UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Grid Reliability and Resilience Pricing Docket No. RM18-1-000

**JOINT COMMENTS
OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION,
CALIFORNIA WIND ENERGY ASSOCIATION,
INDEPENDENT ENERGY PRODUCERS ASSOCIATION,
PACIFIC GAS & ELECTRIC COMPANY,
SACRAMENTO MUNICIPAL UTILITY DISTRICT, AND
WESTERN POWER TRADING FORUM**

I. Introduction and Purpose of Comments

Pursuant to the "Notice Inviting Comments" issued by the Federal Energy Regulatory Commission ("Commission") in the above-referenced docket, the California Municipal Utilities Association ("CMUA"), California Wind Energy Association ("CalWEA"), Independent Energy Producers Association ("IEP"), Pacific Gas and Electric Company ("PG&E"), Sacramento Municipal Utility District ("SMUD"), and Western Power Trading Forum ("WPTF") (collectively, "Joint Commenters") respectfully submit these comments on certain issues contained in the Grid Resiliency Pricing Rule Notice of Proposed Rulemaking ("Proposed Rule" or "NOPR"), issued by the Secretary of Energy.

Joint Commenters represent a diverse group of market participants and stakeholders that are active within the organized market operated by the California Independent System Operator Corporation ("CAISO"). While we often differ on issues pertaining to CAISO market rules, we are unanimous in our agreement that important changes to the complex market rules in independent system operators ("ISOs") and regional transmission organizations ("RTOs") must

be made deliberately, subject to rigorous scrutiny, and tailored to the particular region served by the relevant RTO. Tens of billions of dollars change hands in each of these markets annually, and mistakes result in huge amounts of lost consumer welfare.

Joint Commenters also recognize that issues are presented by the changes in wholesale markets that have seen penetration of large amounts of intermittent resources with zero marginal cost energy, driving average energy prices down. In California, debates are ongoing at the CAISO and elsewhere on what market changes may be necessary to fully value thermal resources that may be needed to maintain system reliability, but otherwise cannot earn sufficient revenue in energy markets to ensure financial viability. The Commission must understand that this issue, which largely involves the viability of the gas fleet in California, is not the issue presented in the NOPR, which is limited to resources with on-site fuel supply.

Even as it applies to the issue identified in the NOPR, Joint Commenters suggest that the Commission is going about it the wrong way. Instead of identifying known reliability issues and crafting rules that would allow market participants to respond to market signals, the NOPR assumes a problem exists without adequate demonstration, and then proposes to remedy that alleged problem with a hastily developed and poorly defined uplift charge, market adder, or other form of administratively-established pricing that would apply to a narrow set of resources. Compounding this evidentiary deficit is a second, and fatal flaw: the Department of Energy ("DOE") invokes section 206 of the Federal Power Act ("FPA") as authority for issuance of the Proposed Rule, but fails to make the requisite finding that existing RTO/ISO tariffs are unjust and unreasonable. There is too much at stake in our organized markets to approach major market

changes in this fashion. We urge FERC to reject the proposals set out in the DOE- proposed NOPR.

II. Description of Joint Commenters

CMUA is a statewide organization of local public agencies in California that provide water, gas, and electricity service to California consumers. CMUA membership includes electric distribution systems and other public agencies directly involved in the electricity industry. CMUA members own or have rights to significant interregional transmission facilities, as well as local and regional generation assets. Certain CMUA members have transferred Operational Control of their transmission facilities and entitlements to the CAISO, and are Participating Transmission Owners. Most, if not all, CMUA members participate in CAISO administered markets, take service over facilities over which the CAISO has Operational Control, and pay CAISO charges. In total, public agencies provide electricity to approximately 25-30 percent of the population in California.

CalWEA is a 17-year-old trade association with 18 member companies, most of which own and operate wind energy projects within the CAISO Balancing Authority Area. Several of these companies sell power directly into the CAISO's markets.

IEP is a nonprofit public benefit corporation formed under the laws of the State of California to encourage the development and use of independent electric supply resources. Its members own and operate roughly 20,000 megawatts of electric generation capacity in California. IEP has been representing the interests of the developers and operators of renewable and other independent electricity supply resources before regulatory agencies, including the FERC, the Legislature, and the courts since 1982.

PG&E is an investor-owned public utility subject to FERC regulation under the FPA. PG&E is a "Participating Transmission Owner" in the CAISO market structure and has conveyed operational control of its electric transmission facilities to the CAISO. As a "Scheduling Coordinator" certified by the CAISO, PG&E schedules transmission and purchases and sells electricity and ancillary services through the CAISO's markets. PG&E is also a "Load Serving Entity" in California, providing natural gas and electric service to approximately 10 million customers throughout northern and central California. PG&E serves its electric customer load through its own generation facilities, which include hydroelectric, nuclear and fossil fuel plants; through bilateral procurement contacts; and through purchasing electricity from the CAISO's wholesale markets, including spot markets. Accordingly, PG&E plays a large role in nearly every aspect of the electric transmission, energy and ancillary services markets within the CAISO's control area.

SMUD is a customer-owned municipal utility district engaged in the generation, distribution, purchase, and sale of electric power to approximately 1.5 million consumers within its boundaries, which encompass most of the County of Sacramento and small portions of the County of Placer and Yolo County, both in California. Formed in 1946, SMUD is a "municipality" as defined by Section 3(7) of the FPA, 16 U.S.C. § 796(7) (2000). While SMUD is not a member of the CAISO controlled grid, SMUD is an active participant in the CAISO intertie market, and SMUD accordingly would be affected by changes to the CAISO market rules.

WPTF is a California nonprofit, public benefit corporation. It is a broad-based membership organization dedicated to enhancing competition in Western electric markets while

maintaining the current high level of system reliability. WPTF supports development of competitive markets throughout the West and of uniform rules to facilitate transactions among market participants. The membership of WPTF includes energy service providers, Scheduling Coordinators, generators, power marketers, financial institutions, energy consultants, and public utilities, all of which participate actively in the California market and other such markets in the West and across the country.

III. Comments

A. The Commission Should Confirm that the Proposed Rule Does Not Apply to the CAISO.

Joint Commenters assume, and seek confirmation, that the Proposed Rule does not apply to the CAISO. In the version of the Proposed Rule published in the Federal Register, the language limits applicability to ISOs or RTOs with energy *and* capacity markets. Specifically, that version limits the scope of the Proposed Rule by adding the language contained in bold below:

18 C.F.R. § 35.28(g)(10)(ii):

> (ii) Scope of application. The requirements of this rule shall apply to Commission-approved independent system operators or regional transmission organizations **with energy and capacity markets** and a tariff that contains a day-ahead and a real-time market or the functional equivalent. The application of this rule must be consistent between the day-ahead and real-time markets.

82 Fed. Reg. 46948 (October 10, 2017) (emphasis added).

The Federal Register version of the Proposed Rule governs; it is publication in the Federal Register that triggers the commencement of the comment period. Since the CAISO does not operate a capacity market, the Proposed Rule by its terms does not apply to the CAISO. While the CAISO Tariff contains provisions to ensure that Load Serving Entities carry planning

reserve margins, as well as requirements to procure local and flexible capacity needs through a process specified in the Tariff, these Tariff provisions do not constitute centralized markets administered by the CAISO in that they do not govern price and do not match buyers and sellers and are not "functionally equivalent" to a capacity market. All such commercial terms are governed by bilateral contracts between private parties. These bilateral markets are not RTO/ISO markets any more than they would be in areas that do not have such structures.

In addition to the clear language in the Proposed Rule, which specifies that eligible resources be "physically located" in a Commission-approved ISO or RTO, Joint Commenters have performed an informal review of resources that actively participate in the CAISO market. To our knowledge, there are no resources that meet the definition of eligible resources contained in the Proposed Rule. Within California there is one nuclear plant that is operational, the Diablo Canyon units, and that facility is a utility-owned ratebased asset scheduled to end commercial operation in 2025. Certain California entities own shares of the Palo Verde Nuclear Generating Station, but not all of those entities operate within the CAISO Balancing Authority Area, and, again, this is a ratebased facility. While there are coal units that bid into CAISO markets, that number is small, they are all located outside of California, and to the best of the knowledge of Joint Commenters, those units are also ratebased.

Joint Commenters request that the Commission confirm that through operation of the language of the Proposed Rule the proposals therein do not apply to the CAISO.

B. The Proposed Rule Does Not Make, Much Less Support, the Requisite Finding that Existing RTO/ISO Tariffs Are Unjust and Unreasonable.

Even if DOE's Proposed Rule could be construed as applying to the CAISO, it is still fatally flawed. Namely, DOE's Proposed Rule indicates that it is proposing that the Commission

take action under sections 205 and 206 of the FPA. 82 Fed. Reg. 46945 (October 10, 2017). "Generally speaking, section 205 covers rate filings by jurisdictional public utilities [and] invokes just and reasonable standards for filed rates...." *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993). But while the Proposed Rule invokes section 205, the core feature of the DOE proposal is its directive that the Commission adopt a final rule "requiring its organized markets to develop and implement market rules that accurately price generation resources necessary to maintain the reliability of our Nation's bulk power system." *Id*. The Proposed Rule, if adopted, would require affected RTOs to modify their existing tariffs. Because the modifications proposed by DOE would constitute changes to existing rates, the Commission's rulemaking power requires it to act under section 206, not section 205. *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). And the fact that DOE is seeking tariff changes that can only be made under section 206 highlights a fatal flaw in the Proposed Rule, namely that DOE has not made the requisite section 206 findings.

The Commission, in fact, has well-established authority to issue rules of general applicability under section 206 of the Act. However, to adopt a general rule under section 206, FERC must first find that the existing rates and/or practices of jurisdictional utilities that it seeks to change are no longer just and reasonable *and* that the change it proposes is just and reasonable. *See Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985) (interpreting the parallel provision of the Natural Gas Act, section 5, to authorize FERC to make general rules as long as it meets the standards of section 5, *i.e.*, findings, supported by substantial evidence, that the existing rates are no longer just and reasonable. *See also Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579-80 (D.C. Cir. 1993). The requisite findings do not appear in the DOE proposal.

Nowhere in the Proposed Rule does DOE claim that the existing market rules of affected RTOs are no longer just and reasonable. The courts have indicated many times to FERC that the absence of a finding that existing rates are not just and reasonable constitutes more than a ministerial error. *See, e.g., Emera Maine et al. v. FERC*, No. 15-1118 (April 14, 2017):

> Section 206 permits, indeed requires, FERC to determine whether an existing rate is "unjust, unreasonable, unduly discriminatory or preferential . . ." 16 U.S.C. § 824e(a). Only *after* having made the determination that the utility's existing rate fails that test may FERC exercise its section 206 authority to impose a new rate. *See, e.g., Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 10 (D.C. Cir. 2002); *Cities of Bethany v. FERC,* 727 F.2d 1131, 1143 (D.C. Cir. 1984). The burden of demonstrating that the existing ROE is unlawful is on FERC or the complainant, not the utility. 16 U.S.C. § 824e(b); *FirstEnergy,* 758 F.3d at 353.

Emera, supra, slip. op. at 3. (emphasis in original)

While a private party bringing a complaint under section 206 must only establish that the utility's rates are not just and reasonable, "it is only FERC who is required to shoulder the 'dual burden' when it institutes a proceeding under section 206." *FirstEnergy Service Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014). Not only does section 206 require the Commission to make the requisite finding of unreasonableness, but it must also demonstrate that the new rate or practice that would supersede existing RTO tariffs is also just and reasonable. *Western Resources, Inc. v. FERC*, *supra*, at 1579-80.

The Proposed Rule does not make that finding either. On the contrary, if its goal is improved grid resilience, the rule must not only make the finding that its proposed solution is just and reasonable, but in making that determination it must weigh both investor and consumer interests. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (just and reasonable rates must fall within a "zone of reasonableness" that "is bounded at one end by the investor interest against confiscation and at the other by the consumer interest against

exorbitant rates.") While the Proposed Rule focuses on providing adequate compensation for generators with on-site fuel as a means to protect system resilience, it examines no evidence and makes no findings whether there might be other means to foster resilience – like distributed generation, transmission infrastructure, or demand response – that would satisfy resilience concerns at a lower cost to consumers. In short, even had the Proposed Rule contained the requisite section 206 findings, the Proposed Rule lacks the substantial evidence that would be required to sustain such findings or to demonstrate that the market design changes directed by the Proposed Rule would satisfy the just and reasonable standard.

Further, it is a fundamental principle governing agency rulemakings that it is improper to adopt a generic rule that addresses problems that exist only in "isolated pockets" of the country. *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1019 (D.C. Cir. 1987) (*AGD*).[1] The Proposed Rule neither contains analysis, nor makes any findings, that the resilience problems that are alleged and that the Proposed Rule seeks to address are either present in California or would be addressed by the regulations DOE would have the Commission adopt.

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[1] As the D.C. Circuit stated in *AGD*:

> The Commission argues that *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C.Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1969, 90 L.Ed.2d 653 (1986), allows it to make § 5 determinations generically. J.A. 412. True but irrelevant. Neither *Wisconsin Gas* nor any other case of which we are aware supports an industry-wide solution for a problem that exists only in isolated pockets. In such a case, the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious.

C. The CAISO Has a Mechanism to Ensure Retention of Units Necessary for Grid Reliability.

The existing CAISO Tariff contains numerous mechanisms to ensure that units needed for grid reliability are retained. First, as discussed above, Section 40 of the CAISO Tariff contains provisions that detail procurement necessary to meet reliability criteria, including granular requirements for both local capacity and flexible capacity, in addition to overall system planning reserve obligations. In addition to the provisions that detail the obligations of representatives of Load Serving Entities, the CAISO has extensive authority to designate units as Reliability Must Run Units. Section 41.2 of the Tariff provides as follows:

> The CAISO will, subject to any existing power purchase contracts of a Generating Unit, have the right at any time based upon CAISO Controlled Grid technical analyses and studies to designate a Generating Unit as a Reliability Must-Run Unit. A Generating Unit so designated shall then be obligated to provide the CAISO with its proposed rates for Reliability Must-Run Generation for negotiation with the CAISO. Such rates shall be authorized by FERC or the Local Regulatory Authority, whichever authority is applicable.

Section 41.3 further specifies that:

> In addition to the Local Capacity Technical Study under 40.3.1, the CAISO may perform additional technical studies, as necessary, to ensure compliance with Reliability Criteria. The CAISO will then determine which Generating Units it requires to continue to be Reliability Must-Run Units, which Generating Units it no longer requires to be Reliability Must-Run Units and which Generating Units it requires to become the subject of a Reliability Must-Run Contract which had not previously been so contracted to the CAISO.

Notably, the term Reliability Criteria is not limited to NERC Reliability Standards but is a broader term that means "Pre-established criteria that are to be followed in order to maintain desired performance of the CAISO Controlled Grid under Contingency or steady state conditions." *CAISO Tariff, Appendix A.*

Thus, the CAISO already has a well-established, flexible, and developed set of tools to ensure that units needed for grid reliability are available and compensated. The RMR construct within the Tariff has a delineated study process, designation process, and contracting and commercial terms to ensure plant availability.

D. Any "Grid Resilience" Policy Must First Start with a Clear Definition of the Term "Grid Resilience."

The Proposed Rule lacks a clear definition as to what "grid resilience" means and how it differs from "grid reliability." Without a clear definition of "grid resilience," there is no way to evaluate whether the grid today is resilient and what specific rule changes are needed to achieve the desired levels of resilience.

More importantly, defining "grid resilience" will be a multi-agency effort and requires significant engagement from a host of entities that may ultimately include federal agencies, reliability organizations, states, utilities, and other stakeholders. Moreover, given significant differences in regional infrastructure, fuel mix, and energy policy the results and conclusions should be expected to vary by region. Such a discussion would have to involve examining the needs, methods to ensure, and measurements of resilience, and the opportunity to reveal how different markets and differing structures may address such resiliency needs. The Proposed Rule lacks all of the above.

E. If the Commission Does Not Simply Reject the Proposed Rule, It Should Direct ISO/RTO Stakeholder Processes or Establish a Notice of Inquiry to Allow Orderly Identification and Evaluation of Relevant Issues.

For all of the reasons described above, the DOE's Proposed Rule is fundamentally and fatally flawed. It would be entirely appropriate for the Commission to reject the Proposed Rule

and close this docket without further action, and that is the action urged by Joint Commenters. If, however, the Commission believes that further consideration of issues raised by the Proposed Rule would be appropriate, the Joint Commenters suggest two alternative approaches.

The first, and preferred, alternative would be for the Commission to direct each ISO or RTO to initiate a stakeholder process to evaluate the potential need for market design changes to ensure grid reliability within its area of operation. This approach would enable an assessment of reliability needs and, if necessary, appropriately tailored market design changes to address those needs specific to conditions prevailing in each ISO/RTO. This would be the most efficient and effective way to identify and develop any market design changes needed to maintain reliability. The Commission could require each ISO or RTO to report on the outcome of such stakeholder processes by a specified date.

A second alternative would be for the Commission to issue a Notice of Inquiry ("NOI") to enable orderly consideration of relevant issues, including an adequate opportunity for input from all electric industry sectors on both the scope and the substance of potential market design changes. Such an alternative NOI should include discussion of and invite comments on at least the following topics: (i) whether there is an evidentiary basis for Commission action under Section 206 of the FPA, (ii) the nature and scope of any threats to electric grid reliability attributable to existing market design features, (iii) whether measures to mitigate any reliability threats that are identified should be implemented on a nationwide basis or tailored to address regional conditions, (iv) the scope of the Commission's authority to direct resource procurement decisions, (v) how to ensure that measures to mitigate identified threats to grid reliability are as consistent as possible with efficient competitive market outcomes, (vi) how best to balance

reliability and cost considerations in crafting any potential market design changes, (vii) attributes of resources needed to support grid reliability, (viii) principles for compensation of resources needed to support grid reliability, (ix) principles for allocation of cost responsibility for payments to resources needed to support grid reliability, (x) availability and performance requirements for resources receiving payments to support grid reliability, and (xi) whether and how environmental considerations should affect procurement of resources to support grid reliability.

Any such alternative NOI should include a procedural schedule that allows sufficient time for comprehensive and carefully considered stakeholder input. Technical Conferences may be appropriate given the complexity of the discussion. Also, regional workshops or hearings may be advisable given the different circumstances that face each RTO/ISO region. Given the breadth and complexity of the potentially relevant issues, an NOI should allow ample time for comments (sixty days at a minimum) and reply comments (also a minimum of sixty days, given the industry-wide significance of and interest in potential NOI topics). Furthermore, if the NOI process should lead to any Commission directive for consideration or implementation of market design changes, the time allowed for compliance filings should be commensurate with the scope and complexity of any market design modifications required to be considered or implemented.

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IV. Conclusion

For the foregoing reasons, the Joint Commenters respectfully urge the Commission to reject the Proposed Rule, or in the alternative direct RTO/ISOs to establish processes to address this issue or institute a Notice of Inquiry to provide an opportunity for full deliberation of the issues presented.

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