

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Grid Reliability and Resilience Pricing )**

**RM18-1-000**

**JOINT MOTION FOR EXTENSION OF TIME AND REQUEST FOR EXPEDITED  
TREATMENT OF THE ENERGY INDUSTRY ASSOCIATIONS**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. § 385.212 (2016), and section 403(b) of the Department of Energy Organization Act, 42 U.S.C. § 7173, the Advanced Energy Economy, American Biogas Council, American Council on Renewable Energy, American Petroleum Institute, American Public Power Association, American Wind Energy Association, Business Council for Sustainable Energy, Electric Power Supply Association, Electricity Consumers Resource Council, Energy Storage Association, Interstate Natural Gas Association of America, National Rural Electric Cooperative Association, Natural Gas Supply Association and Solar Energy Industries Association (collectively, “Energy Industry Associations”) hereby respectfully submit this motion for extension of time for filing comments on the Notice of Proposed Rulemaking (“NOPR”) released by the Secretary of Energy (“Secretary”) and docketed by the Commission in the above-captioned proceeding.<sup>1</sup> As noted below, the Energy Industry Associations are also submitting this motion to the Secretary. For the reasons discussed below,

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<sup>1</sup> The undersigned incorporate by reference their previously filed motion in this docket and reiterate some of the points made therein. *Joint Motion of the Energy Industry Associations in Response to the Secretary of Energy’s Requests for an Interim Final Rule and an Expedited Time Frame for Comment and Consideration*, Docket No. RM18-1-000 (Oct. 2, 2017).

the Energy Industry Associations request a ninety (90) day initial comment period and a forty-five (45) day reply comment period.<sup>2</sup>

## **I. BACKGROUND**

On September 28, 2017, the Secretary released the NOPR and directed the Commission to “consider and take final action” on the NOPR within 60 days from publication in the *Federal Register*. In order to meet that deadline, the NOPR invited the Commission to issue a notice with comment procedures within two days after the NOPR’s publication and provided that comments otherwise would be due within 45 days after such publication.

On October 2, 2017 (one business day after the NOPR was released), the Energy Industry Associations filed a *Joint Motion of the Energy Industry Associations in Response to the Secretary of Energy’s Requests for an Interim Final Rule and an Expedited Time Frame for Comment and Consideration*, requesting that the Commission reject the unreasonable time frame in the Letter for considering comments in this proceeding and instead adopt one that could allow for meaningful participation by interested parties.<sup>3</sup> Later that day, the Commission issued a Notice Inviting Comments (“Notice”) providing a mere 21 days for initial comments and 15 days for reply comments. The NOPR has not yet been published in the *Federal Register*.

## **II. MOTION FOR EXTENSION OF TIME TO FILE COMMENTS**

The proposed reforms laid out in the NOPR, if finalized, would result in one of the most significant changes in decades to the energy industry and would unquestionably have significant ramifications for wholesale markets under the Commission’s jurisdiction. When agencies consider a proposed rule that could affect electricity prices paid by hundreds of millions of consumers and

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<sup>2</sup> Initial comments are currently due on or before October 23, 2017, and reply comments are due on or before November 7, 2017. If the Commission were to grant our 90-day extension request, initial comments would be due on or before January 2, 2018, and reply comments would due on or before February 16, 2018.

<sup>3</sup> See *supra* note 1.

hundreds of thousands of businesses, as well as entire industries and their tens of thousands of workers, such as the proposal in question, it is customary for an agency to allow time for meaningful comments to be filed in the record so that the agency can make a reasoned decision thereon. In fact, agencies are under an obligation to allow a comment period of not less than 60 days for typical rulemaking proceedings, unless exceptional circumstances exist.<sup>4</sup>

The time frame for comments provided in the Notice is far too short to allow stakeholders to submit careful analysis on this complex and significant rulemaking. The Energy Industry Associations urge the Commission to extend the comment period consistent with the normal deliberative process that it typically affords such major undertakings. An extension of time to file comments in the proceeding would allow for meaningful public input from all stakeholders, including from energy market participants, grid operators, regulators and consumers, and would provide the Commission with more detailed and carefully considered comments that would help ensure that it can make a reasoned decision in this matter based on the best-available information.

Given the importance and complexity of this issue, we recommend that the Commission provide 90 days for interested parties to provide initial comments on the NOPR and 45 days for reply comments. At a minimum, the Commission should provide for a comment period of not less than 60 days. To be clear, even a 60-day initial comment period and 45-day reply comment period would be insufficient to allow interested parties to adequately respond to the proposed rule; therefore, we encourage the Commission to adopt extended deadlines for these comments that are more commensurate with the stakes of this proceeding and are at least the same duration that the Commission typically affords such matters of this importance.

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<sup>4</sup> Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993).

While the Administrative Procedure Act does not specify the minimum length of the public comment period, agencies commonly allow at least 60 days for typical rulemakings. Executive Order 12866 suggests that agencies allow the public at least 60 days to comment for “significant” rules and says that any comment period should be not less than 60 days “in most cases.”<sup>5</sup> “For complex rulemakings, agencies may provide for longer time periods [than 60 days for comments], such as 180 days or more.”<sup>6</sup> To our knowledge, the Commission has never allowed less than 60 days for public comment on any major rulemaking. For instance, in the notice for Order No. 1000,<sup>7</sup> the Commission originally allowed 60 days for comments and then extended that deadline significantly,<sup>8</sup> as well as providing for an additional 45 days for reply comments.<sup>9</sup> Furthermore, we note that the Commission routinely grants at least 60 days for run-of-the-mill rulemakings (e.g., establishing a 60-day comment period on a NOPR regarding the designation of exhibits for FERC hearings).<sup>10</sup>

While “[a]gencies may use shorter periods when justified,”<sup>11</sup> there is no justification in the Notice or the NOPR for circumventing the required bare minimum of a 60-day comment period. To the extent the NOPR implies that an emergency exists to justify the abbreviated schedule, publicly available information from the Department of Energy (“DOE”) and North American Electric Reliability Corporation (“NERC”) demonstrate that no such emergency exists.<sup>12</sup> To the

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<sup>5</sup> *Id.*

<sup>6</sup> A Guide to the Rulemaking Process Prepared by the Office of the Federal Register, 10, available at [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).

<sup>7</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011); FERC Stats. & Regs. ¶ 31,323, *order on reh’g*; Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh’g and clarification*; Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

<sup>8</sup> *See Notice of Proposed Rulemaking; Notice Extending Comment Period Re Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, RM10-23-000 (Aug. 10, 2010).

<sup>9</sup> *See Notice of Proposed Rulemaking; Notice Providing for Reply Comments for Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities* Docket No. RM10-23-000 (Sep. 29, 2010).

<sup>10</sup> *See Revised Exhibit Submission Requirements for Commission Hearings*, 150 FERC ¶ 61,193 (Mar. 19, 2015).

<sup>11</sup> *See supra* note 4.

<sup>12</sup> *See, e.g.*, NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION, STATE OF RELIABILITY 2017, vi (Jun. 2017) (“finding that the bulk power system provided an adequate level of reliability during 2016”); DEPARTMENT OF

contrary, both DOE and NERC recently released reports categorically concluding that there is no immediate reliability emergency. For example, DOE’s 2017 Staff Report to the Secretary on Electricity Markets and Reliability recently concluded: “reliability is adequate today despite the retirement of 11 percent of the generating capacity available in 2002, as significant additions from natural gas, wind, and solar have come online since then;”<sup>13</sup> and at the FERC Reliability Conference, NERC’s CEO, Gerry W. Cauley, concluded that “the state of reliability in North America remains strong, and the trend line shows continuing improvement year over year.”<sup>14</sup>

We recognize that the Commission’s Notice adopts a time frame for comments within the deadlines set forth in the NOPR. Accordingly, we are simultaneously submitting this motion to the Secretary for consideration, and urge the Secretary to work with the Commission to adopt the reasonable procedural time frame laid out by the Energy Industry Associations here.

In the absence of that outcome, the Energy Industry Associations assert that the Commission is not required to adopt the timeline in the NOPR and should independently determine whether it is reasonable. Section 403(b) of the Department of Energy Organization Act states: “The Commission shall . . . take final action on any proposal made by the Secretary . . . in an expeditious manner in accordance with such *reasonable* time limits as may be set by the Secretary for the completion of action by the Commission on any such proposal.”<sup>15</sup> The statutory requirements for reasoned agency decision-making and for agency action to be supported by substantial evidence, *see, e.g.*, 5 U.S.C. § 706(2); 16 U.S.C. § 825l(b), cannot be overcome by fiat. As discussed above, the schedule laid out in the NOPR for notice and comment is unreasonable

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ENERGY, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY, 16 (Aug. 2017) (“While markets have evolved since their introduction, they are currently functioning as designed—to ensure reliability and minimize the short-term costs of wholesale electricity. . .”).

<sup>13</sup> DEPARTMENT OF ENERGY, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY, 63.

<sup>14</sup> FERC Reliability Conference, Panel I: Overview of the State of Reliability, Remarks of Gerry W. Cauley, CEO of the North American Reliability Corporation, 1 (June 22, 2017).

<sup>15</sup> 42 USC §7173(b) (emphasis added).

on its face; therefore, the Commission is justified in setting it aside and instead proposing a reasonable schedule for seeking comments on the NOPR, such as the time frame proposed herein.

### **III. MOTION FOR EXPEDITED TREATMENT**

The Energy Industry Associations respectfully request that the Commission act on this motion, by no later than October 6, 2017, and in so doing, make a reduction in the comment period for the filing of answers to this motion to reflect this request for expedited treatment. If the Commission is not inclined to grant the extension, interested parties need certainty in this regard as soon as possible so that they can plan accordingly.

### **IV. CONCLUSION**

For the foregoing reasons, the undersigned Energy Industry Associations respectfully request that the Commission grant this motion for an extension of time to allow for a ninety day initial comment period and forty-five day reply comment period, and the motion for expedited treatment.

Respectfully submitted,

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