly given the lack of dispatch-ability during times of need, monthly payments of the RSR Units’ full costs of operation and service is unjust and unreasonable and should be rejected by the Commission.

Notwithstanding the flagrantly egregious payment for highly limited resources that would not likely contribute to resilience or reliability needs during the most needed periods, FirstEnergy’s proposal also suffers from the same shortcomings as the DOE Proposal itself in that FirstEnergy failed to identify a real problem based on facts and evidence, demonstrate that the current RTO rates are unjust and unreasonable or that current efforts are not already addressing any resilience issues. As the PJM IMM succinctly stated, there are not resource adequacy problems in PJM:

Retirement of units is not a reliability risk. PJM assesses the reliability impacts of unit retirements and maintains a Reliability Must Run process to provide cost compensation for units that it requires remain in service for short periods for reliability reasons. This process is sufficient to accommodate cost of service support for any units that PJM deems necessary for reliability or resilience that would otherwise retire. There is no need to add an additional process that would distort the market to provide cost of service support to units of a particular fuel class in the name of reliability or resilience. PJM IMM Comments at 20.

Finally, FirstEnergy’s remedy, while it may keep some coal and nuclear generating resources afloat at a great expense to load, would require the RTOs to enter into RSR

Agreements for a minimum of fifteen years. FirstEnergy selected fifteen years as the RSR Agreement duration based upon its assertion that fifteen years is “roughly how long it takes to site, design, permit, and construct a new nuclear power plant.” FirstEnergy Comments at 6. However, FirstEnergy does not explain why a nuclear power plant timeframe is required or necessary nor whether there are other resources capable of commercial operation on a substantially shorter timeframe that could provide the resilience benefits of a retiring coal or nuclear plant. Notwithstanding the fact that there has been no demonstration that the resources are necessary at all, the Commission should not strap customers with fifteen year contracts when there are other, more reasonable and cost effective options available to meet reliability and resilience needs. FirstEnergy failed to demonstrate that such extreme measures are just, reasonable, not unduly discriminatory, necessary or would actually address resilience concerns.

For the reasons described herein, FirstEnergy’s modified proposal should be rejected.

## **2. Price Formation Proposals**

Numerous commenters urged the Commission to take actions to modify the RTO energy market rules, particularly regarding price formation. Comments recommending that the Commission continue its current price formation efforts through various open dockets and evaluate the impacts on pricing before expanding its efforts further fall within the procedural and legal bounds of the Commission’s rights. Recommendations by, for example, Exelon Corporation, NRG Energy, Inc., the PSEG Companies and PJM,<sup>13</sup> to

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<sup>13</sup> PJM did not ask for its price formation proposal to be adopted through a FPA section 206 proceeding. Rather, PJM requested a directive from the Commission to propose changes within a certain timeframe, which could enable PJM to argue that, as a compliance filing, PJM is not obligated to seek

adopt their recommended price formation proposals through a FPA section 206 proceeding by a date certain or to otherwise establish a deadline by which time the RTOs must file other price formation rule changes is outside of the Commission's legal boundaries.

AMP has joined with Advanced Energy Economy, American Wind Energy Association, NextEra Energy Resources, LLC, the Natural Resources Defense Council, and the Office of the People's Counsel for the District of Columbia to jointly address the comments relating to the treatment of inflexible units in the determination of Locational Marginal Pricing ("LMP") and, thus, will not repeat those comments here. However, it is worth stating here that the Commission should decline requests to modify the energy market rules through either this proceeding or a FPA section 206 filing. Rather, the Commission should allow the RTO stakeholder processes to work without a Commission-imposed deadline. The imposition of arbitrary deadlines results in unnecessarily rushed processes, precludes the necessary consensus building among market participants who have to live with the construct, and shifts the focus to the RTO solutions to the exclusion of others.

These issues require time to resolve in a way that is endorsed by the market participants that will be affected by changes to the capacity constructs or the energy markets. There is good reason for ample time and Commission guidance on this. AMP urges the Commission to either not set a deadline or allow a generous allotment of time for stakeholders to work out solutions without the threat of a unilateral filing impeding the

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Stakeholder approval of energy market changes and effectively circumvent the PJM stakeholder's FPA section 205 authority over the Operating Agreement.

stakeholder process. The Commission should decline requests to set arbitrary deadlines and let the stakeholder process work.

### 3. MOPR Expansion

A number of merchant generators that would benefit from higher prices insist that the Commission should broadly apply rules that prohibit capacity resources from offering their generation below artificially established floors, otherwise known as Minimum Offer Price Rules or MOPR.<sup>14</sup> In comments in this proceeding, several commenters renewed the call for broad application of MOPRs to new and existing units of all fuel sources as an alternative proposal to the DOE's Proposal. For example, the Electric Power Supply Association ("EPSA") argued that the Commission should "take decisive action to protect the organized markets from the impacts of out-of-market subsidies and, more specifically, from the impacts of out-of-market subsidies for existing resources." EPSA Comments at 52. The Commission should not require an expanded MOPR as an alternative solution to resilience concerns.

This alternative proposal – MOPR expansion – suffers from the same procedural deficiency as other alternative proposals in that it has not been properly noticed as part of this rulemaking process.<sup>15</sup> From a substantive standpoint, however, broad application of MOPR is also unjust and unreasonable.

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<sup>14</sup> See, e.g., Initial Comments of the Electric Power Supply Association, Motion to Intervene and Comments of Peabody Energy Corporation, NRG Energy, Inc. Comments.

<sup>15</sup> APA § 553(b)(1) - (3) requires an agency to meet minimum requirements for notice of proposed rulemaking actions and a fair opportunity for public comment. The notice of a proposed rule must include "sufficient detail on its content and basis in law and evidence to allow for meaningful and informed comment" and the APA "requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule." *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1133 (1995) (citing *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994)).

Applying MOPR to existing units flies in the face of basic economic theory where an existing resource's rational bid is to be a price taker. The existing PJM MOPR at least has a basis in economic theory: it targets a limited set of new or uprated resources (new gas-fired resources) - it does not apply to new nuclear, coal, hydroelectric, renewable, or energy storage resources, because these resources cannot be developed on a timeframe and at a size that could allow the exercise of buyer-side market power. And, it properly does not include existing resources. Expanding the MOPR to existing units does not have the same basis in rational economic theory because existing units have sunk costs that new units do not have - once they're sunk, they're sunk and it makes sense for them to be price takers. It also takes more of the auction process behind closed doors as either PJM and/or the Market Monitor administratively determine the unit's cost. It also introduces additional uncertainty because resources can no longer know whether they will clear or not. Any blanket proposal that replaces lower cost offers with higher, administratively determined offers has more to do with maintaining existing seller-side market power than tailoring a real solution to a real problem. MOPR expansion should be rejected.

### **III. Conclusion**

For the reasons discussed herein, the existing RTO tariffs, rates and other provisions have not been demonstrated to be unjust, unreasonable or unduly discriminatory. There is not a well-defined problem and the DOE Proposal lacks enough clarity to know whether it addresses a problem at all, let alone could be determined to be just and reasonable. Accordingly, the Commission should decline to adopt the Proposal and should terminate this docket. While the Commission should direct additional study

and input on the definition of resilience, the efforts already undertaken to address resilience, and the impact (if any) on the grid of the trend away from central-station baseload resources, proposals to adopt outright or use a FPA section 206 proceeding by a date certain or to otherwise establish a deadline by which time the RTOs must file price formation rule changes should be rejected as substantive and procedurally defective. Any next steps should be afforded a reasonable timeframe that allows for careful technical, engineering and market analysis, and meaningful input of RTOs, stakeholders and other interested parties before a final rule is adopted.

Respectfully submitted,

/s/ Lisa G. McAlister

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission's Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated this the 7th day of November, 2017.

/s/ Lisa G. McAlister  
Lisa G. McAlister