US Department of Energy

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Electricity Delivery and
Energy Reliability

March 30, 2018

VIA COURIER

The Honorable James Richard Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: Joint Request of the Energy Industry Trade Associations for Notice-and-Comment Procedures Regarding the March 29, 2018 Request of First Energy Solutions for an Emergency Order Pursuant to Section 202(c) of the Federal Power Act

Dear Secretary Perry:

The Advanced Energy Economy, the American Council on Renewable Energy, the American Forest & Paper Association, the American Petroleum Institute, the American Wind Energy Association, the Electric Power Supply Association, the Electricity Consumers Resource Council, the Independent Petroleum Association of America, the Interstate Natural Gas Association of America, the Natural Gas Supply Association, and the Solar Energy Industries Association (collectively, "Joint Industry Commenters") hereby respectfully submit this joint request that the Secretary of Energy establish notice-and-comment procedures with respect to the March 29, 2018 request (the "March 29 Request") of FirstEnergy Solutions ("FE Solutions") for issuance of an order pursuant to Section 202(c) of the Federal Power Act (the "FPA").[1] In the March 29 Request, FE Solutions asks the Secretary to require PJM Interconnection, L.L.C. ("PJM") to pay certain nuclear-powered and coal-fired generators "cost-based rates that provide for full cost recovery . . . ."[2] As was well-documented in the recent proceeding before the Federal Energy Regulatory Commission ("FERC") initiated by the Secretary's October 10, 2017 proposed rulemaking on grid resilience pricing,[3] such action would have far reaching implications for the PJM markets and for a broad spectrum of parties, including those represented by the Joint Industry Commenters. It is, therefore, imperative that all stakeholders be afforded notice, and a meaningful opportunity to be heard, before any favorable action is taken on the March 29 Request.[4]

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1 16 U.S.C. § 824a(c) (2017).

2 March 29 Request at 31.

3 *See Grid Resilience Pricing Rule*, Notice of Proposed Rulemaking, 82 Fed. Reg. 46,940 (Oct. 10, 2017) (the "October 10 NOPR").

4 Naturally, the Joint Industry Commenters would not object to the Secretary's rejection of the March 29 Request without notice and comment.

The purported problem prompting the March 29 Request is the same one that was the subject of the Secretary's October 10 NOPR.[5] On January 8, 2018, FERC issued an order terminating that rulemaking and initiating a separate proceeding in order "to examine holistically the resilience of the bulk power system."[6] FERC held that none of the participants in the rulemaking, including FE Solutions, which filed extensive comments, had demonstrated that existing tariffs were unjust and unreasonable or that the proposed cost-based rates for select generators were just and reasonable.[7] FERC also relied on "extensive comments" from PJM and other system operators which identified no "past or planned generator retirements that may be a threat to grid resilience."[8] By its March 29 Request, FE Solutions is asking the Secretary to second-guess FERC's expert findings on a record substantially less developed than that in the FERC proceeding. This is particularly problematic where the proposed remedy is concerned, because Section 202(c) of the FPA unambiguously requires that any compensation required by the Secretary be "just and reasonable."[9] FE Solutions is also asking the Secretary to disregard the Department of Energy's own regulations, which clearly state that "economic factors relating to service . . . generally will not be considered as emergencies unless the inability to supply electric service is imminent."[10] As recognized in the FERC proceeding and as discussed below, there is no imminent threat.

Even leaving aside the merits and assuming *arguendo* that the March 29 Request identifies a valid problem, FE Solutions's own conduct in response to the Commission's January 8 Order belies claims that there is any ***immediate*** problem requiring issuance of an order before affected parties have a meaningful opportunity to be heard. Specifically, FE Solutions did not avail itself of the opportunity to request rehearing of the January 8 Order within the 30 days prescribed by the FPA[11] and waited nearly three months to file the March 29 Request. It would be manifestly unreasonable and unfair to both other interested parties and the Secretary for FE Solutions to demand that the Secretary act without hearing from interested parties, including PJM, after having failed to exercise its right to request rehearing before FERC and waited nearly three months before challenging FERC's order through the March 29 Request to the Secretary.

It is also telling that the most immediate considerations underlying FE Solutions's March 29 Request are that FE Solutions: (1) "likely will file for bankruptcy by the end of March 2018"; and (2) has "already submitted notice to PJM that it would deactivate its nuclear

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5 *See Grid Resilience Pricing Rule*, Notice of Proposed Rulemaking, 82 Fed. Reg. 46,940 (Oct. 10, 2017).

6 *Grid Reliability & Resilience Pricing*, 162 FERC ¶ 61,012 at P 1 (2018) (the "January 8 Order").

7 *See id.* at PP 14-16.

8 *Id.* at P 15.

9 16 U.S.C. § 824a(c) (2012).

10 10 C.F.R. § 205.371 (2017).

11 *See* 16 U.S.C. § 825*l*(a) (2012).

assets . . . in 2020 and 2021."[12] Notwithstanding FE Solutions's assertions to the contrary, these considerations both underscore the lack of urgency in this case. First, the near-term effect of a bankruptcy filing will be to decrease, not increase, the financial pressures on FE Solutions inasmuch as actions to collect pre-petition debts will be stayed, giving it a "breathing spell" while it reorganizes.[13] While the bankruptcy filing may be an unwelcome event for FE Solutions and its stakeholders, that event only serves to lessen the immediacy of any alleged problem facing society arising from threatened retirements of its facilities. Second, threatened retirements that will not occur until 2020 and 2021 can hardly be said to present an issue so immediate as to justify denying affected parties the opportunity to comment and depriving the Secretary of the benefit of those parties' input.[14]

For the foregoing reasons, the Joint Industry Commenters respectfully request that the Secretary establish notice-and-comment procedures before taking any favorable action on the March 29 Request. Specifically, the Secretary should provide for publication of a notice of the March 29 Request in the *Federal Register* and establish a comment period of at least 60 days. Such a comment period would be consistent with the requirements of Executive Order 12866, which states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."[15]

Thank you for your consideration of this matter.

Very truly yours,

Greg Wetstone
President and CEO
Todd Foley
Senior Vice President, Policy &
Government Relations
AMERICAN COUNCIL ON RENEWABLE ENERGY
1600 K Street, N.W.
Washington, DC 20006
202-777-7581
wetstone@acore.org

Malcolm Woolf
Senior Vice President, Policy
ADVANCED ENERGY ECONOMY
1000 Vermont Avenue, N.W., 3rd Floor
Washington, DC 20005
(202) 380-1950
mwoolf@aee.net

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12 *See* March 29 Request at 8 (footnote omitted).

13 *In re Robinson*, 764 F.3d 554, 559 (6th Cir. 2014) (quoting H.R.Rep. No. 95–595, at 340 (1978), 1978 U.S.C.C.A.N. 5963, 6297).

14 FE Solutions also fails to acknowledge that those retirements cannot occur until PJM reviews their potential reliability impacts, and that, to the extent reliability impacts are identified, PJM has authority to take steps to address them.

15 *Regulatory Planning and Review*, Exec. Order No. 12866, 58 Fed. Reg. 51,735, 1993 WL 13149641, § 6 (Sept. 30, 1993).

Jerry Schwartz
Senior Director
Energy and Environmental Policy
AMERICAN FOREST & PAPER ASSOCIATION
1101 K Street, NW, Suite 700
Washington, DC 20005
(202) 463-2581
Jerry_Schwartz@afandpa.org

Todd A. Snitchler
Group Director, Market Development
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, DC 20005
(202) 682-8457
SnitchlerT@api.org

Amy L. Farrell
Sr. Vice President, Government &
Public Affairs
Gene Grace
Senior Counsel
AMERICAN WIND ENERGY ASSOCIATION
1501 M Street, N.W., Suite 900
Washington, DC 20005
(202) 383-2521
afarrell@awea.org

John P. Hughes
President & CEO
ELECTRICITY CONSUMERS RESOURCE COUNCIL
1101 K Street, N.W., Suite 700
Washington, DC 20005
(202) 682-1390
jhughes@elcon.org

Nancy E. Bagot
Senior Vice President
ELECTRIC POWER SUPPLY ASSOCIATION
1401 New York Avenue, N.W., Suite 950
Washington, DC 20005
(202) 628-8200
NancyB@epsa.org

Susan W. Ginsberg
Vice President, Crude Oil &
Natural Gas Regulatory Affairs
INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA
1201 15th Street N.W., Suite 300
Washington, DC 20005
(202) 857-4728
sginsberg@ipaa.org

Joan Dreskin
Vice President & General Counsel
INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA
20 F Street, N.W., Suite 450
Washington, DC 20001
(202) 216-5900
jdreskin@ingaa.org

Patricia Jagtiani
Executive Vice President
NATURAL GAS SUPPLY ASSOCIATION
1620 Eye Street, N.W., Suite 700
Washington, DC 20006
pjagtiani@ngsa.org

Abigail Ross Hopper
President & CEO
SOLAR ENERGY INDUSTRIES ASSOCIATION
600 14th Street, N.W., Suite 400
Washington, DC 20005
(202) 682-0556
ahopper@seia.org

cc: Bruce J. Walker, Assistant Secretary, DOE Office of Electric Delivery & Energy Reliability
Patricia A. Hoffman, Principal Deputy Assistant Secretary, DOE Office of Electric Delivery & Energy Reliability
The Honorable Kevin J. McIntyre, Chairman, FERC
The Honorable Cheryl A. LaFleur, Commissioner, FERC
The Honorable Neil Chatterjee, Commissioner, FERC
The Honorable Robert F. Powelson, Commissioner, FERC
The Honorable Richard Glick, Commissioner, FERC
The Honorable Kimberly D. Bose, Secretary, FERC