

“ensure that certain reliability and resilience attributes of electric generation resources are fully valued.”⁴ Because of the broad business, policy and consumer interests that are represented by NEPOOL’s over 480 members, the Commission should expect individual NEPOOL members to submit their individual views to the Commission on the DOE NOPR without the benefit of full discussion within the NEPOOL process. Accordingly, NEPOOL is not able to take a substantive position on specific views or aspects of the DOE NOPR at this time. Instead, NEPOOL files these Comments to urge the Commission in any action taken (including in any affirmative action on the DOE’s requested rulemaking) (1) to provide adequate time and process for meaningful stakeholder consideration and input before issuing any final rule; (2) to allow sufficient flexibility, both procedurally and substantively, for each region with an organized market to address the concerns raised in the DOE NOPR with reference to the specific and unique circumstances of that region; and (3) to ensure adequate time for compliance with any final rule so that New England can follow its Commission-approved stakeholder process in designing and finalizing any such compliance.

In support hereof, NEPOOL respectfully states as follows:

I. BACKGROUND

In its September 29 notice to the Commission, the Energy Secretary urges the Commission to exercise its exclusive jurisdiction, in short order, to “address threats to U.S. grid resiliency⁵” through the issuance of a proposed new rule titled the “Grid Resiliency Pricing Rule.” Specifically, the DOE NOPR asks the Commission to require regional transmission organizations (“RTOs”) and independent system operators (“ISOs”) to develop and implement

⁴ DOE NOPR at 1.

⁵ Press Release, DOE, “Secretary Perry Urges FERC to Take Swift Action to Address Threats to Grid Resiliency” September 29, 2017, available at: <https://energy.gov/articles/secretary-perry-urges-ferc-take-swift-action-address-threats-grid-resiliency>.

market rules for the full recovery of costs, and a fair rate of return for “eligible” resources that (i) are able to provide essential energy and ancillary reliability services; (ii) are baseload generating resources; (iii) have a 90-day fuel supply on site in the event of fuel supply disruptions caused by emergencies, extreme weather, or natural or man-made disasters; (iv) are compliant with all applicable environmental regulations; and (v) are not subject to cost-of-service rate regulation by any State or local authority.⁶ As stated in the DOE NOPR, the purpose of this proposed rulemaking is to curb the “premature retirements” of certain baseload units such as coal and nuclear facilities.⁷ The Energy Secretary requests that the Commission expeditiously consider and complete final action on the DOE NOPR by December 11, 2017.⁸

On October 4, 2017, following the Commission’s October 2 Notice, and pursuant to 18 C.F.R. § 375.315(b)(2), the Commission’s Office of Energy Policy and Innovation (“OEPI”) issued a request for additional information containing a number of questions for commenters to consider addressing to assist Commission Staff in understanding the implications of the DOE NOPR.⁹ NEPOOL expects that some of its own members will provide their individual responses on those questions, without the benefit of the opportunity for exploring them fully within the NEPOOL stakeholder process. NEPOOL’s ability to respond to the specific inquiries of the OEPI Request and to the DOE NOPR generally in these Comments is necessarily limited by the short period within which it has had to fully engage its members. To the extent NEPOOL is able

⁶ DOE NOPR at 11-12.

⁷ *Id.* at 2.

⁸ December 11, 2017 is 60 days from publication of the DOE NOPR in the *Federal Register*.

⁹ *Request for Information*, Reference: Grid Reliability and Resilience Pricing, Docket No. RM18-1-000 (Oct. 4, 2017) (“OEPI Request”). While NEPOOL addresses only a few of the detailed questions in the OEPI Request in these Comments, NEPOOL expects that many of its individual members, as well as ISO-NE, will provide their own responses to many, if not all, of the questions contained in the OEPI Request.

meaningfully to discuss those questions within its stakeholder process, NEPOOL reserves the right to supplement its Comments based on those discussions.

II. COMMENTS

A. Any Final FERC Rule Should be Preceded by Sufficient Notice and Opportunity for Comment

While NEPOOL understands the DOE's call for the Commission to act with urgency with respect to any action(s) taken in response to the DOE NOPR, the Commission is an independent agency and must act in accordance with settled administrative law.¹⁰ The law, as set forth in Section 553 of the Administrative Procedure Act ("APA"),¹¹ requires the Commission to afford adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule itself.¹² While there is no minimum period of time in which the Commission is required to accept comments, the agency must provide interested persons an "adequate" opportunity to comment through the submission of written "data, views, or arguments."¹³ Matters "of great importance, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures."¹⁴

Thus, while the Commission should respond to the DOE's concerns and proposal, the Commission must exercise its independence and expertise before acting to approve any final rule. The DOE NOPR raises many important questions, as Commission Staff has recognized. At a minimum, answers to those questions will likely differ across different regions and different

¹⁰ 42 U.S.C. § 7172(g); Commission activities "shall not be subject to further view by the Secretary [of Energy] or any officer or employee of the Department."

¹¹ 5 U.S.C. § 553 (2012).

¹² 5 U.S.C. § 553 (b)-(c).

¹³ 5 U.S.C. § 553 (c).

¹⁴ Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 259 (1946); CHARLES H. KOCH JR., 1 ADMINISTRATIVE LAW AND PRACTICE 329-30 (2010 ed.).

policy and business interests based on different facts and circumstances in each region. The answers from each region to some of those questions could be critical in determining how that region might respond to the concerns reflected in the DOE NOPR. The Commission's conclusions with respect to some of those questions can also be critical in defining any appropriate and responsive market changes.

Accordingly, NEPOOL respectfully urges the Commission, if it is inclined to proceed with a proposed or final rule, to first provide further guidance with respect to its expectations on details it considers to be essential. Such guidance properly would be informed by the Commission's careful consideration of the comments submitted in this docket. If the Commission decides to modify the proposal contained in the DOE NOPR, NEPOOL requests that the Commission provide a meaningful opportunity for interested stakeholders to consider and comment on those proposed changes before any rule is finalized. Recent rulemaking proceedings initiated by the Commission have allowed for several months for comments, and a meaningful opportunity for the Commission to consider those comments, before the ultimate adoption and implementation of any final rule changes.¹⁵ The DOE's preference for expeditious treatment notwithstanding, any Commission rule(s) that might arise out of the DOE NOPR

¹⁵ See e.g., *Price Formation Fixes for Organized Markets under RM15-24*, NOPR issued on September 17, 2015, Final Rule issued on June 16, 2016; *Proposal to Revise Standard Generator Interconnection Agreements under RM16-1*, NOPR issued on November 19, 2015, Final Rule issued on June 16, 2016; *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators under RM16-23*, NOPR issued on November 17, 2016, no Final Rule issued to date; *Minimum Pricing Requirements for Fast-Start Resources under RM17-3-000*, NOPR issued on December 15, 2016, no Final Rule issued to date. See also *Adoption of Recommendations*, 76 FR 48789 (Aug. 9, 2011); Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821-22 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.")

would certainly benefit from a more deliberative process.¹⁶ Such additional opportunity for comment and industry/stakeholder input may be crucial to the successful implementation of any new policy and/or market rules emerging from the Commission’s response to the DOE NOPR. For these reasons, NEPOOL urges the Commission to ensure that it has fully considered any and all comments that are responsive to the Commission’s further guidance on expectations.

B. Any Commission Action(s) or Final Decision Should Be Sufficiently Flexible to Account for Regional Differences and Priorities

If any proposed or final rule is issued by the Commission here, NEPOOL also urges the Commission to ensure that any such rulemaking recognize the regional wholesale market differences among the various RTOs/ISOs, and allow for regional differences and priorities. The nature, complexity, and difficulty of implementation of any changes that may be required by the Commission in response to the DOE NOPR can vary dramatically across regions based on, for example, differences in markets, state directives and laws, existing and planned infrastructure, and the size, number and location of affected resources. The industry and the Commission will be best served if any final rule affords all stakeholders, market participants, grid operators,

¹⁶ Assuming the DOE NOPR is a “significant regulatory action” within the meaning of Executive Order 12,866, there should be a minimum comment period of 60 days. Executive Order 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51735 (Sept. 30, 1993). *See Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pumps Energy Conservation Standards*, 67 FR 36368-01 (regulatory action classified as “economically significant regulatory action” under Executive Order 12866 meaning the rule may “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities”); *Coordination of Federal Authorizations for Electric Transmission Facilities*, 81 FR 5383-01 (Feb. 2, 2016) (NOPR to amend regulations for the timely coordination of Federal Authorizations for proposed interstate electric transmission facilities determined to be a “significant regulatory action” under Executive Order 12866). *See also* Administrative Conference of the United States (recommending that agencies provide at least 60 days for public comment on significant regulatory actions, and afford at least 30 days for any other rulemaking, regardless of significance).

regulators and consumers sufficient flexibility to develop their own responsive regional policies and/or market rules.

To be clear, NEPOOL neither takes a substantive position on the DOE's proposed rule at this time nor suggests that the Commission issue any rule(s) of its own in response to the DOE NOPR. If the Commission acts, however, NEPOOL's Comments underscore that any proposed or final rule could have a significant impact on both the New England wholesale markets, and on its schedule for planned regional initiatives and market improvements. In addition, any Commission-directed rule changes that are too prescriptive may be difficult to implement across RTO/ISO markets and could result in unexpected interactions operationally.

NEPOOL, in conjunction with ISO-NE and the New England states, engages in a full and robust dialogue among the many affected business interests in New England that carefully accounts for such circumstances. More particularly, the NEPOOL stakeholder process is designed to identify, refine and ultimately work through complex issues with solutions that are best suited for the New England markets, interests, infrastructure and resources. In fact, each of the RTOs/ISOs have been considering some of the issues raised by the DOE NOPR.¹⁷ In New England, ISO-NE and NEPOOL have developed numerous enhancements to the market rules designed to improve price formation in the region's energy and ancillary services markets.¹⁸

¹⁷ See DOE NOPR at 4-5 ("FERC should expedite its efforts with states, RTO/ISOs, and other stakeholders to improve energy price formation in centrally-organized wholesale electricity markets. After several years of fact finding and technical conferences, the record now supports energy price formation reform, such as the proposals laid out by PJM and others.").

¹⁸ NEPOOL has identified improved price formation for New England's wholesale power markets as one of its key strategic priorities. In furtherance of NEPOOL's own priorities, working closely with ISO-NE and State officials, NEPOOL has considered and approved through its Participant Processes numerous price formation-related market enhancements. NEPOOL has joined with ISO-NE in filing a number of those market reforms, including: (1) changes to permit bidders increased energy offer flexibility, *ISO New England Inc. and New England Power Pool*, 145 FERC ¶ 61,014 (Oct. 3, 2013); (2) changes to implement an electronic, rather than manual, dispatch and curtailment methodology for certain

Over the past few years, the region has also adopted substantial reforms in its markets designed to enhance resource adequacy and fuel security, including the pay-for-performance construct in New England's Forward Capacity Market¹⁹ and a Winter Reliability Program that was established to provide better fuel assurance during New England's cold winter months.²⁰

The NEPOOL discussions on these important reforms highlight that the devil is often in the details. Where, as here, the details (and interactions with the wholesale markets) matter greatly, they require informed and fully engaged dialogue among the many affected business interests in each RTO/ISO, including in New England. A related challenge is the uncertainty and potential increased complexity surrounding the final scope of the DOE's proposal, such as the appropriate selection and treatment of eligible resources under any final rule. For example, if a final "Grid Resiliency Pricing Rule" were to expand the eligibility criteria to include new resources, the development of any proposed Tariff changes to effectuate such a proposal would require and benefit from fulsome stakeholder consideration and discussion. In a similar fashion, as each RTO/ISO operates in its own unique region, issues of cost allocation, and how the costs of any proposed rule would be spread among the affected market participants, do not lend

intermittent wind and hydro resources to permit such resources to operate up to a pre-determined Do Not Exceed dispatch point, *ISO New England Inc. and New England Power Pool*, 152 FERC ¶ 61,065 (July 23, 2015); (3) Market Rule revisions to settle energy transactions at the same time as energy dispatch intervals, *ISO New England Inc. and New England Power Pool*, Docket No. ER16-1838-000 (July 26, 2016) (unpublished letter order accepting Tariff revisions to the settlement interval in the real-time energy and reserves markets); (4) reforms to increase the number of resources that are economically dispatchable in real-time, *ISO New England Inc. and New England Power Pool*, 157 FERC ¶ 61,189 (Dec. 9, 2016); and (5) changes to improve the Real-Time Energy Market's pricing logic when fast-start assets are deployed to supply energy, *ISO New England Inc. and New England Power Pool*, Docket No. ER15-2716-000 (Oct. 19, 2015) (unpublished letter order accepting Tariff revisions to fast-start resource pricing and dispatch).

¹⁹ *ISO New England Inc., et al.*, 144 FERC ¶ 61,204 (2013), *reh'g denied*, *ISO New England Inc.*, 147 FERC ¶ 61,026 (2014).

²⁰ *ISO New England Inc. and New England Power Pool*, 152 FERC ¶ 61,190 (2015).

themselves to a one-size-fits-all Commission-imposed outcome. As such, any final rule should take into account the regional differences in each RTO/ISO based on the facts and circumstances associated with that region.

In short, if the Commission is inclined to direct any rule change(s) in response to the DOE NOPR, NEPOOL stresses that the Commission should not apply a one-size-fits-all solution since each RTO/ISO has unique regional issues and priorities, and different markets.

C. DOE's Proposed Compliance/Implementation Timelines Should be Adjusted²¹

Compliance with any final rule that comports with the APA and achieves rates that comply with the Federal Power Act cannot be accomplished in the time proposed by the DOE NOPR. Should the Commission issue a final rule in response to the DOE NOPR, the Energy Secretary proposes that each RTO/ISO submit a compliance filing within 15 days of the effective date of any such rule.²² NEPOOL acknowledges that some of the issues raised in the DOE NOPR have been discussed for some time. Nonetheless, NEPOOL notes that potential solutions and proposals are challenging and complex, and there must therefore be adequate time for careful, complete and informed proposals to address any final compliance requirements. 15 days simply does not afford sufficient time.

If past is prologue, there is no chance that New England can develop and explore together in 15 days market rule changes that are fully and appropriately responsive to Commission directives. Developing wholesale market rule changes, with the required input of hundreds of

²¹ This Section C is directly responsive to the following question asked by OEPI under "Other" category on page 5 ("The proposed requirement for submitting a compliance filing is 15 days after the effective date of any Final Rule in this proceeding, with the tariff changes to take effect 15 days after the compliance filings are due. Please comment on the proposed timing, both to develop a mechanism for implementing the required changes and to implement those changes, including whether or not such changes could be developed and implemented within that timeframe").

²² DOE NOPR at 1.

stakeholders, and producing a consensus-driven compliance process, in such a short period would deprive NEPOOL members any opportunity for vetting the proposal. Such an outcome would also further deprive ISO-NE, and ultimately the Commission, from receiving the benefits of full, informed and meaningful stakeholder consideration and input.²³

Pursuant to New England’s governance arrangements, and as required by the Participants Agreement between ISO-NE and NEPOOL, any proposed changes to the region’s Tariff/Market Rules are preceded by deliberative NEPOOL Participant Processes.²⁴ In the conventional NEPOOL stakeholder process, proposed tariff revisions are vetted by stakeholders over the course of at least three meetings, within a schedule that allows for sufficient time between meetings for further discussion and refinement. At the first of the three meetings, ISO-NE (or a participant-sponsor) usually presents its proposal to the relevant NEPOOL Technical Committee, describing the problem it is seeking to address or improvement it is seeking to make, and receiving conceptual input on that information from the stakeholders. At the second meeting, usually one month later so that stakeholders have the chance to consider and explore the proposal, ISO-NE provides and reviews proposed tariff revisions, and receives input and comment on its tariff language. Following these two meetings, a third, typically another month

²³ If for example, the Commission adopted the DOE’s proposed Grid Resiliency Pricing Rule “as is” on December 11, 2017, the difficulties associated with the DOE NOPR’s proposed timing would be further exacerbated by the fact that much of the development of the rules and tariff changes would need to be performed during the holiday season, as under the current DOE NOPR, the effective date of any final rule would be January 10, 2018. This date is 30 days after the December 11, 2017 date for “final action” as set forth in the NOPR’s *Federal Register* Notice. *See Grid Resiliency Pricing Rule*, Docket No. RM18-1-000 (82 Fed. Reg. 46,940, Oct. 10, 2017). Absent an extension, the compliance/tariff filings would therefore be due by January 25, 2018.

²⁴ *See e.g.*, Section 11 of Participants Agreement, available at <http://nepool.com/uploads/Op-PA.pdf> or in ISO-NE’s “Agreements and Contracts” Tariff in the Commission’s eTariff database.

later, is held at which there is a final Technical Committee meeting to vote on whether to recommend the proposed changes for approval by the Participants Committee.²⁵

NEPOOL also notes that any market rule changes that require reprogramming of market software cannot be implemented in the additional time proposed in the DOE NOPR for implementation of compliance changes. The DOE NOPR proposes that compliance changes that are filed with the Commission within 15 days after a final rule be implemented within 15 days.²⁶ Even if New England dropped all other market changes and improvements reflected in ISO-NE's work plan, programming, testing and implementation of changes as potentially comprehensive as those that might be required by any final rule in response to the DOE NOPR could take many months. Therefore, if the Commission decides to issue any rule change(s) in response to the DOE NOPR, a reasonable and rational compliance schedule needs to be adopted.

There have been no rulemaking proceedings in recent memory that followed the highly abbreviated schedule proposed here by DOE. By way of recent example, New England's fast-start resource dispatch, pricing and compensation changes, which accomplish much of what the Commission's NOPR in Docket No. RM17-3-000 suggests might be required by a final rule, received the full benefit of extensive stakeholder negotiations and coordination with ISO-NE and

²⁵ As explained in New England's response to Order No. 719, the Participants Committee is the Participant body that provides the final input by NEPOOL on changes to the Tariff, Manuals, Operating Procedures and other New England matters. New England's governance arrangements have been established to recognize that some Participants may be unable to participate fully and with the benefit of full management feedback until after the Technical Committees have completed their deliberations and made their recommendations. For that reason, all recommendations from the Technical Committee are considered by the Participants Committee (absent delegation to another representative of NEPOOL), but it is final Participants Committee action that defines NEPOOL's organizational position. *See* Filing of ISO New England and New England Power Pool in response to Order No. 719, Docket No. ER09-1051, filed Apr. 28, 2009.

²⁶ DOE NOPR at 1.

New England state officials long before being filed with the Commission.²⁷ Additionally, the Commission issued its fast-start pricing NOPR only after months of technical conferences/workshops with industry experts, market participants and RTO/ISO representatives. New England's fast-start pricing rule changes, when finalized, required more than 17 additional months for final programming, testing, and implementation.²⁸

Should the Commission issue any proposed or final rule in response to the DOE NOPR, the Commission could also adopt a practice that it has previously followed when seeking to facilitate expedited consideration of complex changes. In a number of circumstances, the Commission has required each RTO/ISO to promptly submit for Commission approval a proposed schedule of compliance with any final order. Such a process allows each region an opportunity to better consider and understand the broader implications of any compliance/implementation deadlines on the region's other priorities, as informed by discussion with its stakeholders. This approach also assures some degree of flexibility with respect to an effective date for implementation to account for the different circumstances of each RTO/ISO, while also providing the Commission with some ongoing information and control over the compliance process.

In sum, if any final rule is issued by the Commission in response to the DOE NOPR, NEPOOL urges the Commission to establish compliance/implementation deadlines that reflect due process, applicable stakeholder processes, as well as regional differences and priorities.

²⁷ See Revisions to Fast-Start Resource Pricing and Dispatch, Docket No. ER15-2716, Joint Filing Letter (Sept. 24, 2015); *ISO New England Inc. and New England Power Pool*, Docket No. ER15-2716-000 (Oct. 19, 2015) (unpublished letter order accepting Tariff revisions to fast-start resource pricing and dispatch); Notice of Proposed Rulemaking, Fast-Start Pricing in Markets Operated by Regional Transmission Organizations and Independent System Operators, Docket No. RM17-3-000 (Dec. 15, 2016) (The Commission has yet to issue a final rule).

²⁸ *See id.*

III. CONCLUSION

WHEREFORE, for the reasons set forth above, NEPOOL respectfully requests that the Commission take these Comments into consideration in its evaluation of, and response to, the DOE NOPR. Moreover, should the Commission consider issuing a proposed or final rule in response to the DOE NOPR, NEPOOL further urges the Commission to allow sufficient flexibility in any final rule, both in terms of timing and substance, so that New England, subject to full Commission review and approval, can fully account for its markets and facts and circumstances.

Respectfully submitted,

NEPOOL Participants Committee

By: /s/
David T. Doot
Joseph H. Fagan
Sebastian M. Lombardi
Sunita Paknikar
Day Pitney LLP
1100 New York Avenue, NW
Washington, DC 20005
Tel: (202) 218-3900
E-mail: dtdoot@daypitney.com
jfagan@daypitney.com
slombardi@daypitney.com
spaknikar@daypitney.com

Its Attorneys

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