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April 5, 2018

Via Electronic Mail

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RE: Protest of the PJM Consumer Representatives

Dear Secretary Perry, Assistant Secretary Walker, and Deputy Assistant Secretary Jereza:

The PJM Industrial Customer Coalition (“PJMICC”), on behalf of the PJM Consumer Representatives, hereby submits the attached Protest to FirstEnergy Solutions Corp.’s (“FES”) March 29, 2018 Request For Emergency Action Under Section 202(c) of the Federal Power Act.

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The Honorable James Richard Perry, et al.
April 5, 2018
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Respectfully submitted,

McNEES WALLACE & NURICK LLC

A handwritten signature in black ink, appearing to read "Robert A. Weishaar, Jr.", written over a horizontal line.

By

Robert A. Weishaar, Jr.

Counsel to the PJM Industrial Customer Coalition
and on behalf of the PJM Consumer
Representatives

RAW/db

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY**

Request for Emergency Order Pursuant
To Federal Power Act Section 202(c) By
FirstEnergy Solutions Corp.

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DOE Docket No. _____

**PROTEST OF THE
PJM CONSUMER REPRESENTATIVES
TO THE EMERGENCY ORDER REQUEST
OF FIRSTENERGY SOLUTIONS CORP.**

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Dated April 5, 2018

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**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY**

Request for Emergency Order Pursuant
To Federal Power Act Section 202(c) By
FirstEnergy Solutions Corp.

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DOE Docket No. _____

**PROTEST OF THE
PJM CONSUMER REPRESENTATIVES
TO THE EMERGENCY ORDER REQUEST
OF FIRSTENERGY SOLUTIONS CORP.**

On March 29, 2018, FirstEnergy Solutions Corp. (“FES”) submitted a Request for Emergency Order Pursuant to Federal Power Act Section 202(c)¹ (“Request” or “Emergency Order Request”) to the Secretary of the Department of Energy (“DOE” or “Department”). Pursuant to Rule 211 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, the PJM Consumer Representatives hereby protest the FES’s Request.²

¹ 16 U.S.C. § 824a(c).

² Federal Power Act Section 202(c) and the Department indicate that the Federal Power Act and the Commission’s Rules of Practice and Procedure should be used for procedural guidance in Emergency Order proceedings. Guidance published on the Department’s website points to the Commission’s Rules where DOE regulations at 10 C.F.R. § 205.370, et. seq., are silent. *See, e.g.*, DOE Answer to Procedural Questions Concerning Rehearing of DOE Order, *District of Columbia Public Service Commission*, Docket No. E0-05-01 (December 30, 2005) at 2. Additionally, the Department has taken the position that the procedure for judicial review of emergency orders under Section 202(c) of the Federal Power Act must be secured through Section 313 of that Act, 16 U.S.C. § 825l. *See, e.g.*, Order No. 202-05-3, *District of Columbia Public Service Commission*, Docket No. E0-05-01 (December 20, 2005) at 11-12. The plain language of Section 202(c)(5) of the Federal Power Act, enacted in 2016, reinforces this principle. Where, as here, a proceeding exists under Chapter 12 of the Federal Power Act, the Commission’s Rules of Practice and Procedure apply. *See* 16 U.S. Code § 825g(b) (Federal Power Act § 308) (“All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission.”).

For purposes of this Protest, the PJM Consumer Representatives are comprised of the following:

PJM Industrial Customer Coalition

State of Delaware Division of the Consumer Advocate

Industrial Energy Consumers of America

West Virginia Consumer Advocate

New Jersey Division of Rate Counsel

West Virginia Energy Users Group

Pennsylvania Office of Consumer Advocate

Chemistry Council of New Jersey

Public Power Association of New Jersey

Delaware Public Service Commission

District of Columbia Office of People's Counsel

American Municipal Power, Inc.

Old Dominion Electric Cooperative

American Forest & Paper Association

Southern Maryland Electric Cooperative, Inc.

Maryland Office of People's Counsel

Illinois Industrial Energy Consumers

The Association of Business Advocating Tariff Equity

American Foundry Society

Indiana Office of Utility Consumer Counsel

Indiana Industrial Energy Consumers, Inc.

Ohio Chemistry Technology Council

American Chemistry Council

Industrial Energy Users – Ohio

Illinois Citizens Utility Board

Industrial Minerals Association – North America

National Industrial Sand Association

Pennsylvania Energy Consumer Alliance

I. PROTEST

FES requests the Secretary of the DOE (“the Secretary”) to use the vehicle of an emergency order to require consumers in the PJM Region to bail out certain types of generation assets that have become uneconomic. The Request is framed in alarming and urgent language, but many of the premises underlying the Request are vastly overstated or demonstrably false. FES fails to acknowledge existing procedures to safeguard essential assets and protect reliability without imposing unjust, unreasonable, and unduly discriminatory costs on consumers in the PJM Region; fails to acknowledge substantial evidence of PJM’s successful reliability measures and actions over the past few years; and fails to demonstrate that a true Section 202(c) emergency exists. The Request fails to demonstrate why nuclear and coal generation facilities should receive a bail-out, likely forcing consumers to absorb significant additional and unnecessary costs.

The Request fails as a matter of fact and law for the following reasons:

- Section 202(c) of the Federal Power Act is very limited in scope, and FES’s attempt to apply Section 202(c) beyond its intended scope is unlawful.
- FES’s Emergency Order Request is unprecedented and overbroad.
- FES has not demonstrated that an emergency exists.
- If reliability concerns were to arise, PJM has in place adequate processes for addressing those concerns.

- If granted, the Request would unnecessarily raise energy prices for consumers and directly undercut the tremendous economic advantage to the United States from natural gas shale plays.
 - FES’s argument that energy price formation in PJM does not adequately compensate baseload resources is invalid and inappropriate in an emergency order request; FES’s argument on price formation is more appropriately presented and examined in the ongoing PJM stakeholder process.
 - FES seeks to undermine the recent Commission order rejecting the grid resiliency pricing proposal and the ongoing FERC grid resiliency proceeding (Dockets AD18-7 and RM18-1) and other stakeholder processes.
 - FES’s clearing of the Base Residual Auction (“BRA”) through 2020-2021 demonstrates that FES currently has an obligation, and associated compensation for that obligation, to run its units through May 31, 2021.
- A. Section 202(c) of the Federal Power Act is Very Limited in Scope, and FES’s Attempt to Apply Section 202(c) Beyond Its Intended Scope is Unlawful.**
- 1. Section 202(c) confines emergencies to specific, imminent events, and any solutions must be specific and temporary.**

Section 202(c) of the Federal Power Act confers certain emergency powers upon the Secretary.³ Importantly, Section 202(c) confines emergencies to specific, imminent events. Section 202(c) of the Federal Power Act grants the Department authority over “the generation of electric energy” in the following circumstances: (1) during wartime; or (2) if “the [Department] determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes.”⁴

The text of the statute provides inherent limitations on the emergency powers and confines Emergency Orders to specific, imminent events. First, the term “exists” indicates a present tense concern—not a distant possibility several years in the future. Second, the term “emergency” is

³ See 16 U.S.C. § 824a(c).

⁴ 16 U.S.C. § 824a(c).

defined by Merriam-Webster's Dictionary as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."⁵ Elsewhere, the same dictionary references an emergency as applying "to a sudden unforeseen situation requiring prompt action to avoid disaster."⁶ This indicates a situation that is imminent and unavoidable. Third, the statute's reference to "wartime powers" indicates the type of factual context Congress intended for the Emergency Order power to be used. The D.C. Circuit has affirmed this view, stating that Section 202(c) "speaks of 'temporary' emergencies, epitomized by wartime disturbances"⁷ and that the statute is reasonably understood to exclude circumstances such as "dependence on imported oil." Finally, the use of the words "sudden" and "shortage" reinforce the statutory context of an immediate need.⁸

Moreover, Emergency Orders are intended to provide for only temporary solutions. The text of Section 202(c) indicates an Emergency Order may "require . . . such *temporary connections of facilities* and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest." Gradual industry changes affecting certain types of generation resources do not constitute a sudden emergency requiring immediate action.

The development of the Federal Power Act also confirms that the authority for Emergency Orders under Section 202(c) is limited to unusual, unexpected circumstances. In 2005, Congress added Section 215 of the Federal Power Act, establishing an Electric Reliability Organization and

⁵ Definition of "emergency," Merriam-Webster's Dictionary 407 (11th ed. 2004).

⁶ Definition of "juncture," Merriam-Webster's Dictionary 678 (11th ed. 2004). The definition of "juncture" further includes this additional definition of "emergency."

⁷ See *Richmond Power and Light v. Federal Energy Reg. Comm.*, 574 F.2d 610, 615 (D.C. Cir. 1978).

⁸ See *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (statutory terms should be interpreted in context of nearby parallel terms "in order to avoid the giving of unintended breadth to the Acts of Congress").

specifying procedures, remedies, and timeframes for federal reliability standards.⁹ As aptly noted in Sierra Club’s response to FES’s Emergency Order Request, prior to the Energy Policy Act of 2005, “the reliability of the nation’s bulk-power system depended on participants’ *voluntary* compliance with industry standards.”¹⁰ Consequently, Federal Power Act provisions that predated the Energy Policy Act, including Section 202(c), were not intended to provide the federal government with authority to enforce broad, long-term reliability requirements. That authority commenced with the Energy Policy Act of 2005, and that authority rests with the Commission, not the Department. Finally, broad ratemaking authority rests with the Commission—not the Department—and is addressed in other provisions within the Federal Power Act. As discussed in further detail below, FES’s Request unlawfully exceeds the scope of the Department’s authority under Section 202(c) in each of these respects.

2. FES’s Request seeks an Emergency Order that would be illegal and that would violate Section 202(c).

FES’s Request is unlawful because it: (1) does not present substantial evidence of an imminent threat to reliability and, even if it did, (2) the requested relief far exceeds the intended breadth of relief and the Department’s authority under 202(c). In Section B of this Protest, the PJM Consumer Representatives demonstrate that the scope of FES’s requested Emergency Order is unprecedented, overbroad, and impermissibly seeks to override existing statutory and regulatory authority as well as FERC and DOE precedent. In Section C of this Protest, the PJM Consumer Representatives explain that FES failed to substantively demonstrate an emergency exists in PJM.

⁹ See generally 16 U.S.C. § 825o.

¹⁰ Sierra Club Comments at 6 (quoting *Alcoa, Inc. v. FERC*, 564 F.3d 1342, 1344 (D.C. Cir. 2009) (emphasis added) (filed with DOE on Mar. 30, 2018).

While Section 202(c) confers certain emergency powers upon the Secretary,¹¹ FES ignores the text of Section 202(c)'s limitations on the use of emergency power as emergencies are specific, imminent events. FES has failed to even state a case that the potential retirement of certain generation assets, several years from now, meets the definition of an emergency. FES passionately advocates for Secretarial intervention without demonstrating that there is an imminent need for intervention for any specific generation unit.

The text of Section 202(c) describes the core power of an Emergency Order to order “*generation, delivery, interchange or transmission of electric energy.*”¹² FES's Request asks for nothing of the sort. The Request fails to identify any generation or other resource that the Secretary should order to be activated or connected.¹³ Instead, the Request is purely financial in nature, asking the Secretary to override existing contracts for assets that are *already* generating electricity. In other words, this Request is about a self-perceived crisis of compensation, not a generation emergency.

FES's urgent and descriptive language cannot conceal the fact that, *even if FES's factual claims were to be believed*, FES's claimed “emergency” is several years away. In the Request, FES did not show that any alternative courses of action were unavailable to address its self-perceived crisis, and it did not demonstrate why the emergency request, *at this time*, is prudent and necessary. FES cites to no current shortfall in power supply. Giving any credence whatsoever to FES's Emergency Order Request would pave the way for other entities to assert an emergency

¹¹ See 16 U.S.C. § 824a(c).

¹² 16 U.S.C. § 824a(c)(1), (2) (emphasis added).

¹³ 10 C.F.R. § 205.373(h) requires an Emergency Order Request to include “[a] description of efforts made to obtain additional power through voluntary means and the results of such efforts.” FES stated this was PJM's responsibility. Request at 29. However, FES could not provide this information because its Request does not ask the Secretary to order additional generation. The Request is simply seeking additional *compensation* for its current generation assets.

whenever their self-perceived crises are only economic and result from the inevitable changing mix of generation resources. Declaring an emergency now, as FES requests, runs directly contrary to the following provision of 10 C.F.R. § 205.371: “Situations where a shortage of electric energy is projected due solely to the failure of parties to agree to terms, conditions, or other economic factors relating to service, generally will not be considered emergencies *unless the inability to supply electric service is imminent.*”¹⁴ FES’s Request fails to state any imminent or specific threat that meets the definition of “emergency” under the statute or its associated regulations.¹⁵

The Department’s regulations define “emergency” in 10 C.F.R. § 205.371 as “an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power.” Section 371 lists six causes of an emergency: (1) weather conditions, (2) acts of God, (3) unforeseen circumstances not preventable by the “entity,” (4) sudden increase in customer demand, (5) inability to obtain adequate amounts of the fuels necessary to generate electricity, or (6) regulatory action prohibiting certain power supply facilities. FES’s Request matches none of these causes. More importantly, FES has shown no “unexpected inadequate supply of electric energy,” as required by the Department’s regulations.¹⁶

¹⁴ Emphasis added.

¹⁵ As stated in the Sierra Club’s Comments at 6:

Reading section 202(c) to permit direct enforcement of reliability requirements through emergency orders would bypass the limits and procedures that Congress enacted in section 215 to constrain such enforcement. See *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 401-2 (D.C. Cir. 2004) (“Congress’s specific and limited enumeration of [agency] power over [particular matter] in [one section of Federal Power Act] is strong evidence that [separate section] confers no such authority on [agency].”).

¹⁶ See 10 C.F.R. § 205.371.

A Section 202(c) Emergency Order may only be issued to address “a specific inadequate power supply situation.”¹⁷ FES can point to no such specific situation and only provides general arguments about what could happen years down the road. In *Richmond Power*, the Commission declined, as improper under Section 202(c), a request to use emergency authority to address “broad questions of resource allocation,” and the D.C. Circuit affirmed.¹⁸ To attempt to enact broad-based sweeping changes through emergency authority is not only ill-advised, but illegal. The Secretary should reject FES’s Request for the same reasons the Commission declined to act under Section 202(c) in the case that led to the *Richmond Power* opinion by the D.C. Circuit.

B. The Scope of the Requested Emergency Order is Unprecedented, Overbroad, and Impermissibly Seeks to Override Existing Statutory and Regulatory Authority and FERC and DOE Precedent.

1. The scope of the Request is inconsistent with the Department’s prior issuances of Emergency Orders.

In the Request, FES seeks an Emergency Order directing “certain existing nuclear and coal-fired generators in PJM...to enter into contracts and all necessary arrangements with PJM, on a plant-by-plant basis...”¹⁹ As to those “certain existing nuclear and coal-fired generators in PJM,” FES attaches to the Request a list (Attachment A) with nuclear and coal-fired generating units in PJM, many of which are not owned by FES. Aside from requesting overbroad relief that lacks specificity and is not tied to discrete issues at specific units it owns, FES violates the legal principle of standing by seeking relief for facilities it does not own.²⁰

¹⁷ 10 C.F.R. § 205.371.

¹⁸ *Richmond Power and Light v. Federal Energy Reg. Comm.*, 574 F.2d 610, 615-16 (D.C. Cir. 1978) (rejecting a claim that the 1973 oil embargo warranted an order, the court said that Section 202(c) is “aimed at situations in which demand for electricity exceeds supply and not at those in which supply is adequate but a means of fueling its production is in disfavor”).

¹⁹ Request at 1.

²⁰ In response to FES’s Request, PJM has noted that FES’s Request curiously seeks relief for FES’s entire merchant fleet as well as relief for all other coal and nuclear units in PJM, totaling over 80 generation units. PJM Letter to

Past Emergency Orders issued by the Department have been narrow in scope, with most directed toward one facility, and all focused on the provision of power to a specific geographical area.²¹ For example, Emergency Orders issued in 2002 and 2003 were specifically directed toward the Cross-Sound Cable connecting Connecticut to Long Island.²² An Emergency Order issued in 2005—in response to “massive destruction” by Hurricane Rita—authorized CenterPoint Energy to temporarily connect electricity lines to restore power to Entergy Gulf States, Inc.

The few orders that reached beyond one or two facilities were still narrowly tailored. For example, arguably the broadest use of emergency order authority by the Department was in response to the massive and unprecedented California energy crisis in 2000-2001.²³ Secretaries Richardson and Abraham issued a short series of Emergency Orders on approximately a weekly basis, requiring specific facilities to “generate, deliver, interchange, and transmit electricity” when requested by the California ISO. These Orders generally expired within approximately two weeks, and the entire series of Orders spanned less than two months.

As to the PJM territory, the Department has issued emergency orders for only two facilities: a 2005 Emergency Order (and follow-up orders) related to Mirant Corporation’s Potomac River

Secretary Perry re FES’s Request for Emergency Relief under Section 202 of the Federal Power Act at fn. 1 (Mar. 30, 2018).

²¹ See *DOE’s Use of Federal Power Act Emergency Authority*, Department of Energy, available at <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use> (last visited Apr. 3, 2018). Assistant DOE Secretary has stated that DOE “would never use” emergency orders for uneconomic plants. See article by Gavin Bede, *Utility Dive* (Feb. 20, 2018). Available at <https://www.utilitydive.com/news/doe-would-never-use-emergency-order-for-uneconomic-plants-walker-says-1/517455/> (last accessed Apr. 5, 2018).

²² In August 2002, responding to concerns about the availability of electricity on Long Island, an Emergency Order was issued directing Cross-Sound Cable Company to operate the Cross-Sound Cable from Connecticut to Long Island and related facilities. In August 2003, DOE required Cross-Sound Cable Company to operate its facilities in response to the blackout under the direction of the New York Independent System Operator and ISO New England.

²³ See *California December 2000*, Department of Energy, available at <https://www.energy.gov/oe/downloads/federal-power-act-section-202c-california-december-2000> (last accessed Apr. 5, 2018).

Generating Station and a 2017 Emergency Order (and follow-up orders) related to Dominion Energy Virginia's Yorktown Units 1 and 2.²⁴ In contrast to the FES Request, both of these Emergency Orders were (1) targeted to a specific city or geographical area, (2) designed to be temporary until new transmission could be put in service, and (3) issued to maintain specific generation units where closing of the units was recent or imminent.

In 2005, Mirant Corporation ceased generation at its coal-fired Potomac River station due to air quality concerns raised by the Virginia Department of Environmental Quality.²⁵ The day of the closure, the District of Columbia Public Service Commission ("DCPSC") requested that the Department find that a Section 202(c) emergency existed. DCPSC's petition to the Secretary stated that the plant's shutdown would "have a drastic and potentially immediate effect on the electric reliability in the greater Washington, D.C. area."²⁶

The Department reviewed DCPSC's petition and considered comments, issuing Emergency Order 202-05-3 approximately four months after receiving the petition.²⁷ The Department recognized the Potomac River plant was one of only three sources of electricity serving the Washington, D.C. central business district. The Department concluded that to maintain a "minimally reliable electric power system, the plant must be available to run" when one of the other two sources of power (two 230 kV transmission lines) was out of service. The Department found an emergency existed based on a combination of factors, including "the reasonable

²⁴ *DOE's Use of Federal Power Act Emergency Authority*, Department of Energy, available at <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use> (last visited April 4, 2018).

²⁵ Emergency Petition and Complaint of the District of Columbia Public Service Commission, DOE Docket No. EO-05-01, FERC Docket No. EL05-145-000 (Aug. 24, 2005) at 1, available at https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/mirant_082405.pdf.

²⁶ *Id.* at 1-2.

²⁷ DOE Order No. 202-05-3 (Dec. 20, 2005), available at https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/mirant_122005_2.pdf.

possibility an outage will occur that would cause a blackout, the number and importance of facilities and operations in our Nation’s Capital . . . the extended number of hours of any blackout . . . and the fact that the current situation violates applicable reliability standards.” The original Order 202-05-3 expired in October 2006 but was renewed periodically until the final Order was issued in January 2007, expiring that summer.²⁸

Unlike FES’s present Request, the Emergency Order for the Potomac River plant was targeted and focused. The concerns were immediate because the Nation’s capital would have had only two sources of power. Further, it was a temporary measure until additional sources of power became available to Washington, D.C.

In June 2017, with Dominion Energy Virginia’s support, PJM requested an Emergency Order from the Department requiring Dominion Energy Virginia to operate its coal-fired Yorktown Units 1 and 2 at the Yorktown Power Station, which had been slated for closure due to violations of environmental standards.²⁹ PJM asked that the Order require the units to operate “only as needed in order to address NERC reliability issues and other local transmission issues.”³⁰ The purpose of the request was “to preserve the reliability of [the] bulk power transmission system in the North Hampton Roads [Virginia] area.”³¹ PJM articulated an immediate need for an order to prevent uncontrolled power disruptions and shedding of critical loads during the peak summer

²⁸ See DOE Order No. 207-07-2, Docket No. EO-05-01 (Jan. 31, 2007), available at <https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EO-05-01.pdf>; DOE Order No. 202-07-3, Docket No. EO-05-01 (Jul. 2, 2007) (indicating Order No. 207-07-2 expired on July 1, 2007), available at https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/DOE_Order_202-07-3.pdf.

²⁹ Dominion Energy Virginia had notified PJM of its intention to deactivate the Yorktown units as of the end of 2014, prompted by the Environmental Protection Agency’s Mercury and Air Toxics Standards requirements. See PJM Request for Emergency Order Pursuant to Section 202(c) of the Federal Power Act (Jun. 13, 2017) at 5, available at https://www.energy.gov/sites/prod/files/2017/07/f35/PUBLIC-DOE%20FPA%20202%28c%29%20Emergency%20Application%20Dominion%20Yorktown%201%20%202%20-6-13..._0.pdf.

³⁰ *Id.* at 15.

³¹ *Id.* at 1.

months which were quickly approaching. PJM had ordered expanded transmission capacity to the North Hampton Roads area, but Yorktown Units 1 and 2 were needed in the interim; PJM also suggested the transmission expansion would require outages, which could, in turn, require the Yorktown Units 1 and 2 to operate. The Department issued Emergency Order 202-17-2 on June 16, 2017. Orders have been reissued approximately every 90 days to maintain Yorktown Units 1 and 2.³²

Unlike the FES Request, the Yorktown Emergency Order was narrowly tailored to a specific and imminent reliability need. PJM stated that its request was “in no way . . . intended as a substitute for the need for transmission infrastructure on the Virginia Peninsula,” but needed only until adequate transmission infrastructure could be placed into service and only for the two Yorktown units.³³

In short, the Department has never exercised Section 202(c) authority in response to a perceived crisis that was several years away and has never exercised Section 202(c) authority anywhere close to the degree requested by FES. Instead, the Department has carefully used Section 202(c) authority to address present-time shortfalls in electricity supply through narrowly tailored solutions. Because FES fails to tailor and limit its request to specific shortfalls in electric supply at specific geographical locations, the Request should be rejected.

2. The Request seeks to vest the Department with ratemaking authority that properly resides with the Federal Energy Regulatory Commission.

³² *Id.* at 6.

³³ Summary of PJM Interconnection LLC’s Request For Emergency Order Pursuant to Federal Power Act Section 202(c) (Jun. 13, 2017), available at <https://www.energy.gov/sites/prod/files/2017/07/f35/DOE%20Dominion%20Yorktown%20FPA%20Section%20202%20Petition%20Summary%20Final%206-13-17%20.pdf>.

Title IV of the DOE Act provides for the creation of the Commission as an “independent regulatory commission.”³⁴ Under Section 402 of the DOE Act, the Commission is vested with the authority to enforce Part II of the Federal Power Act. The Commission’s jurisdiction is exclusive.³⁵ Section 401(f) provides that the Commission is authorized to establish such procedural and administrative rules as are necessary to exercise its functions. Additionally, Section 403(c) provides that “[a]ny function described in section 402 of this Act which relates to the establishment of rates and charges under the Federal Power Act...may be conducted by rulemaking procedures.”³⁶

Although the Secretary has the authority to issue an Emergency Order where an urgent need necessitates it, that authority does *not* include dictating rates, as FES asks the Secretary to do here. The DOE Act explicitly states, “[t]he decision of the Commission involving any function within its jurisdiction...*shall not* be subject to further review by the Secretary.”³⁷ Despite this provision, FES asks the Secretary, if affected parties cannot negotiate new contractual terms in 15 days, to “step in and *determine* the just and reasonable compensation and conditions.”³⁸

This request contravenes the Department’s own regulations. 10 C.F.R. § 205.376 states that if parties affected by an Emergency Order are unable to reach an agreement as to rates, the Department “shall refer the rate issues to the Federal Energy Regulatory Commission.” Consequently, this Request asks DOE to impermissibly override its own regulations (which have the force of law and are subject to notice-and-comment rulemaking procedures). Because FES

³⁴ 42 U.S.C. § 7171(a). As an independent regulatory commission, “the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department [of Energy].” 42 U.S.C. § 7171(d).

³⁵ 42 U.S.C. § 7172(g).

³⁶ 42 U.S.C. § 7173(c).

³⁷ 42 U.S.C. § 7172(g) (emphasis added).

³⁸ Request at 32 (emphasis added).

requests no new connections to provide electric service, it effectively is asking for an Emergency Order on rates alone. However, the Department explicitly cannot grant FES’s request that it directly set “just and reasonable rates.” That jurisdiction lies with FERC, not the Department. Further, FERC has already exercised its authority to set “just and reasonable rates” and has rejected proposals similar to FES’s Request. In Docket No. RM18-1-000, the Commission held that establishing cost-of-service rates for “all eligible resources . . . regardless of need or cost to the system” had not been demonstrated to be just and reasonable.³⁹ If FES believes FERC errs in its determination of just and reasonable rates in any particular rate proceeding, it may appeal to the D.C. Circuit—not the Secretary of Energy.

3. The Request seeks relief that does not constitute “just and reasonable” compensation under the Federal Power Act.

The wholesale compensation mechanisms of the Regional Transmission Organizations (“RTOs”) and Independent System Operators (“ISOs”) that would be affected by the Request are established through FERC-approved tariffs that the Commission must find are just and reasonable.⁴⁰ To alter those tariffs, the Commission—not the Department—must find that the current tariffs are not just and reasonable before it may determine a just and reasonable replacement rate.⁴¹ Under Section 206 of the Federal Power Act (“FPA”), the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential is on the proponent of the new rate.⁴² It is not enough to claim that the rates are unreasonable because unit owners may be required to close

³⁹ Grid Resilience in Regional Transmission Organizations and Independent System Operators, 162 FERC ¶ 61,012 at P 16 (Jan. 8, 2018).

⁴⁰ 16 U.S.C. § 824d.

⁴¹ 16 U.S.C. § 824e.

⁴² 16 U.S.C. § 824e(b); *FirstEnergy Serv. Corp. v. FERC*, 758 F.3d 346, 354 (D.C. Cir. 2014).

uneconomic generation units. Providing economic signals to unit owners is the very point of market-based compensation and the just and reasonable market rules that are in place to determine market-based compensation.⁴³ Accordingly, the potential closing of generation units does not demonstrate that rates that have been found to be just and reasonable have suddenly become unjust and unreasonable.

FES's Request complains that the market-based rates in PJM do not generate sufficient revenue (while failing to mention both the billions of dollars utilities received for stranded costs during state restructuring processes and the high prices and high profits these same units commanded in the mid-2000s). For example, customers in Pennsylvania,⁴⁴ New Jersey,⁴⁵ and Ohio⁴⁶ paid billions in stranded costs. FES proposes new "just and reasonable" rates but has never

⁴³ See Murray Energy Comments at 19, FERC Docket RM18-1-000 ("While other issues—including increasing environmental burdens for coal and rising operating costs for nuclear—were contributing factors, the core issue boils down to economics. If wholesale prices were higher, for example, it would be profitable for a coal plant to install new emission scrubbers and the magnitude of coal and nuclear retirements would be significantly lower.").

⁴⁴ In Pennsylvania, customers paid the Pennsylvania jurisdictional utilities approximately \$12.3 billion in stranded costs. Stranded cost determinations were not changed in Pennsylvania when energy market prices were, in actuality, much higher than projected in the stranded cost proceedings. As such, generation owners, many of which were affiliates of the jurisdictional utilities, realized the upside benefit of higher LMPs while customers continued to make stranded cost payments. See *Application of Metropolitan Edison Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al.*; *Application of Pennsylvania Electric Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al.*, Docket Nos. R-00974008, *et al.*, and R-00974009, *et al.*, Final Opinion and Order (Oct. 20, 1998); *Pennsylvania Public Utility Commission v. Pennsylvania Power Company (Application for Approval of A Restructuring Plan Under Section 2806 of the Public Utility Code)*, Docket No. R-00974149, Final Order (May 3, 1999) (adopting Tentative Order entered Apr. 1, 1999); *Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al.*, Docket Nos. R-00973953 and P-00971265, Final Order (May 14, 1998); *Re West Penn Power Company*, 91 Pa. PUC 700 (Order entered Nov. 19, 1998).

⁴⁵ In New Jersey, customers paid approximately \$2.94 billion for net-of-tax stranded costs. *In re Public Service Elec. and Gas Company's Rate Unbundling, Stranded Costs and Restructuring Filings*, 330 N.J. Super. 65, 116 (App. Div. 2000), *affirmed* 167 N.J. 377, 771 A.2d 1163 (2001); see also *Murphy v. Public Serv. Elec. & Gas Co.*, 2009 N.J. Super. Unpub. LEXIS 309 (App. Div. 2009).

⁴⁶ Like other states, Ohio provided for stranded cost recovery and authorized approximately \$8.4 billion in electric transition plans. See Docket Nos. 99-1729-EL-ETP, Opinion and Order at 11 (9/28/00), <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=WQWKCC2QHW8Q0Q92>; 99-1658-EL-ETP, Opinion and Order at 23 (8/31/00), available at: [http://dis.puc.state.oh.us/ViewImage.aspx?CMID=RQHRQ\\$ZFW2EZ9YSU](http://dis.puc.state.oh.us/ViewImage.aspx?CMID=RQHRQ$ZFW2EZ9YSU); 99-1687-EL-ETP, Testimony of Ralph Luciani at Exhibit RLL-6 (12/20/99), available at: [http://dis.puc.state.oh.us/ViewImage.aspx?CMID=LL8IYWXPXY9KXIB\\$@](http://dis.puc.state.oh.us/ViewImage.aspx?CMID=LL8IYWXPXY9KXIB$@); PUCO Case No. 99-1212-EL-ETP, Opinion and Order at 31 (7/19/00), available at: [http://dis.puc.state.oh.us/ViewImage.aspx?CMID=SK29QJKYOPIS\\$BUO\\$](http://dis.puc.state.oh.us/ViewImage.aspx?CMID=SK29QJKYOPISBUO); Supplemental Testimony of Waggoner at HLW-1S, 2S, 3S (4/4/00), available at:

demonstrated that the existing rates—*rates approved by the Commission*—are unjust and unreasonable. In effect, FES equates the poor economics of its units with unreasonable rates.⁴⁷ A guarantee of positive annual revenue in a competitive market, however, is not required by the United States Constitution or the Federal Power Act.⁴⁸

4. The Request ignores decades of precedent by seeking cost-based rates that seek to reverse the owner’s write-down of the asset value.

Throughout the Request, FES asks the Department to order PJM to enter cost-based contracts with many generation assets, overturning FERC decisions granting market-based rate authority to generation assets such as those of FES. In essence, FES is proposing to “have its cake and eat it too.” FES is requesting that PJM customers be forced to pay cost-based rates for power from nuclear and coal facilities through “full recovery of [the generator’s] fully allocated costs and a fair return on equity.”⁴⁹

In making this request, FES is prodding the Secretary to take dramatic steps in contravention of FERC policy set forth in Order No. 697, overriding FERC’s authority and

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=SLQYV6XHZZIUF95R>. FirstEnergy’s stranded cost total authorized in its electric transition plan was approximately \$6.41 billion (\$5.25 billion for out-of-market generation and \$1.16 billion for regulatory assets). PUCO Case No. 99-1212-EL-ETP, Opinion and Order at 31 (7/19/00), available at: [http://dis.puc.state.oh.us/ViewImage.aspx?CMID=SK29QJKYOP1\\$BUO\\$](http://dis.puc.state.oh.us/ViewImage.aspx?CMID=SK29QJKYOP1BUO); Supplemental Testimony of Waggoner at HLW-1S, 2S, 3S (4/4/00), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=SLQYV6XHZZIUF95R>.

⁴⁷ See, e.g., Exelon Comments at 9, FERC Docket No. RM18-1-000. There is also a substantial inconsistency in the claims the parties are making as to the failures inherent in the market-based approaches of the RTOs and ISOs. For example, the Nuclear Energy Institute complains about the effect of short term prices while simultaneously pointing out that other social goals are embedded in retail and wholesale pricing. NEI Comments at 3-4, FERC Docket No. RM18-1-000.

⁴⁸ *Market Street Railway Co. v. California Railroad Comm’n*, 323 U.S. 548 (1945); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (regulation under the parallel provisions of the Natural Gas Act does not ensure that the business will produce net revenue).

⁴⁹ Request at 31. Specifically, FES asks that the Emergency Order apply to unregulated “nuclear and coal-fired generators located within the PJM footprint” that are compliant with environmental laws and possess certain levels of on-site fuel storage. *Id.*

imposing non-market prices on uneconomic assets. FES’s assertion that these actions would result in “just and reasonable rates” ignores decades of FERC precedent.

FES’s Request does not stop with a request for cost-based compensation; it also asks that recent impairments/write-downs, taken by FES and other asset owners consistent with accounting standards, be ignored in cost-of-service calculations. In Footnote 172 of the Request, FES states that “the traditional cost-of-service model needs to be modified” to be additionally favorable to FES and other generators. FES contends:

Certain nuclear and coal-fired units have, for financial reporting purposes, impaired the generating asset values based on the expectation that market revenues would not be sufficient to provide a return of and on invested capital. The fact that these assets were impaired for financial reporting purposes does not change the amount that was invested in the plant nor does it relieve their owners from their obligations to bondholders. *As a result, the traditional cost-of-service model needs to be modified* to allow cost recovery based on pre-impairment asset values or it needs to be modified to allow a return on equity on the post-impairment asset value with an additional allowance for recovery of maturing debt in addition to interest expense.⁵⁰

Even in situations where nuclear and coal-fired units have taken impairments—writing off the value of the asset—FES requests *full* cost-based recovery, *even on the value of the write-down*. Put simply, FES wants the Department to (1) magically restore, in contravention of FERC precedent, the full value of its assets; and (2) dictate that customers pay for FES shareholders to earn a “fair return on equity” of this full value. FES provides no support for this aspect of its Request.

On the merits, this Request should fail for many of the same reasons FERC rejected the proposed rulemaking in its Grid Reliability and Resilience Pricing rulemaking proceeding at Docket No. RM18-1-000. It is fundamentally unfair to require customers to fund FES and other generators’ “double dip”—benefitting from “original” asset value even after impairing the assets.

⁵⁰ Request at 31-32, fn. 172 (emphasis added).

FES has failed to demonstrate that its chosen units are actually needed to serve load and has failed to explain whether its proposed compensation should be net of market revenues. Further, its proposed solution, implemented by an emergency order, would neglect the cost controls imposed by proper cost-based ratemaking.

Energy customers in the PJM Region have already shouldered the costs of paying the asset owners at least once through regulated rates (return of, and on, capital investment), again through stranded cost recovery in several states, and once more when high natural gas prices in the mid-2000s drove energy market prices to higher levels. Now that these same energy customers are beginning to realize some benefit from Locational Marginal Pricing (“LMP”) occasioned by drops in natural gas prices, FES asks for an Order declaring an “emergency” and providing unprecedented and unlawful relief. The hyperbole and language of “crisis” used by FES reflects a desperate attempt by FES to prop up certain failing assets and deliver to its shareholders an investment return to which they are not entitled. The Request seeks relief that is impermissible; the Request should be denied.

C. FES Has Not Substantively Demonstrated that an Emergency Exists.

An emergency is “an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power.”⁵¹ Emergencies are caused by: (1) weather conditions, (2) acts of God, (3) unforeseen, unpreventable circumstances, (4) sudden increase in customer demand, (5) inability to obtain adequate amounts of the fuels necessary to generate electricity, or (6) regulatory action prohibiting certain power supply facilities.⁵² FES has failed to demonstrate “a specific

⁵¹ 10 C.F.R. § 205.371.

⁵² 10 C.F.R. § 205.371.

inadequate power supply situation” caused by any of those scenarios.⁵³ Economic circumstances resulting from a changing generation resource landscape do not constitute a sudden emergency requiring immediate action. In response to FES’s Request, PJM stated: “without reservation there is no immediate threat to system reliability.”⁵⁴

1. PJM is not facing premature retirements of coal and nuclear generating facilities; rather, units are retiring due to correct economic signals.

In the Request, FES argues that FERC and PJM are allowing premature retirements of coal and nuclear generating facilities and argue immediate action is necessary to avert a crisis. Despite FES’s claims to the contrary, capacity reserve margins are ample in the PJM Region. Retirement decisions have been based upon fundamental economics, involving many generation facilities that have reached the end of their normal lives. These retirements cannot be accurately characterized as *premature*.⁵⁵ Nuclear units that have retired have done so based upon multiple factors, including equipment repairs that became unfeasible. Further, the minimal use of Reliability Must Run (“RMR”) agreements demonstrates that the organized market regions are by no means facing the loss of critical generation facilities.

a. Ample capacity reserve margins in PJM demonstrate that retirements have not been premature.

In PJM, the most recent BRA for capacity, for the 2020/2021 Delivery Year, cleared reserves of 23.3 percent—or 6.7 percentage points higher than the targeted minimum required reserve level of 16.6 percent.⁵⁶ The fact that 165,109.2 megawatts (“MW”) of unforced capacity

⁵³ 10 C.F.R. § 205.371.

⁵⁴ PJM Letter to Secretary Perry re FES’s Request for Emergency Relief under Section 202 of the Federal Power Act at 1 (Mar. 30, 2018).

⁵⁵ See Request at 12.

⁵⁶ See 2020-2021 BRA Results, available at <https://www.pjm.com/~media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx> (last accessed Apr. 5, 2018).

producing reserves of 23.3 percent in PJM cleared in the BRA does not even tell the whole story.⁵⁷ The amount of capacity in PJM greatly exceeds the amount of cleared resources, with a total of 189,917.8 MW of capacity offered into the 2020/2021 BRA. Resources that were eligible to participate in the auction exceeded this amount, and totaled 212,995.6 MW.⁵⁸ By any measure, PJM does not face a capacity shortfall.

Interconnection queues for new generation facilities are also quite robust. For example, based upon a recent report, there are over 60,000 MW of new generation resources in various stages of PJM's interconnection queue.⁵⁹ The fact that most of this new generation is planned as renewable or gas-fired resources simply reflects the current economics of constructing new generation facilities. Clearly, recent attempts to construct new coal-fired and nuclear facilities have not proved to be great success stories.⁶⁰ Under these circumstances, and given continued and projected low natural gas prices, it logically follows that interconnection queues are dominated by renewable and gas-fired generation facilities. While not all planned generation facilities in the queue will ultimately be placed in service, many of them will be. This reality is not reflected anywhere in the FES Request.

Clearly, there is no current or imminent shortage of generation resources that warrants any action, much less the type of action contemplated in the Request. The fact that some existing coal-

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ PJM Interconnection, L.L.C., *PJM Interconnection Queue Status & Statistics Update Database Snapshot on 04/24/2017* at 16 (May 4, 2017), available at <http://www.pjm.com/-/media/committees-groups/committees/pc/20170504/20170504-item-12-pjm-queue-status-update.ashx> (last accessed Apr. 4, 2018).

⁶⁰ See The Post and Courier, *Two identical nuclear projects, one in Georgia and one in South Carolina. Only one survived* (Oct. 29, 2017), available at http://www.postandcourier.com/news/two-identical-nuclear-projects-one-in-georgia-and-one-in/article_4954353a-b8f6-11e7-be85-f341791366a7.html (last accessed Apr. 4, 2018). See also Mississippi Public Service Commission, *Mississippi Power Company to Suspend Lignite Coal Gasification at Kemper Co. Power Plant* (June 28, 2017), available at <http://www.psc.state.ms.us/mpsc/press%20releases/2017/Mississippi%20Power%20Company%20to%20Suspend%20Lignite%20Coal%20Gasification%20at%20Kemper%20Co.%20Power%20Plant.pdf>.

fired and nuclear generating facilities have recently retired, or plan in the near future to retire, is simply a function of market economics.⁶¹

b. Many coal-fired generation facilities have reached the end of their remaining useful life, triggering retirement.

Nationwide, the coal units that were retired in 2015 were mainly built between 1950 and 1970, and the average age of those retired units was 54 years. The rest of the coal fleet that continues to operate is relatively younger, with an average age of 38 years.⁶² The coal units retired in 2015 also tended to be smaller than the rest of the coal fleet. The net summer capacity of the average retired coal unit was 133 MW, compared with 278 MW for the average coal units still operating.⁶³ Coal plants in these vintages have a typical design life of between 30 to 40 years.⁶⁴ Thus, the coal-fired power plants that have recently retired are beyond their design life,⁶⁵ and their smaller size makes them generally less economic to run. This reality is not reflected in the FES Request.

c. Nuclear plant retirements have been driven by economics, local politics, and equipment failures.

FES argues that PJM does not value resiliency and therefore does not appropriately compensate resources like nuclear and coal. An examination of recent nuclear plant retirements

⁶¹ Given the current market disincentives, this process makes intuitive sense. With lower wholesale prices of electricity due to falling natural gas prices and increasing low marginal cost renewables, coal and nuclear plants make less money and become increasingly financially distressed. Eventually, dismal revenue projections and falling profits lead to a management decision to shed unprofitable assets. While other issues—including increasing environmental burdens for coal and rising operating costs for nuclear—were contributing factors, *the core issue boils down to economics*. If wholesale electricity prices were higher, for example, it would be profitable for a coal plant to install new emission scrubbers and the magnitude of coal and nuclear retirements would be lower. Murray Energy Comments at 19 (emphasis added).

⁶² See EIA Mar. 8, 2016 *Electric Generator Inventory*.

⁶³ *Id.*

⁶⁴ See American Public Power Association, *Michigan's Lansing BWL to close coal-fired power plant by end of 2025* (Aug. 25, 2017), available at <https://www.publicpower.org/periodical/article/michigans-lansing-bwl-close-coal-fired-power-plant-end-2025> (last accessed Apr. 4, 2018).

⁶⁵ See Power, *America's Aging Generation Fleet* (Jan. 28, 2013), available at <http://www.powermag.com/americas-aging-generation-fleet/?printmode=1> (last accessed Apr. 4, 2018).

nationwide supports the conclusion that the retirements have been driven by economics and equipment failures that proved too costly to repair, or resulted from negotiations with state or local officials who were concerned over continued operation of the facilities.⁶⁶

In the PJM territory, Exelon Corporation agreed to cease electric generation operations at the Oyster Creek Generating Station by December 31, 2019. The agreement was part of a negotiated settlement with the State of New Jersey intended to ensure that water withdrawals from Barnegat Bay for cooling purposes and discharges from the plant did not damage the ecological health of the Bay.⁶⁷

⁶⁶ This trend is not isolated to PJM. In January of 2017, Entergy announced that it had reached an agreement with the State of New York to shut down the Indian Point nuclear station by 2021 rather than continuing to fight legal battles over renewal of licenses. See Entergy, *Entergy, NY Officials Agree on Indian Point Closure in 2020-2021* (Jan. 9, 2017), available at <http://www.entergynewsroom.com/latest-news/entergy-ny-officials-agree-indian-point-closure-2020-2021/> (last accessed Apr. 4, 2018). Entergy also cited economic factors as contributing to the decision to shut down the facility. Dominion Energy elected to close the Kewaunee Power Station in Wisconsin in 2013 after failing to find a buyer. See USA Today, *Kewaunee County ready to move on after nuclear plant closing* (July 12, 2017), available at <https://www.usatoday.com/story/news/investigations/2017/07/12/kewaunee-nuclear-plant-closing/103598506/> (last accessed Apr. 4, 2018). Dominion said the decision was based purely upon economics, as the plant lacked economies of scale and falling natural gas prices had lowered wholesale power prices. Owners of the San Onofre nuclear power plant made the decision to close the facility in 2013, after a project to replace steam generators went poorly. See The Orange County Register, *San Onofre nuclear plant to shut permanently, Edison says* (June 8, 2013), available at <http://www.ocregister.com/2013/06/08/san-onofre-nuclear-plant-to-shut-permanently-edison-says/> (last accessed Apr. 4, 2018). Duke Energy announced in 2013 that it would close the Crystal River nuclear facility in Florida after construction workers cracked the wall of the containment building during a project to replace steam generators. See Tampa Bay Times, *Duke Energy announces closing of Crystal River nuclear power plant* (updated Feb. 11, 2014), available at <http://www.tampabay.com/news/business/energy/duke-energy-announces-closing-of-crystal-river-nuclear-power-plant/1273794> (last accessed Apr. 4, 2018). Pacific Gas & Electric Co. announced in June 2016 that it would shut down its Diablo Canyon nuclear reactors when their operating licenses expire in 2024 and 2025. However, the decision to shut down the reactors was the result of a negotiated settlement with environmental organizations. See Los Angeles Times, *PG&E to close Diablo Canyon, California's last nuclear power plant* (June 21, 2016), available at <http://www.latimes.com/business/la-fi-diablo-canyon-nuclear-20160621-snap-story.html> (last accessed Apr. 4, 2018). Vermont Yankee Nuclear Power Station closed in December 2014. Entergy's decision to shut down the facility resulted from negotiations with state officials who objected to continued operation of the facility. See State of Vermont Public Service Department, *Brief History of Vermont Nuclear Power* (2017), available at http://publicservice.vermont.gov/content/nuclear_decommissioning_citizens_advisory_panel_ndcap/history. Entergy announced in December 2016 that it planned to close the Palisades nuclear generating facility in Michigan on October 1, 2018. On September 28, 2017, Entergy announced it was reversing its decision and would operate the facility at least until the spring of 2022. See Entergy, *Entergy to Continue Operating Palisades Power Plant Until Spring 2022* (Sept. 28, 2017), available at <http://www.palisadespower.com/entergy-to-continue-operating-palisades-power-plant-until-spring-2022/> (last accessed Apr. 4, 2018).

⁶⁷ See State of New Jersey Department of Environmental Protection, *Comprehensive Plan of Action Item #1 Close Oyster Creek Nuclear Power Plant* (last updated June 16, 2016), available at <http://www.nj.gov/dep/barnegatbay/plan-oystercreek.htm>.

These decisions to operate or close existing reactors illustrate that nuclear plant retirements are not being driven by RTO power market rules and, thus, the relief being sought by FES would have no impact on those closures. In some cases, local politics and equipment failures have led to decisions to retire or to continue to operate nuclear generating facilities. In fact, three of these closures (Kewaunee, San Onofre, and Crystal River) are not even located in regions of the country that would be subject to the Emergency Order. Thus, the claim that “PJM has done little to prevent this emergency,” or that RTO market rules are driving *premature* nuclear plant retirements does not withstand scrutiny.⁶⁸

d. The use of RMR agreements has been infrequent.

The RMR process provides PJM with the ability to keep essential assets online if, and only to the extent that, a reliability problem exists. PJM does use this process on occasion when needed. However, PJM has used the process infrequently, further confirming that generation needed for reliability or “resilience” is not retiring and certainly not retiring prematurely.⁶⁹

The nation is not facing *premature* retirements of coal and nuclear generating facilities; rather, these generating units are retiring due to correct economic signals or for reasons completely unrelated to PJM market rules. Not only is there no emergency, but PJM’s process is working by facilitating the exit of uneconomic and inefficient old generation and facilitating the entry of economic and efficient new generation. It would be inappropriate for the Secretary to issue an Emergency Order that would fundamentally disrupt the entry and exit signals that are currently being provided by the PJM market.

⁶⁸ See Request at 1.

⁶⁹ American Manufacturers Comments at 34-39.

2. The recent Bomb Cyclone weather events and resulting NETL Report do not justify FES's request for DOE to prop up uneconomic coal and nuclear units in PJM.

In its Request, FES relies heavily on a recently released a DOE-sponsored National Energy Technology Laboratory report (“NETL Report”).⁷⁰ The NETL Report states that some coal-fired generating units were a prominent example of “resilience in action” in PJM during the “Bomb Cyclone” winter weather events in late December 2017 to early January 2018.⁷¹ However, the NETL Report’s conclusion about the resiliency of existing coal units in PJM is based on a limited comparison between the increase in coal generation during the Bomb Cyclone and the level of generation from December 1 through 26, 2017 from other resources.⁷² Importantly, the NETL Report includes an upfront disclaimer indicating that it only represents “the views and opinions of authors” that “do not necessarily state or reflect the those of the United States Government or any agency thereof.”⁷³

Despite FES’s claims, the NETL Report does not show that “immediate action” by DOE is necessary to prop up uneconomic coal and nuclear units.⁷⁴ Prior to the Bomb Cyclone, many coal generation units were idle or only partially utilized because they were uneconomic and too costly to operate. The increase in coal generation during the Bomb Cyclone shows only that those coal generators are uncompetitive unless electricity and gas prices increase significantly.⁷⁵ Instead of measuring resilience in PJM, the NETL Report “simply finds which energy sources are the most

⁷⁰ See Request at 4-9 (citing National Energy Technology Laboratory, Reliability, Resilience, and the Coming Wave of Retiring Baseload Units Volume I: The Critical Role of Thermal Units During Extreme Weather Events (Mar. 13, 2018) (“NETL Report”), available at <https://www.netl.doe.gov/research/energy-analysis/search-publications/vuedetails?id=2594>.

⁷¹ NETL Report at 12.

⁷² See NETL Report at 12.

⁷³ See NETL Report, Disclaimer page.

⁷⁴ See Sierra Club Comments at 12-15 (submitted Mar. 30, 2018 to the DOE in response to FES’s Request).

⁷⁵ Sierra Club Comments at 13.

expensive.”⁷⁶ Thus, FES’s reliance on the NETL Report’s cursory assessment that many coal units in PJM are expensive fails to support FES’s claim that those units are critically needed to meet demand or ensure resiliency or reliability.

Essentially, the NETL Report provides an assessment of the present supply curve in PJM and highlights that as load increases, RTOs move up the supply stack and increasingly commit higher cost, lower efficiency units.⁷⁷ The NETL Report appears to misconstrue typical generation operation of coming on-line when market forces are such that the price being paid for electricity is greater than the cost for the unit to produce electricity as somehow equating that to a herculean effort at providing grid resilience. Such an assessment ignores the fact that in most cases, the generation coming on-line is receiving a capacity market payment collected from consumers to provide standby service and be ready to provide output when demand or prices are high. While it is admirable that units residing in the portion of the supply stack were called on and operated as obligated, it is no less important to recognize that there likely remained higher priced units in the supply stack that were not required to operate during the Bomb Cyclone but none-the-less also received a capacity payment for the standby service that was provided.

Reliance on an assessment of resilience simply based on a cursory review of increased generation output overlooks other data points that qualify the increased output. As PJM noted, combined, 28% of its coal and oil units with on-site fuel inventories reported issues with fuel

⁷⁶ Sierra Club Comments at 13 (citing Michael Goggin, Fossil Lab Misses Mark in Cold Weather “Resilience” Report, (Mar. 28, 2018), available at <http://sustainableferc.org/fossil-lab-misses-mark-in-cold-weather-resilience-report/>.)

⁷⁷ See NETL Report at 12-18.

resupply due to fuel transportation constraints from a contribution from coal plants, with coal units most frequently reporting delays due to frozen rivers and increased barge traffic.⁷⁸

Additionally, as it relates to PJM, the NETL Report seems to value the inability of coal plants to cycle during lower priced overnight hours or lower load days of the Bomb Cyclone and equates this inflexibility to increase resilience contribution. NETL correctly identified cycling of natural gas units during the Bomb Cyclone but failed to acknowledge that the flexibility afforded by units that can cycle over holidays, lower load weekend periods, and overnight hours is a desirable characteristic that results in more efficient power market operations.⁷⁹ In fact, based on the average daily generation output metric that is used in NETL to purportedly assess plant performance and resilience contribution value, this metric is likely skewed significantly due to desired cycling of the natural gas and oil units, and its value as a meaningful metric is questionable.

As explained in Sierra Club's comments in response to FES's Request, PJM is and has been effectively ensuring system reliability and resilience during a time of shifting energy and generation resources.⁸⁰ During the Bomb Cyclone, PJM explained that "the grid and the generation fleet performed well" and that "[e]ven during peak demand, PJM had excess reserves and capacity."⁸¹ The NETL Report does not demonstrate that, after the retirement of certain coal

⁷⁸ PJM Interconnection, PJM Cold Snap Performance Dec. 28, 2017 to Jan. 7, 2018 (Feb. 26, 2018) at 16, available at <http://www.pjm.com/-/media/library/reports-notices/weather-related/20180226-january-2018-cold-weather-event-report.ashx>).

⁷⁹ See NETL Report at 15 ("wide swings in hourly output of up to 4 GW imply that increment was met by cycling natural gas combined cycle units").

⁸⁰ See Sierra Club Comments at 15.

⁸¹ Sierra Club Comments at 15 (citing PJM Interconnection, PJM Cold Snap Performance Dec. 28, 2017 to Jan. 7, 2018 (Feb. 26, 2018), available at <http://www.pjm.com/-/media/library/reports-notices/weather-related/20180226-january-2018-cold-weather-event-report.ashx>).

units, PJM will be unable to procure sufficient generation capacity to meet its reserve margin requirement from new or existing resources.

Importantly, the NETL Report does not measure resiliency and does not constitute a formal and thorough determination on resiliency. A full-scale measure and evaluation of resiliency and the range of threats to the bulk power system is occurring in the FERC Grid Resilience proceeding.⁸²

3. The Polar Vortex does not justify FES's request for DOE to prop up uneconomic coal and nuclear units in PJM.

a. *PJM has already adopted changes in response to the 2014 Polar Vortex.*

FES argues that the 2014 Polar Vortex (and associated cold weather spikes) justifies its request for DOE emergency action to ensure the continued operation of certain existing nuclear and coal generation facilities.⁸³ PJM has already initiated and adopted changes in response to the 2014 Polar Vortex. Thus, FES fails to reconcile its Request for an Emergency Order with the many market rule changes and generation performance enhancements that have already been implemented and have demonstrated improved system performance.⁸⁴ Instead, PJM invokes the Polar Vortex simply to argue for prolonged operations of certain coal and nuclear units because electric supply from nuclear and coal-fired generators is critical during cold weather events.

b. *The 2014 Polar Vortex demonstrates that lessons learned have been successful.*

The two regions most directly impacted by the 2014 Polar Vortex have already undertaken detailed reviews and have implemented market rule changes to forestall a repeat performance of

⁸² See Grid Resilience in Regional Transmission Organizations and Independent System Operators, Docket Nos. AD18-7-000; see R-18-07

⁸³ Request at 5, 9, 17.

⁸⁴ See Sierra Club Comments at 10-12 (arguing that the Polar Vortex does not justify FES's request for DOE to prop up uneconomic coal and nuclear units in PJM).

the operational issues that challenged grid performance in 2014.⁸⁵ PJM has implemented numerous changes to its market rules that include its Capacity Performance construct and changing the timing of its day-ahead scheduling deadlines to provide gas-fired generators a better ability to submit timely pipeline nominations.⁸⁶ ISO New England has also implemented market rule changes that include its forward capacity market pay-for-performance rules.⁸⁷ Even regions not directly stressed by the 2014 Polar Vortex have used it as a “lessons learned” experience and have taken steps to improve market functionality. For example, New York ISO has initiated changes to its shortage pricing rules and improved operational monitoring on fuel availability.⁸⁸ MISO has implemented over 20 specific steps to reduce risks associated with grid operation during extreme weather events.⁸⁹

Even though not all of the market rule changes have been implemented, the changes implemented prior to the winter of 2015 have already demonstrated a marked improvement in system performance. The winter of 2015 was remarkably similar to weather in 2014 as described by PJM:

The winter of 2015 was marked by cold temperatures similar to the winter of 2014
– with the coldest temperatures experienced during February 2015 throughout the

⁸⁵ The 2014 Polar Vortex and earlier severe winter weather conditions did, however, highlight operational issues that contributed to the forced outages and poor performance, and compelled examination of the underlying causes and remedies. The regions most affected—PJM and ISO-NE—undertook detailed reviews to rectify those issues. PJM and ISO-NE each found that most, if not all, of the operational issues could be addressed if generation suppliers made investments in weatherization or increased operating budgets and commitments for future fuel deliveries. Both regions proposed (and the Commission generally accepted) market solutions that: (1) pay generation resources for better performance and allow recovery of investment in operational reliability of the resource, including forward fuel costs; and (2) impose a strong monetary penalty for poor performance—with limited to no exceptions. Comments of the ISO/RTO Council at 21, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017) (“ISO/RTO Council Comments”).

⁸⁶ PJM Comments, Appendix A at 3-7, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000.

⁸⁷ Comments of ISO New England Inc. at 11, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017).

⁸⁸ Comments of the New York Independent System Operator, Inc., Attachment at 5, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017).

⁸⁹ MISO Comments, Attachment A at 20, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000.

entire PJM footprint. Numerous cities across PJM hit their daily low-temperature records during February 2015. Due to the low temperatures and associated high electricity demand for heating needs, PJM set a new wintertime peak demand record of 143,086 megawatts the morning of Feb. 20 (hour ending 0800). The new peak record surpassed the previous all-time winter peak of 142,863 MW set Jan. 7, 2014. Some of the individual transmission zones within the PJM footprint also set all-time record winter peaks.

In addition to the extremely cold temperatures, PJM also reviewed effective temperatures or wind chill data, for select cities throughout the footprint for both 2014 and 2015. This analysis indicated January 2014 actually felt colder just about everywhere when compared to 2015, especially in Columbus, Cleveland and Chicago, where effective temperatures were between 14 and 16 degrees warmer in 2015. The significant wind chill experienced during 2014 could have contributed to the higher amount of generator forced outages encountered in 2014. By comparison, the less severe warmer effective temperature, wind chill, in 2015 may have contributed to improved generator performance.⁹⁰

PJM reported improved system performance in 2015 notwithstanding the fact that certain market rule changes, such as its Capacity Performance rules, had not been implemented:

Generator performance in February 2015 showed improvement, with forced outage rates better than in January 2014. For the morning of Feb. 20, 2015, when PJM reached a new all-time winter peak, the forced outage rate was 13.4 percent, representing 24,805 MW of generation forced out of service. Although the 2015 winter peak forced outage rates represent an improvement over the 22 percent forced outage rate during the Jan. 7, 2014, peak, the 2015 rates were still above historical “normal” winter peak outage rate of between 7 and 10 percent. The performance improvements of winter 2015 over 2014 are attributed to steps PJM and generation owners initiated after the winter of 2014 experience: pre-winter operational testing for dual-fuel and infrequently run units, a winter-preparation checklist program, better communication of fuel status and increased coordination with natural gas pipelines.

A total of 168 units (9,919 MW) participated in the pre-winter operational testing. Units that participated in the pre-winter operational testing had a lower rate of forced outages compared to those that did not test.⁹¹

⁹⁰ PJM Interconnection, L.L.C., *2015 Winter Report* at 5 (May 13, 2015), available at <http://www.pjm.com/-/media/library/reports-noticees/weather-related/20150513-2015-winter-report.ashx?la=en>.

⁹¹ *Id.* at 5-6.

Other RTOs/ISOs have also reported improved operational performance due to market rule changes that were implemented following the 2014 Polar Vortex.⁹² Given the improved system performances resulting from the successful implementation of lessons learned from the 2014 Polar Vortex, FES fails to explain why reliance on cold weather occurrences during the 2014 Polar Vortex now provides an evidentiary basis for out-of-market subsidies to prolong the continued operation of certain coal-fired and nuclear generating facilities.

4. The bankruptcy filing by FES, subsequent to its Request to DOE, undermines FES's claims of "emergency."

On March 29, 2018, FES filed the instant Emergency Order Request with DOE. In FES's request, FES explained that it would likely file for bankruptcy at the end of March 2018.⁹³ On March 31, 2018—a mere two days after its Emergency Order Request — FES filed for bankruptcy in the U.S. Bankruptcy Court for the Northern District of Ohio.⁹⁴ FES's bankruptcy filing and the convenient foreshadowing of such bankruptcy two days earlier in the Emergency Order Request was a strategic business decision — not the result of an unforeseen and uncontrollable emergency. Thus, the planned bankruptcy filing by FES right after FES's Request to DOE undermines any and all claims of "emergency" by FES in the DOE request. Furthermore, the bankruptcy filing in fact solidifies and affirms FES's abuse of Section 202(c) of the Federal Power Act by engaging the DOE (and requiring the expenditure of resources by numerous stakeholders in the hours and days after FES's Emergency Order Request). The DOE should outright reject FES's request. It is not PJM's nor PJM's stakeholders' responsibility to help mitigate, resolve, or ameliorate FES's business and financial decisions that eventually gave way to FES's bankruptcy filing.

⁹² ISO/RTO Council Comments at 21-22, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000.

⁹³ Request at 8, 20, fn. 121.

⁹⁴ See http://www.cleveland.com/business/index.ssf/2018/03/firstenergy_solutions_bankrupt.html.

5. On-site fuel supply is not a significant contribution to reliability and resilience.

FES argues that nuclear and coal-fired units are “the backbone of the electric system” because they are designed to run “24/7” with 25 days of on-site fuel availability. However, the assumption that a significant on-site fuel supply contributes to grid reliability and resilience is contradicted by factual history. Comments submitted by The Rhodium Group, LLC (“Rhodium”) to the grid resiliency rulemaking in RM18-1-000 support this conclusion. Relying upon data submitted to the EIA on Form OE-417 reports since the beginning of 2012, Rhodium found that:

[b]etween 2012 and 2016, utilities reported roughly 3.4 billion customer-hours impacted by major electricity disruptions. 96% of those lost service hours were due to severe weather (Figure 2). Fuel emergencies or deficiencies at power plants resulted in 2,382 customer hours of lost service or 0.00007% of the total. *2,333 of those customer hours were due to one event in Northern Minnesota in 2014 involving a coal-fired power plant.*⁹⁵

Rhodium determined that the vast majority of customer outages were the result of damaged distribution facilities.⁹⁶ Thus, on-site fuel supply contributes little, if anything, to actual reliability and resilience. Further, the relatively short duration of most disruptive events undermines FES’s argument that 25 days of on-site fuel availability will ensure reliability and resilience.

D. If Reliability Concerns Were to Arise, PJM Has in Place Adequate Processes For Addressing Those Concerns.

PJM’s generation deactivation process adequately evaluates all generation retirements for an adverse impact on reliability. In its Open Access Transmission Tariff and in PJM Manual 14D, PJM describes a detailed process that must follow when a generation retirement is announced. After such an announcement, a timetable begins in which PJM initiates an analysis and explores

⁹⁵ Rhodium Comments at 3, *Grid Reliability and Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017) (emphasis added).

⁹⁶ *Id.* at 2.

transmission solutions to enable power to continue to reliably flow to customers.⁹⁷ Generator retirements are also included in PJM’s Regional Transmission Expansion Planning (“RTEP”) process. PJM utilizes criteria to identify potential transmission system problems due to specific retiring. PJM may order transmission upgrades to keep the grid reliable in response to generator retirements.

PJM has in place Tariff provisions that provide adequate compensation for units that determined to be RMR units. Attachment K Appendix Section 6 is entitled “Must-Run For Reliability Generation” and addresses PJM’s RMR process. The RMR process provides PJM with the ability to keep essential assets online. The RMR process is described in greater detail in Section 9.2 of PJM Manual 14D.

Under PJM Manual 14D, PJM may request a generating unit to operate past its desired deactivation date. Upon this notice, the generator may file with FERC for full cost recovery; alternatively, the generator owner may elect to receive avoidable cost compensation as per Part V of the PJM Tariff.⁹⁸

PJM has used the RMR process infrequently, indicating that generation needed for reliability or “resilience” is not retiring and certainly not retiring prematurely.⁹⁹ However, these processes provide PJM the tools to make it economic to keep generators online when necessary for grid reliability. This process, and PJM’s careful management of the grid, negate the need for an Emergency Order by the Department.

⁹⁷ See PJM Manual 14D: Generator Operational Requirements § 9.1. See also <http://learn.pjm.com/three-priorities/planning-for-the-future/explaining-power-plant-retirements.aspx>.

⁹⁸ PJM Manual 14D § 9.2.

⁹⁹ American Manufacturers Comments at 34-39, Docket No. RM18-1-000.

E. If Granted, the Request Would Unnecessarily Raise Energy Prices For Consumers and Directly Undercut the Tremendous Economic Advantage to the United States from Natural Gas Shale Plays.

FES's Request to DOE seeks to impose enormous unnecessary energy costs on the American public. The advent of low priced natural gas specifically, and energy prices generally, has been, and continues to be, a monumental opportunity for the nation's energy consumers. Low natural gas prices and the resulting low energy prices in LMP-based markets provide a tremendous economic advantage to energy-intensive businesses. These businesses contribute in meaningful and tangible ways to the communities in which they are located. The natural gas Shale Plays have spearheaded a "Manufacturing Renaissance" in the United States. Requiring customers, including energy-intensive businesses, to subsidize (apparently indefinitely) large amounts of uneconomic generation sources would directly undercut this opportunity for economic growth and impede the ability of market forces to naturally select successful generation resources.

The economic benefits of shale gas production are real and tangible. The lower price of natural gas translates into lower priced electricity. As stated in *The Economist*, "In principle, all American companies and consumers benefit from lower energy prices. The effect may not always be big enough to spur heavy new investment, but it might be sufficient to keep American factories with high labor costs going in the face of foreign competition."¹⁰⁰ Economists at Citigroup and UBS predict that shale gas will lift America's Gross Domestic Product ("GDP") growth by half a percentage point a year.¹⁰¹ Indeed, less expensive energy is cited as one factor by those who have predicted a manufacturing renaissance in America.¹⁰²

¹⁰⁰ The Economist, *Deep sigh of relief* (Mar. 16, 2013), available at <https://www.economist.com/news/special-report/21573279-shale-gas-and-oil-bonanza-transforming-americas-energy-outlook-and-boosting-its> (last accessed Apr. 3, 2018).

¹⁰¹ *Id.*

¹⁰² *Id.*

Natural gas markets have been found to be less integrated compared to markets for other fossil fuels. As such, U.S. natural gas prices have fallen sharply and are effectively decoupled from those in the rest of the world. This offers the United States a concrete competitive advantage. If energy-intensive customers are required to subsidize uneconomic coal and nuclear generators that the RTOs have already found to be unnecessary for reliable operations, the competitive cost advantage that the Shale Plays have brought will be undercut. Simply put, the tax on businesses produced by FES's Emergency Order—if it were to be approved—would increase energy costs and would make those regions that must pay the new tax less attractive for businesses to locate or expand their operations.

Other studies have linked American natural gas development with strengthening the U.S. economy and making domestic manufacturing more competitive.¹⁰³ A report from the University of Michigan found that more than 200 mostly U.S.-based companies have participated in “onshoring” during the prior four years, motivated in part by the availability of less expensive natural gas.¹⁰⁴ Researchers at the London School of Economics found the estimated effect of the shale gas boon on gross output, employment, and capital investment within energy-intensive sectors is “positive throughout and significant.”¹⁰⁵ Their research showed that the “shale gas boom” led to a “relative expansion of energy intensive manufacturing in the U.S.”¹⁰⁶ Similarly, the researchers found that U.S. manufacturing exports grew “by about 10 percent on account of

¹⁰³ See HIS CERA, *Fueling the Future with Natural Gas: Bringing It Home* (Jan. 2014), available at <http://marcelluscoalition.org/wp-content/uploads/2014/01/Fueling-the-Future-Executive-Summary-14Jan2014.pdf> (last accessed Apr. 3, 2018).

¹⁰⁴ University of Michigan, *Shale Gas: A Game-Changer For U.S. Manufacturing* at 14 (July 2014), available at <http://energy.umich.edu/sites/default/files/PDF%20Shale%20Gas%20FINAL%20web%20version.pdf>. (last accessed Apr. 3, 2018).

¹⁰⁵ Centre for Economic Performance, *On the Comparative Advantage of U.S. Manufacturing: Evidence from the Shale Gas Revolution* at 24 (Nov. 2016), available at <http://cep.lse.ac.uk/pubs/download/dp1454.pdf> (last accessed Apr. 3, 2018).

¹⁰⁶ *Id.* at 32.

their energy intensity since the onset of the shale revolution.”¹⁰⁷ In short, the study found that the “price differential between the U.S. compared to Asia and Europe is thus likely to persist in turn helping to lift U.S. manufacturing.”¹⁰⁸ Granting FES’s Request could potentially affect the existing price differential and, thus, undercut U.S. manufacturing.

Many view the United States as currently in the midst of an energy revolution. With such rapid fundamental changes afoot, it is reasonable to expect “winners” and “losers.” Low natural gas prices may have an adverse impact on certain market participants, such as certain inefficient legacy coal units and single-unit nuclear plants. As a general matter, however, the shale gas revolution should be viewed as an opportunity to establish a competitive advantage as the vast majority of our nation’s economy that has benefited from lower energy prices. FES’s Request seeks an outcome that would undeniably increase both near-term and long-term energy costs for all customers, particularly energy-intensive businesses, while providing unprecedented financial security and subsidies to a discreet and limited class of market participants that own inefficient legacy units. Such a result cannot be viewed as sound public policy or as capable of producing just and reasonable rates, free from the Federal Power Act’s requirement that rates shall not be unduly discriminatory or preferential. In fact, such an approach threatens the economic outlook for all businesses that evaluate energy costs as a component of whether to site, maintain, or expand businesses in a particular region.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 33.

F. FES’s Argument that Energy Price Formation in PJM Does Not Adequately Compensate Baseload Resources is Invalid and Inappropriate in an Emergency Order Request; FES’s Argument on Price Formation is More Appropriately Presented and Examined in the Ongoing PJM Stakeholder Process.

In its request, FES argues there is an urgent need for reforming energy market rules surrounding price formation in order to more appropriately compensate baseload resources like coal and nuclear facilities.¹⁰⁹ Through its Request, FES seeks to undermine competitive markets and the series of the Commission’s orders seeking and promulgating open access and competitive wholesale energy markets. FES’s argument on energy price formation is more appropriately presented and examined in the ongoing PJM stakeholder process instead of in an emergency order request.

1. Resilience is already a critical part of reliability assessments.

In comments to the Grid Resilience proceeding in AD18-7-000/RM18-1-00, PJM explained that it already considers resilience factors because many resilience actions are “anchored in...the existing reliability standards.”¹¹⁰ Resilience is a critical part of reliability assessments; however, resilience is not a wholly distinct and separate concept. FES has not demonstrated that DOE or the Commission should carve out resilience and treat it as a discrete characteristic of wholesale electricity markets. Resilience is embedded within independent reliability standards that are promulgated and enforced by the North American Electric Reliability Council (“NERC”), the not-for-profit electric reliability organization that develops and enforces reliability standards and is subject to FERC’s oversight. NERC is well-positioned to provide intelligence, knowledge,

¹⁰⁹ Request at 8, 14, 16, 19, 27.

¹¹⁰ PJM Comments, Docket No. AD18-7-000 at 4 (filed Mar. 9, 2018).

metrics, and threat analyses to apply to resilience vulnerability and high-impact, low-frequency events that test grid resilience.¹¹¹

PJM has explained that the PJM Bulk Electric System is safe and reliable today because it has been designed and operated to meet all applicable reliability standards.¹¹² Therefore, the grid operator in PJM, tasked with ensuring reliability, does not contend there are safety and reliability issues in the PJM footprint. PJM, a non-profit service company, is better positioned to evaluate reliability issues and emergencies surrounding certain uneconomic generating units than FES. In a March 30, 2018 letter response to FES's Request, PJM again affirmed: "PJM can state without reservation there is no immediate threat to system reliability."¹¹³

2. FES has not demonstrated a dearth of capacity in PJM.

Not only has FES failed to demonstrate a lack of capacity in PJM, but PJM has indicated that the opposite is the case.¹¹⁴ PJM's study, *PJM's Evolving Resource Mix and System Reliability*, released in 2017, stated that "[t]he expected near-term resource portfolio is among the highest-performing portfolios and is well equipped to provide the generator reliability attributes" based on the requirements of the PJM Open Access Transmission Tariff, the PJM Operating Agreement, the PJM Reliability Assurance Agreement, and applicable NERC reliability standards.¹¹⁵ Even as the potential future resource mix moves in the direction of less coal and nuclear generation, the PJM Evolving Resource Mix Study found generator reliability attributes of frequency response,

¹¹¹ See, e.g., NERC's State of Reliability 2017 Report (June 2017), available at https://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/SOR_2017_MASTER_20170613.pdf.

¹¹² PJM Comments, Docket No. AD18-7-000 at 4 (filed Mar. 9, 2018).

¹¹³ PJM Letter to Secretary Perry re FES's Request for Emergency Relief under Section 202 of the Federal Power Act at 1 (Mar. 30, 2018).

¹¹⁴ See American Manufacturers' Comments at 31-32 and n. 67.

¹¹⁵ PJM Interconnection, L.L.C., *PJM's Evolving Resource Mix and System Reliability*, at 4 (Mar. 30, 2017) (internal footnote omitted) ("*PJM Evolving Resource Mix Study*"), available at <http://www.pjm.com/~media/library/reports-notices/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx>.

reactive capability, and fuel assurance may decrease while flexibility and ramping attributes increase.¹¹⁶ To be clear, PJM’s study identified areas of future attention, but the study did not suggest a reliability problem of such a magnitude that it needed to be addressed imminently.

3. Energy prices are currently reflecting lower fuel prices.

A fundamental characteristic of PJM’s LMP is that it drives short-term market outcomes toward pricing for all energy on the basis of the cost of the marginal unit, which is the least efficient unit, the unit with the most expensive fuel source, or both. In 2008-2009, when natural gas prices were high, customers shouldered the burden with respect to higher energy prices. During that time of record high LMPs, customers raised repeated concern, if not objection, that LMP drove short-term market outcomes toward pricing for all energy on the basis of high-priced natural gas.¹¹⁷ The response then to customer concerns was effectively that “the market was the market,” with high prices being only a function of gas prices and nothing can or should be done to ameliorate high LMPs. With the shale gas revolution and abundant natural gas and low fuel prices, LMPs have reached historic lows.

In PJM, the Independent Market Monitor has recognized that LMPs are low but that LMPs are not too low.¹¹⁸ PJM energy prices track closely with fuel prices and indicate an efficiently functioning market.¹¹⁹ Energy markets and capacity markets work together to allow resources an opportunity to recover their costs. In a time of low energy prices, it should not be surprising that the capacity market needs to do more “heavy lifting” to support ISO/RTO resource adequacy and reliability imperatives and return the “missing money” that was often cited as the initial need for

¹¹⁶ *PJM Evolving Resource Mix Study* at 5.

¹¹⁷ *Id.* at 15 (“The majority of short run marginal costs for power production are fuel costs.”).

¹¹⁸ Testimony of Joseph Bowring Before the House Committee on Energy & Commerce, Subcommittee on Energy, State of Electricity Markets at 4 (Oct. 5, 2017), available at <http://docs.house.gov/meetings/IF/IF03/20171005/106470/HHRG-115-IF03-Wstate-BowringJ-20171005-U3.pdf>.

¹¹⁹ IMM Comments at 15, Docket No. RM18-1-000.

capacity markets. Even with low energy prices, the PJM Independent Market Monitor has found that at least 50 percent of all nuclear units recovered avoidable costs from all markets, including the capacity markets.¹²⁰ Based on the twelve months ending June 2017, at least 75 percent of all nuclear units recovered avoidable costs from all markets.

It also warrants noting that several other initiatives have been implemented recently that may have impacts on LMP in PJM, such as the Capacity Performance requirements, increasing the PJM energy offer price cap, allowing the triggering of transient shortages, and adding new steps to the operating reserve demand curve for shortage pricing. These changes should be given an opportunity to address any perceived concerns that may still linger. For example, on September 21, 2017, as reserve margins reduced and began to approach reserve requirements, PJM real-time LMP and reserve prices rose significantly due to the recently implemented changes to the shortage pricing operating reserve demand curves. On this day, between 2:00 p.m. and 5:00 p.m., more than half of the pricing for this period was impacted by a market change that triggers shortage pricing as reserves *approach* a reserve requirement rather than trigger shortage pricing only after reserve requirements have been violated.¹²¹ This change to shortage pricing was implemented on July 12, 2017.

4. Confidence in markets is tested when changes to energy market price formation can be viewed as a thinly veiled effort to provide price support for certain classes of resources.

Confidence in markets is tested when changes to energy market price formation can be viewed as a thinly veiled effort to provide price support for certain classes of resources or certain market participants. Industrials advocated for restructuring over twenty years ago to allow the

¹²⁰ *Id.* at 18.

¹²¹ See PJM Interconnection, L.L.C., *Real-time Market Results* at 6 (Sept. 21, 2017), available at <http://www.pjm.com/-/media/committees-groups/committees/oc/20171010/20171010-item-19-real-time-market-results.ashx>.

market to discipline such market entry and exit; it is a fine line between adjusting market rules and engineering preferred pricing outcomes. Coal-fired units with an average age of 49 years old comprise the majority of capacity that is at risk of retirement.¹²² It is reasonable to query how long these assets should reasonably be expected to be operational. Without substantial evidence of reliability problems with the current time-tested approach to energy price formation, FES's Request can reasonably be viewed as a reckless attempt to engineer preferred pricing outcomes to support certain legacy units.

Low natural gas prices may have an adverse impact on certain PJM market participants but, as a general matter, the shale gas revolution should be viewed as a remarkably beneficial opportunity for this region to establish a competitive advantage for businesses. If the market was not allowed to develop during the first decade of the 2000s during a time of high natural gas prices, the shale gas revolution, shale finds, and associated technologies (all leading to today's lower natural gas prices) may not have robustly developed. Unilaterally modifying energy price formation to benefit certain legacy units will increase, to some unknown degree, costs to customers, including businesses that evaluate energy costs as a component of whether to site or expand business in a particular region. Low energy prices send a signal that resources may be uneconomic and should retire—that is an efficient market result. Choosing certain higher cost generation technologies and not letting the market function could chill future investments in alternative energy technology and other resources.

5. Unit inflexibility should not be used as an excuse to inflate energy prices.

To the extent price formation is an issue that warrants attention, many fundamental issues must be considered before the bedrock of PJM's energy markets is upset. FES's characterization

¹²² IMM Comments at 19-20, Docket No. RM18-1-000.

of the facts in its Request implies that certain inflexible resources are being required to operate at a loss. That is simply not the case. Inflexible coal or nuclear units serving load may operate at a loss during a particular hour, but PJM makes a unit that is dispatched whole over an entire day period; losses in some hours are netted with profits in other hours.

In a nutshell, if the generation units were flexible, the units would be backed down or shut down when they became uneconomic to run. An approach that allows these inflexible resources to set prices does not comport with economic logic or the fundamentals of LMP. Simply put, inflexible units may operate and serve load, but, if the inflexible units were to retire, other presumably flexible units would replace them. Such is the reality of using markets to discipline market entry and exit.

6. Adoption of changes to energy pricing rules would severely disrupt contracting for retail supply.

Given the heavily regulated nature of PJM’s energy market, a common feature of industry-standard agreements for wholesale transactions and for service to retail customers is a “change in law” provision or “regulatory change” clause.¹²³ Such provisions authorize suppliers to pass along additional costs caused by a change in law or regulatory change to their customers currently under contract. As the Department considers FES’s call to override the fundamentals of LMP in PJM, the Department should be cognizant of the ripple effects of such an action on contracts across the industry, including potentially default service agreements and retail agreements.

While ISO/RTO markets across the country have experienced numerous rule changes, the LMP price-setting fundamentals in PJM have been virtually unchanged. Where LMP mechanics have changed in other markets, such changes have occurred after significant stakeholder processes

¹²³ See Energy Research Council, *Are fixed-price electricity supply contracts really fixed?* (2013), available at <http://energyresearchcouncil.com/Are-fixed-price-electricity-supply-contracts-really-fixed.html> (“Many supplier contracts have “pass-through” or “change-in-law” provisions, which can affect a customer’s electricity bill.”) (website sponsored by, among others, Constellation, an affiliate of Exelon).

that included market simulations that previewed the resulting pricing under the new regime.¹²⁴ This provided ample time for operational analysis to be performed and market participants to understand the implications of the change.

Such a significant change as FES proposes, especially without appropriate time to understand the potential market implications, adds to uncertainty and may lead some market participants to re-open existing contracts using the industry-standard “change in law” or “regulatory change” provisions.

In this context, some suppliers may argue that the higher prices produced by the change in law or regulatory change are costs that should be shifted to their counterparties. For retail energy contracts and default service agreements, quantifying the impact of a change in law or regulatory change of this magnitude and complexity would be speculative and costly. Customers would have little information or leverage to dispute the amount of additional costs their suppliers will require them to pay to avoid default.

This Request should not become a vehicle to short-circuit price formation changes. Certainly, the record does not support a finding that existing price formation is unjust and unreasonable. The Federal Power Act requires more evidentiary support before significant costs are put upon customers to the benefit of the owners of nuclear and coal-fired generation.¹²⁵

¹²⁴ . For example, MISO began its discussions of extended LMP, which PJM referenced in its Comments, in at least 2010, if not before. MISO submitted proposed tariff revisions to implement extended LMP (Initial ELMP Filing) in December 22, 2011, in Docket No. ER12-668-000, which were conditionally approved on July 20, 2012. Extended LMP was not implemented until March 1, 2015. A status report was filed in ER12-668 on August 29, 2016.

¹²⁵ *Id.* at 35.

G. FES Seeks to Undermine the Commission’s Recent Order Rejecting the Grid Resiliency Pricing Proposal and the Ongoing FERC Grid Resilience Proceeding and Stakeholder Processes.

1. FES failed to request rehearing of the Commission’s January 8 Order rejecting the Grid Resiliency Pricing proposal.

On January 8, 2018, the Commission terminated the proposed resiliency rule focused on providing out-of-market compensation to generators with on-site fuel capability and instead instituted a proceeding in AD18-700 seeking comments and responses on resilience to enable the Commission to holistically examine the resilience of the bulk power system.¹²⁶ In that Order, the Commission rejected the same types of arguments and rationale that FES advances in its Emergency Order Request. FES failed to seek reconsideration of the Commission’s January 8 Order rejecting the Grid Resiliency Pricing proposal. Now, FES seeks to advance the same types of arguments and rationale that the Commission has already rejected. DOE must reject FES’s forum-shopping and abuse of process and agency resources. FES had the opportunity to ask for reconsideration it seeks now before DOE, but declined to request rehearing at FERC on its January 8 Order rejecting the Grid Resiliency Pricing proposal. Now, without any reference to changed circumstances, FES seeks to re-litigate the same issues at DOE. In doing so, FES provides little evidentiary support of its own and fails to confront the large body of record evidence amassed at FERC in RM18-1-000 from industry, experts, RTOs and ISOs, states, and other stakeholders demonstrating that the relief FES requests is unnecessary and unrelated to reliability or resilience and would result in unjust, unreasonable, and unduly discriminatory or preferential rates.

¹²⁶ Grid Resilience in Regional Transmission Organizations and Independent System Operators, 162 FERC ¶ 61,012 (Jan. 8, 2018).

2. The Commission’s Resilience Docket and PJM’s ongoing stakeholder processes are more appropriate forums to address FES’s concerns.

The Commission is currently evaluating grid resilience issues in RTOs/ISOs and potential recommendations and reforms.¹²⁷ FES complains that the Commission’s ongoing docket on resilience is “too little, too late.”¹²⁸ However, FERC’s ongoing proceeding is precisely the forum to thoroughly address and evaluate—free from a hyperbolic expression of emergency¹²⁹—the complex and multi-layered legal and technical issues surrounding resilience. FERC is also the more appropriate forum to address the longer-term generation resource issues regarding FES’s concerns that a substantial portion of the generation fleet will be retiring over a number of years. Although FERC found no urgent threat to the grid’s reliability to justify the extraordinary action proposed again now, it did initiate an administrative proceeding to better define and understand resilience and determine whether additional steps are needed to ensure resilience. FirstEnergy attempts to side-step and undermine that proceeding with its Emergency Order Request to DOE.

3. FES’s Emergency Order Request proceeding should not be used to short-circuit or circumvent any stakeholder and FERC processes that are currently investigating and evaluating price formation changes.

FES’s Request seeks to short-circuit or circumvent any stakeholder process that is underway to consider any need for price formation changes. Price formation issues require lengthy stakeholder discussion and debate. For example, MISO stakeholders considered Extended LMP

¹²⁷ See Grid Resilience in Regional Transmission Organizations and Independent System Operators, 162 FERC ¶ 61,012 (2018) (terminating DOE’s proposed rule focused on providing out-of-market compensation to generators with on-site fuel capability and instituting proceeding in AD18-700 seeking comments and responses on resilience to enable the Commission to holistically examine the resilience of the bulk power system).

¹²⁸ Request at 10.

¹²⁹ See Request at 33 (“The time for talk is over. We find ourselves at a crisis point...”).

for at least five years before it was implemented in March 2015.¹³⁰ Furthermore, FERC will continue to investigate energy price formation as it impacts resiliency and baseload generation.¹³¹

PJM had issued its Whitepaper on Energy Price Formation on June 15, 2017.¹³² PJM proposed enhancements to energy price formation on November 15, 2017.¹³³ On December 21, 2017, the Commission instituted a Federal Power Act Section 206 paper proceeding to investigate PJM's practices regarding the prices of fast-start resources.¹³⁴ In the PJM stakeholder process, the Energy Price Formation Senior Task Force is evaluating proposals to enhance energy market pricing to ensure "prices accurately reflect the true incremental cost of serving load and minimize the need to recover those costs through out-of-market uplift payments."¹³⁵ The task force recently posted an updated Issue Charge¹³⁶ and Problem Statement.¹³⁷

The PJM stakeholder process on energy price formation issues is ongoing and underway. PJM should be allowed to complete a meaningful stakeholder process "to explore ideas, to discuss options, and to allow all PJM stakeholders an opportunity to represent their interests."¹³⁸ In

¹³⁰ See Midcontinent Independent System Operator, Inc., *ELMP Parallel Operational Analysis* (June 2014), available at <https://cdn.misoenergy.org/20140603%20MSC%20Item%2005e%20ELMP%20Parallel%20Operation%20Analysis73949.pdf>.

¹³¹ See generally FERC Dockets RM18-1-000 and AD18-7.

¹³² See PJM Interconnection, L.L.C., *Energy Price Formation and Valuing Flexibility* (June 15, 2017), available at <http://www.pjm.com/~media/library/reports-notice/special-reports/20170615-energy-market-price-formation.ashx>.

¹³³ See <http://www.pjm.com/~media/library/reports-notice/special-reports/20171115-proposed-enhancements-to-energy-price-formation.ashx> (PJM Proposed Enhancements to Energy Price Formation, Nov. 15, 2017).

¹³⁴ *PJM Interconnection, L.L.C.*, Order Instituting Section 206 Proceeding and Commencing Paper Hearing Procedures and Establishing Refund Effective Date, 161 FERC ¶ 61,295 (Dec. 21, 2017); see generally FERC Docket No. EL18-34-000.

¹³⁵ Energy Price Formation Senior Task Force, <http://www.pjm.com/committees-and-groups/task-forces/epfstf.aspx> (last accessed Apr. 4, 2018).

¹³⁶ Energy Price Formation Issue Charge, <http://www.pjm.com/~media/committees-groups/task-forces/epfstf/postings/energy-price-formation-issue-charge.ashx?la=en> (last accessed Apr. 4, 2018).

¹³⁷ Energy Price Formation Problem / Opportunity Statement, <http://www.pjm.com/~media/committees-groups/task-forces/epfstf/postings/energy-price-formation-problem-statement.ashx?la=en> (last accessed Apr. 4, 2018).

¹³⁸ IMM Comments, RM18-1-00, at 35.

addition to the options identified by PJM in its Price Formation Whitepaper, other options for addressing measurable and verifiable reliability or resilience concerns exist. The Commission must provide adequate latitude and discretion to the stakeholder process to allow all reasonable options to be considered, including those options offered in the Independent Market Monitor's Comments in the grid resilience docket.¹³⁹

FES has failed to provide any evidentiary foundation supporting a finding that existing price formation is unjust and unreasonable. The Federal Power Act requires more stakeholder vetting and evaluation before significant costs are put upon customers to the benefit of the owners of nuclear and coal-fired generation.

H. FES's Clearing of the BRA Through the 2020/2021 Delivery Year Demonstrates that FES Currently Has an Obligation, and Associated Compensation For that Obligation, to Run Its Units Through May 31, 2021.

In successfully clearing the BRA through the 2020-21 delivery year, FES willingly took on an obligation, and the associated compensation for that obligation, for that time period. FES's units are committed through that time frame. Despite making these economic decisions, FES now seeks a bailout.

It should be noted that there were many years in which nuclear and coal units generated substantial returns. At the time, industrial entities were deeply concerned about locational-marginal pricing. Meanwhile, utilities such as FirstEnergy were receiving stranded cost payments based on these low numbers.

If the Secretary were to grant FES's Request, customers would be placed in the untenable position of being responsible for the *higher* of cost- or market-based rates. When LMP prices are higher, driven by higher fuel costs, customers have been compelled to pay such market-based

¹³⁹ IMM Comments, RM18-1-00, at 42-45.

prices. Now, driven by lower cost prices, the Request would lead customers to guarantee cost recovery for certain types of generation, including legacy units, in contravention of fundamental and long-standing tenets of FERC ratemaking.¹⁴⁰ Under this approach, customers cannot reasonably view their rates to be “just and reasonable.”

Plainly stated, energy-intensive businesses and other consumers that depend on reliable and reasonably priced energy to produce products and provide services would be required to provide an apparent long-term bailout to certain market participants. Such a bailout cannot be justified on reliability grounds.¹⁴¹ The Request asks to break contracts and seeks unprecedented executive authority to impose new cost structures without due process. If such an Emergency Order were issued, the incredible progress of a market-oriented approach for electric regulation would be heedlessly damaged at the stroke of a pen.

¹⁴⁰ See *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

¹⁴¹ See, e.g., PJM Interconnection, L.L.C., *PJM’s Evolving Resource Mix and System Reliability*, at 3, 5, 6, and 8 (Mar. 30, 2017), available at <http://pjm.com/-/media/library/reports-notice/special-reports/20170330-pjms-evolving-resource-mix-and-system-reliability.ashx?la=en>.

II. CONCLUSION

For the reasons set forth above, the PJM Consumer Representatives respectfully request that the Department deny FES's Request for an Emergency Order.

Respectfully submitted,

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/s/ Robert A. Weishaar, Jr.

By _____

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Dated: April 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 5th day of April, 2018.

/s/ Robert A. Weishaar, Jr.

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