

environmental quality. These comments represent the collective view of the six New England states.

II. BRIEF DESCRIPTION OF THE PROPOSED RULE

The Proposed Rule, if adopted, would effectuate fundamental changes to the rules governing competitive electric power markets. It states that “threats to grid reliability and resilience” necessitate Commission action “to ensure that the reliability and resiliency attributes of generation with on-site fuel supplies are fully valued and in particular to exercise its authority to develop new market rules that will achieve this urgent objective.”⁴ As support for the Proposed Rule, DOE points to the retirements and planned retirements of so-called baseload electric generators, primarily coal and nuclear resources.⁵

If adopted, the Proposed Rule would require new rules for cost-of-service regulation in regions like New England with competitive wholesale markets. Specifically, it would guarantee full cost recovery plus a “fair return on equity” for resources located in regions with competitive energy and capacity markets that “provide essential energy and ancillary reliability services and have a 90-day fuel supply on site in the event of supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters.”⁶ Under the Proposed Rule, “resources must be compliant with all applicable environmental regulations and are not subject to cost-of-service rate regulation by any State or local authority.”⁷

The Proposed Rule provides for Commission action within 60 days of publication in the *Federal Register*, which, given the October 10, 2017 publication date, would be December 11,

⁴ 82 Fed. Reg. 46,945.

⁵ *See id.* at 46,942-46,943.

⁶ *Id.* at 46,945. *See also id.* at 46,948 (describing applicability of the Proposed Rule).

⁷ *Id.* at 46,945.

2017.⁸ The Commission has revised the proposed deadline that DOE included for comment on the Proposed Rule, and issued an order requiring initial comments to be filed by October 23, 2017 and reply comments by November 7, 2017.⁹

III. COMMENTS

New England consumers and businesses rely on the stability of our region’s power system to sustain our economies and quality of life, and for those reasons the New England states have long considered power system reliability a priority. Over the last 15 years, New England has invested over \$8 billion in transmission infrastructure to meet reliability needs and expects to invest approximately \$4 billion more through 2021.¹⁰ In the past decade, New England customers have also made over \$10 billion in capacity payments to electric power generators and other suppliers to ensure that resources are available to support reliable system operations.¹¹

While new challenges will always emerge, recent system experience in New England has demonstrated ISO-NE’s ability to maintain overall reliable system operations. For example, FERC Staff’s 2010 ISO/RTO Metrics Report—the first such report produced—showed that

⁸ *Id.* However, the Department of Energy Organization Act does not require the Commission to take action within the time parameters set forth by the DOE Secretary and, instead, provides that the Commission “shall consider and take final action on any proposal made by the Secretary . . . in an expeditious manner in accordance with such reasonable time limits as may be set by the Secretary for the completion of action by the Commission on [the Secretary’s] proposal.” 42 U.S.C. § 7173(b).

⁹ See October 2017 Notice; see also Notice Denying Extension of Time, Docket No. RM18-1-000 (Oct. 11, 2017).

¹⁰ See ISO Newswire, *Regional transmission investment: Summer 2017 update*, Jun. 29, 2017, at <http://isonewswire.com/updates/2017/6/29/regional-transmission-investment-summer-2017-update.html>;

¹¹ See Joint Report of the Consumer Liaison Group Coordinating Committee and ISO New England, 2016 Report of the Consumer Liaison Group, Mar. 1, 2017, at 38, available at https://www.iso-ne.com/static-assets/documents/2017/03/2016_report_of_the_consumer_liaison_group_final.pdf; see also ISO-NE, Key Grid and Market Stats, at <https://www.iso-ne.com/about/key-stats/markets>.

“ISO-NE has had no violations . . . of national or regional reliability standards” during the reporting period of 2007 to 2009.¹² For the period 2010 to 2014, ISO-NE was among the regions with the lowest number of violations and had no reported instances of load shedding.¹³ Moreover, despite extreme cold weather and operational challenges during the winter of 2013-2014, ISO-NE maintained reliable electric service.¹⁴

As the electric grid evolves—with changes to the generation fleet, the advent of new technologies, and new operational challenges emerging—ISO-NE should continue to review and assess system reliability. In doing so, ISO-NE should continue to work closely with the New England states, market participants, and other stakeholders to ensure that our region’s market-based structure continues to provide the appropriate power system attributes for enduring reliable operations. Like every region, New England has unique power system characteristics and challenges, and it also has a proven record of solving its challenges through collaboration and, often, creativity. Individual regions like New England are best situated to explore whether there are needed attributes not being valued in their power markets and, as appropriate, to consider market rule changes tailored to the region’s specific challenges and market design.

¹² FERC Staff, *2011 Report to Congress on Performance Metrics for Independent System Operators and Regional Transmission Organizations*, April 2011, at 73 (Appendix F), available at <https://www.ferc.gov/industries/electric/indus-act/rto/metrics/iso-ne-rto-metrics.pdf>.

¹³ FERC Staff, *Common Metrics Report: Performance Metrics for Regional Transmission Organizations, Independent System Operators, and Individual Utilities for the 2010-2014 Reporting Period*, Docket No. AD14-15-000, Aug. 2016 (Revised Aug. 2017), at 18-19, available at <https://www.ferc.gov/legal/staff-reports/2016/08-09-common-metrics.pdf>.

¹⁴ See, e.g., FERC Staff, *Recent Weather Impacts on the Bulk Power System*, Jan. 16, 2014, at Slide 4, available at <https://www.ferc.gov/legal/staff-reports/2014/01-16-14-bulk-power.pdf>; ISO-NE, *Winter Reliability Program Updated*, Restructuring Roundtable, Sept. 25, 2015, at Slide 5, available at https://www.iso-ne.com/static-assets/documents/2015/09/final_gillespie_raab_sept2015.pdf. See *infra* at 12-13 regarding ISO-NE’s ongoing efforts to analyze winter reliability challenges.

While the Proposed Rule has elevated the discussion around system reliability, the Commission should decline to adopt it as a final rule. In contrast to the regional approach discussed above, its one-size-fits all proposal coupled with the magnitude of change it seeks to impose—on a schedule that suggests an emergency exists—make it a flawed vehicle for further action by the Commission. The Proposed Rule fails to adequately consider and analyze the impact that a final rule would have on the competitive market structures currently in place, including its potential to distort competitive market prices, cause investor uncertainty, and undermine the long-term sustainability of these markets. The Commission should reject the invitation to implement a new regulatory regime that is fundamentally divorced from its long-standing policies favoring competitive market structures and respect for region-specific approaches that reflect unique facts and circumstances.

Instead, the Commission should continue to allow regions to develop and pursue their own processes for considering appropriate market rule changes that are based on challenges that are specific to, and identified by, that region. In New England's case, these changes are premised on solutions developed by ISO-NE in conjunction with the region's states and stakeholders.

In addition, separate from the merits of the Proposed Rule, the fast-track schedule for comments in this proceeding raises serious doubts about the ability of interested parties to provide meaningful input to the Commission. The potential for accelerated Commission action, consistent with the schedule in the Proposed Rule, likewise presents an impediment to the Commission's full and fair consideration of comments within this short timeline. Such an accelerated process for a rulemaking with sweeping implications, as is the case here, undermines consumer and investor confidence in any final rule adopted on this timetable as well as the

underlying stability of the market rules themselves. Despite the Commission's and Commission staff's best efforts, a final rule would be readily open to challenge on the basis of these procedural infirmities. This threshold issue is reason alone for the Commission to decline to adopt the Proposed Rule.

Finally, while recognizing that there are many open questions related to the Proposed Rule and its mechanics, adoption of the Proposed Rule would set up the potential for an unnecessary and unproductive jurisdictional confrontation between the Commission and states. The Proposed Rule wades into traditional state authorities over integrated resource planning, resource adequacy, and utility procurement. If adopted, a final rule may also frustrate implementation of state restructuring laws. Market rules dressed as "grid resilience" cannot be used to override these state authorities. Rather than impose a new market structure that provokes these jurisdictional conflicts, the collective energies and resources of the Commission and the states are better spent working collaboratively to advance our shared reliability objectives.

A. The Fast-Track Timeline for Comment and Commission Action Limits the Opportunity for Interested Parties to Develop Meaningful Responses to a Potential Landmark Rule and Erodes Confidence in the Rulemaking Process

This rulemaking has the potential to force historic, transformational, and expansive changes on the electric industry and the consumers it serves. It could fundamentally alter long-standing energy policies, lead to unjust and unreasonable costs, and reshape a significant sector of our nation's economy. If adopted, a final rule could have substantial environmental impacts as well. The fast-track process for comment and Commission action is grossly disproportionate to the magnitude of change being proposed and the complexity of interests involved. The timeline for public comment and potential decision-making raises serious doubts about the legal validity of adopting the Proposed Rule, and these questions alone justify a Commission

determination that it would be inappropriate to issue a final rule in this proceeding at this time and under these circumstances.

Putting aside serious concerns regarding the compressed timeline for input, commenters are also impeded by the Proposed Rule's absence of essential detail. There are numerous open questions about the reforms being proposed, as illustrated by the dozens of detailed questions that FERC's Office of Energy Policy and Innovation issued on October 4, 2017 in this docket. These questions range from the threshold question regarding any need for the proposed reforms, to determining how to measure the 90-day on-site fuel requirement, and complex questions around cost-based compensation and its interaction with current market design. The absence of requisite specificity in the Proposed Rule makes it impossible for commenters to discern exactly what is being proposed and to understand the impact the Proposed Rule would have on their regions and markets.

All of these procedural deficiencies raise questions about the legality of a final rule adopted in this proceeding based on whatever record might be developed in this short timeframe.¹⁵ The Administrative Procedure Act ("APA") requires that a rulemaking provide "meaningful opportunity" for comment and that "in order to satisfy this requirement, an agency must also remain sufficiently open-minded[.]" *Rural Cellular Assoc. v. FERC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (citations omitted). "Among the purposes of the APA's notice and comment requirements are '(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties

¹⁵ The timeline for comment in this proceeding provides for less than 15 days from publication of the Proposed Rule in the *Federal Register* to the deadline for initial comments. Reply comments are due just over two weeks later. In total, all responses are required to be filed less than 30 days after the Proposed Rule was published in the *Federal Register*.

an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.” *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3rd Cir. 2011), quoting *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). In order to “achieve [the APA’s] purposes . . . ‘the notice required by the APA . . . must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based.... [A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.” *Prometheus Radio Project*, 652 F.3d at 449, quoting *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (emphasis in original). The fast-track timeline for comment in this proceeding falls well short of the basic requirements of the APA to provide a meaningful opportunity for affected parties to provide the Commission with diverse perspectives on the Proposed Rule and to “develop evidence in the record to support their objections to the rule.” *Prometheus Radio Project*, 652 F.3d at 449.

Moreover, no matter how efficient and diligent the Commission and Commission staff will be in reviewing comments, given the wide-ranging interests that the Proposed Rule potentially affects, the record in this proceeding—notwithstanding the insufficient timeframe—could easily swell to thousands of pages. To adopt the Proposed Rule within the 60-day schedule set forth in the proposal, just weeks after receiving such a voluminous record, would very likely invite objections that the Commission has not been “sufficiently open-minded.” *Rural Cellular Assoc.*, 588 F.3d at 1101. The 60-day timeline makes it impossible for the Commission to take any fair or reasonable substantive action within 60 days other than outright rejection of the proposal.

In addition, the Proposed Rule provides insufficient detail on the *need* for reforms, the mechanics of the proposal, and how it interacts within the current market structure to enable consumers, investors, and all affected parties to provide meaningful responses. This lack of concrete and focused detail is legally deficient and fatal to the Proposed Rule. *See Prometheus Radio Project*, 652 F.3d at 449.

Finally, there has not been sufficient justification that an emergency situation exists that warrants altering long-standing APA considerations of adequate notice and opportunity for comment. While the Proposed Rule raises the specter of a repeat of the 2014 polar vortex, it is important to note that ISOs/RTOs have implemented actions to minimize fuel scarcity concerns, such as ISO-NE's Winter Reliability and Pay for Performance programs. ISO-NE also continues to examine closely issues related to fuel security.¹⁶ Further, FERC staff recently issued its Winter 2017-18 Energy Market Assessment ("Winter Assessment"), which concludes that "at this time we do not see major risk factors that would likely lead to significant market disruptions during this winter."¹⁷ As the Winter Assessment notes, "[t]here is always the possibility of unforeseen events";¹⁸ however, the Proposed Rule has not provided a compelling rationale for why such a short timeline for responding to such a significant proposal is necessary.

The Commission should decline to adopt a Proposed Rule that fails to meet these basic requirements of the APA. Commenters must be accorded a meaningful opportunity to respond to a fully developed proposal and to provide views on what could become a landmark

¹⁶ *See infra* at 12-13.

¹⁷ FERC Staff, Winter 2017-18 Energy Market Assessment, Docket No. AD06-3, Oct. 19, 2017, at 19, available at <https://www.ferc.gov/market-oversight/reports-analyses/mkt-views/2017/10-19-17-A-3.pdf>.

¹⁸ *Id.*

Commission order. The Commission's adoption of the Proposed Rule within the aggressive timeline set out in the proposal would undermine confidence in the final rule and raise serious questions about its validity.

B. The Proposed Rule Does Not Adequately Consider Its Impact on Existing Competitive Markets and Consumers and Individual Regions are Best Positioned to Address Unique Challenges to Power System Operations

New England was at the forefront of restructuring the electric power industry. This enabled the early creation of wholesale markets that shift capital investment risks from ratepayers to market participants and, through competitive processes, drive the selection of resources that are able to reliably serve consumers at the lowest reasonable cost. Two decades ago, five of the six New England states moved toward a partial or full restructuring of their electric retail markets.¹⁹ In 1996, New Hampshire was the first state in the country to pass legislation enabling restructuring.²⁰ One year later, Rhode Island became the first state to implement restructuring.²¹ By the end of the 1990s, Connecticut, Maine, and Massachusetts had all enacted legislation to effectuate restructuring. These collective actions, and the ensuing development and refinement of competitive markets in the years to follow, demonstrate New England's sustained commitment to markets as a means to identify resources able to reliably serve consumers at the lowest reasonable cost through competitive processes. Most notably, this market-based approach has proven successful in maintaining reliable system operations through a competitive structure designed to benefit consumers.

¹⁹ See Reishus Consulting, LLC, *Electric Restructuring in New England – A Look Back*, Prepared for the New England States Committee on Electricity, Dec. 2015, at 12, available at http://nescoe.com/wp-content/uploads/2015/12/RestructuringHistory_December2015.pdf.

²⁰ *Id.*

²¹ *Id.*

ISO-NE recently described how the Proposed Rule differs from New England’s current market structure:

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.^[22]

The Proposed Rule does not address how the broad scope and application of its mandate would affect the competitive market structures currently in place in New England and in other regions.

There is, of course, always room for improvement to wholesale power markets, and the rules governing these markets continue to evolve based on experience and technological innovation. For example, there have been, and continue to be, a multitude of activities related to market rule reforms to address reliability and so-called price formation, an area in which DOE expressed strong interest in the Proposed Rule.²³ In our region, ISO-NE has instituted a new market design, Pay for Performance (“PfP”), in response to concerns about resource performance. Set for implementation in 2018, PfP is structured to provide market-based incentives for resources to perform during shortage conditions.²⁴ ISO-NE has recently

²² ISO-NE, *Study on Regional Fuel Security to be Delayed Pending Resolution of DOE Proposal on Grid Resiliency Pricing*, Oct. 13, 2017 (“Fuel Security Study Update”), at 1, available at https://www.iso-ne.com/static-assets/documents/2017/10/20171013_fuel_security_analysis_delay_final.pdf.

²³ See, e.g., 82 Fed. Reg. 46,493-46,495.

²⁴ See ISO-NE, FCM Performance Incentives: Key Project, at <https://www.iso-ne.com/committees/key-projects/fcm-performance-incentives>; Testimony of Gordon van Welie, ISO-NE President and Chief Executive Officer, House Energy and Commerce Subcommittee on Energy, *Powering America: A Review of the Operation and Effectiveness of the Nation’s Wholesale Electricity Markets*, July 26, 2017 (“ISO-NE Testimony”), at 3,

implemented several other market rules promoting price formation and reliable operations, including a move to sub-hourly settlement, improved offer flexibility, increased reserve pricing during shortage events, and a revised fast start pricing methodology to better reflect the value of these resources.²⁵ In addition, ISO-NE has employed “new situational awareness and forecasting tools [and] improved communication with pipeline operators.”²⁶

As the Proposed Rule recounts, the Commission has also taken action on price formation, across multiple proceedings, over the last several years.²⁷ To the extent reforms are needed to address documented and vetted risks to reliable system operations, the Commission has existing tools to explore such reforms within a market-based construct.

Moreover, as evidenced by recent market reforms in New England, individual regions are best equipped to confront those risks and develop solutions in the first instance based on particular facts and circumstances. Indeed, well before the Proposed Rule was issued, ISO-NE initiated an analysis of “the operational impact of growing fuel-security issues in the region.”²⁸ The study’s purpose “is to quantify the potential fuel security risks with the intent of engaging regional stakeholders in a discussion on the degree of risk that can be tolerated and whether it is

available at <http://docs.house.gov/meetings/IF/IF03/20170726/106323/HHRG-115-IF03-Wstate-vanWylieG-20170726.pdf>.

²⁵ See generally ISO-NE, Energy Market Pricing Enhancements: Key Project, at <https://www.iso-ne.com/committees/key-projects/energy-market-pricing-enhancements>; see also Comments of ISO New England Inc., Fast-Start Pricing in Markets Operated by Regional Transmission Organizations, Docket No. RM17-3-000 (Feb. 28, 2017), at 1-2; ISO-NE Testimony at 3.

²⁶ ISO-NE Testimony at 3.

²⁷ 82 Fed. Reg. 46,944-46,945.

²⁸ Fuel Security Study Update at 1.

necessary to make improvements to the wholesale market design.”²⁹ ISO-NE had planned to release a final report on the analysis, and begin discussions with stakeholders, on October 24, 2017.³⁰ These efforts are now paused, with ISO-NE concluding that the Proposed Rule “has raised the potential for significant changes to the wholesale electricity markets in the US [and] the ISO has concluded that it is prudent to delay finalizing the study until the FERC has provided direction to the industry on how to interpret the [Proposed Rule] in the context of competitive wholesale markets.”³¹ Unintentionally, the Proposed Rule has stalled discussion in New England on fuel security challenges—the very core focus of DOE’s proposal—and discussion of additional analysis that may be needed or of potential solutions suited to New England’s market.

Although DOE’s perspective that changes to regional power systems have been significant and an examination of grid reliability impacts is warranted, the changes across regions have not been uniform. It is crucial that the Commission decline to adopt the top-down, one-size-fits all approach reflected in the Proposed Rule. Instead, the Commission should continue to empower regions like New England to identify emerging challenges unique to their power systems and, through discussion among ISOs/RTOs, states, and market participants, develop tailored and well-defined solutions to meet those regions’ needs.

²⁹ *Id.* at 1-2. For example, in a presentation to the Commission last week, ISO-NE stated that while it “expects to have adequate electricity supplies this winter,” it continues to be concerned about gas pipeline constraints and the “ability to meet energy needs . . . if gas cannot be supplied to gas-fired generators.” Peter Brandien, Vice President of System Operations, ISO-NE, Winter 2017-2018 Operations and Market Performance, Slides 20, 23, available at <https://ferc.gov/industries/electric/indus-act/rto/10-19-17-A-4-ISONE.pdf>.

³⁰ Fuel Security Study Update at 1.

³¹ *Id.* at 2.

C. Needed Market Reforms are Best Achieved Through Partnerships Between the Commission and States and the Proposed Rule Creates the Potential for an Unnecessary Jurisdictional Confrontation

In seeking to impose a sweeping new regulatory regime, the Proposed Rule implicates authorities reserved for the states over integrated resource planning, resource adequacy, and utility procurement. It also potentially frustrates state laws in connection with electric industry restructuring. This jurisdictional showdown is unnecessary and unconstructive. As discussed above, individual regions are readily capable of addressing specific system operational challenges unique to their regions, and through those processes, ISOs/RTOs, states, and market participants can work together with the Commission to identify gaps and fashion appropriate remedies. Such remedies would, by their nature, respect and preserve the authorities of the Commission and the states.

If, nonetheless, the Commission issues a final rule in this or any related proceeding, that rule must be carefully structured to avoid any alteration of federal and state jurisdictional boundaries. While the Commission has exclusive jurisdiction over interstate wholesale electric sales and regulates certain other matters related to the interconnected grid, the Federal Power Act clearly reserves authority to states over generation facilities. 16 U.S.C. § 824(b)(1) (2016). *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016); *New York v. FERC*, 535 U.S. 1, 24 (2002) (“Order No. 888 does not even arguably affect the States’ jurisdiction over three of these subjects: generation facilities, transmissions in intrastate commerce, or transmissions consumed by the transmitter.”) States, for example, “retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission.” *Conn.*

Dep't of Pub. Util. Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009). States also have authority, *inter alia*, over integrated resource planning and their utilities' generation and resource portfolios. *See Allco Finance Ltd. v. Klee*, 861 F.3d 82, 101 (2nd Cir. 2017).

The New England states have the authority to re-regulate power generation and achieve the same resource-based, cost-of-service structure that the Proposed Rule seeks to effectuate. Instead, consistent with their restructuring laws, New England states have largely elected to meet resource adequacy needs and promote system reliability through the ISO-NE markets. The Proposed Rule, if adopted, may intrude into states' determination that markets will serve as the primary mechanism for identifying resources able to reliably serve consumers at the lowest reasonable cost. It may also impede the ability of New England states to achieve the overall objectives of restructuring, including bringing downward pressure to costs through competitive market dynamics and shifting capital investment risks to market participants. Such a final rule creates the potential to needlessly upset the Federal Power Act's division of authority between states and the Commission.

The Commission can, and should, avoid these questions and the unproductive jurisdictional skirmishes that its answers would trigger. Rather than abandon long-standing policies fostering the creation and development of competitive markets, the Commission should support ISOs/RTOs, states, and stakeholders in their efforts to promote reliable system operations through appropriate market rules that can account for and value needed power system attributes.

IV. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission consider its comments in this proceeding.

Respectfully submitted,

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