UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Reliability Technical Conference	Docket No. AD18-11-000

COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)

The Electricity Consumers Resource Council (ELCON) appreciates the opportunity to submit these post-technical conference comments.

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations.

ELCON is concerned by a statement by FERC Chief of Staff Anthony Pugliese at a recent conference suggesting that, notwithstanding the public proceedings in this docket on reliability of the Bulk Power System, Commission staff may be pursuing a different agenda in a non-public fashion:

> We are working with DOD and DOE and NSC to identify the [coal and nuclear] plants that we think would be absolutely critical to ensuring that not only our military bases but things like hospitals and other critical

> infrastructure are able to be maintained, regardless of what natural or man-made disasters might occur.[1]

ELCON acknowledges Chairman McIntyre's subsequent statement that "Commission staff has not discussed the merits of any 'grid resilience' proposal that would seek to prefer one form of generation over another with executive branch officials."[2] However, any suggestion that staff is promoting radical new standards of reliability and generation attributes to justify consumer- or taxpayer-funded bailouts raises a question about whether the Commission is properly acting in its capacity as an unbiased, independent regulatory commission above the fray of politics. It would be particularly surprising given the Commission's recent rejection in Docket RM18-1 of the Department of Energy's (DOE's) proposed rule pursuant to Section 403 of the Department of Energy Organization Act, which was the subject of extensive proceedings and generated a broad consensus that bailout of coal and nuclear plants would be inconsistent with the Federal Power Act.

The tangible evidence presented in the extensive comments filed in Docket RM18-1 confirmed that coal and nuclear bail outs would radically undo the efficient functioning of the competitive markets and trigger catastrophic economic impacts including increased electricity costs for untold numbers of businesses and consumers,

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[1] Sam Mintz, Peter Behr and Rod Kuckro, "Top staffer plunges FERC into Trump's coal, nuclear fight," *EnergyWire*, August 9, 2018. The subsequent statement of Craig Cano, a FERC spokesperson, that "in response to a question after the speech, the Chief of Staff was simply stating that the federal government is working to ensure that important critical infrastructure, like hospitals, remains operational [and that] FERC is an independent agency and therefore has not assisted in the development of policy but provides technical assistance as subject matter experts" does not alleviate concerns that FERC is continuing to breach its independent role by promoting DOE's ill-conceived efforts to bail out coal and nuclear plants.

[2] Letter from Commissioner McIntyre to Sen. Maria Cantwell, Aug. 24, 2018.

and a substantial loss of U.S. manufacturing capacity and jobs, without actually redressing a real problem. A remarkably broad range and large number of commenters expressed their strong opposition to the DOE proposal, including electricity consumer groups, representatives of a wide range of electricity generation interests, the RTOs and ISOs, state public utility commissions, consumer advocates, public interest organizations, and notably a bipartisan group of former FERC Commissioners. A number of the comments included very detailed, quantitative information, including economic impact assessments.

It is essential that the Commission avoid the appearance of politicization and bias that would be inconsistent with its important statutory role as an independent commission. The Commission must assure due process in matters before it, which "requires a neutral and unbiased decisionmaker."[3] In structuring the Commission in this fashion, Congress made "[a] special effort . . . to preserve the independence of action and decision of the Commission and to insulate it from influences from other parts of the Department."[4] When such independent regulatory commissions were first established, the Supreme Court emphasized that their hallmark is independence from political influence:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. . . . [I]ts

[3] *See, e.g., Pham v. Blaylock*, 712 Fed. Appx. 360, 363 (5th Cir. 2017).

[4] H. Rept. 95-346, part 1, 8 (1977).

> members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'[5]

Any suggestion that Commission staff has prejudged a particular outcome may impugn the integrity and credibility of any future Commission rulemaking on reliability issues.

ELCON incorporates by reference the initial and supplemental comments that it filed along with a coalition of U.S. manufacturing representatives in Docket No. RM18-1.[6] Here, ELCON emphasizes two points relevant to the recent reports that FERC is continuing to support DOE's efforts to enact coal and nuclear bailouts.

First, coal and nuclear bailouts would run contrary to the Commission's long-standing policy preferences for market solutions and fuel-neutrality, and will unduly discriminate against suppliers who will be at a competitive disadvantage because they do not receive the subsidy. Beginning in 1996, when FERC Order 888 gave states the option of establishing competitive wholesale electricity markets, a key feature of the market system has been neutrality among generation technologies. Most recently, on September 7, 2017, Kevin McIntyre and Richard Glick testified before the Senate Energy & Natural Resources Committee on their nominations as Commissioners, with both emphasizing that FERC should be "fuel neutral."[7] Uneconomic coal and nuclear

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[5] *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), q*uoting Illinois Central Railroad Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454 (1907)

[6] Comments of ELCON, *et al.* dated October 23, 2017, and Reply Comments of ELCON, *et al.,* dated November 7, 2017, in Docket No. RM18-1.

[7] See, e.g., U.S. Senate Committee on Energy and Natural Resources September 7, 2017 Hearing: Pending Nominations, Questions for the Record Submitted to Mr. Kevin J. McIntyre, https://www.energy.senate.gov/public/index.cfm/files/serve?File_id=1E0AF72C-362D-4068-8C84-5BE2D84A301D (extensive references to fuel neutrality and resource neutrality).

generation should not be favored over natural gas, demand response, renewables, or other resources.

Second, the ramifications of the Commission's actions on this issue are huge. A number of the comments provided quantitative assessments of the costs that the coal and nuclear bailouts would impose. Although the costs typically are presented in ranges and vary depending on various assumptions, the cost assessments consistently establish that the magnitude of likely costs will be in the billions of dollars *per year*. Imposing costs of this profound magnitude on electricity consumers will have broad adverse impacts on industrial employment and the competitiveness of U.S. industry. The cost estimates presented in the various comments filed in Docket RM18-1 include the following:

- An analysis conducted by *The Brattle Group* estimates that the annual cost of subsidies under the Proposal would be in the range of $4 to $11 billion per year: "We estimate that between 57,000 and 88,400 MW (57.0-88.4 GW) of coal and nuclear generating capacity in the PJM Interconnection ("PJM"), Midcontinent ISO, New York ISO, and ISO New England regions would be eligible to receive additional payments under the proposed DOE rule. Based on 2016 market conditions, these out-of-market payments would likely range from $3.7 billion to $11.2 billion per year." "The low end of this estimate is based on a low estimate for plants' operating costs and short depreciation life for past capital expenditures, and the high end of the estimate is based on higher operating cost estimates and long depreciation life for past capital expenditures."[8]

- A quantitative economic impact study commissioned by the Commonwealth of Kentucky concluded that a 10% increase in the real price of electricity would cause a net loss of one million jobs and a decrease of $142 billion in the national GDP, and that those effects would be felt the strongest in the metals, paper, wood, chemical, textiles, and minerals sectors of the economy that collectively employ 2.5 million.[9]
- In its comments in Docket RM18-1, the *R Street Institute* stated that "[a]s a rough cost benchmark, consider that subsidy costs to keep one or two unprofitable coal and nuclear plants open reaches hundreds of millions per year. Applying this rulemaking to merchant nuclear plants alone would cost billions per year."[10]
- Research from the *Energy Innovation and the Climate Policy Initiative* examined several interpretations in order to project the potential costs of implementing the proposed coal and nuclear bailouts. In its "most conservative" scenario, eligible units are limited to only generators that

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[8] The Brattle Group, Evaluation of the DOE's Proposed "Grid Resiliency Pricing Rule" at pp. 2, 25, 31-33 (Oct. 2017) (Attachment A to the Joint Industry Comments Opposing the DOE Proposal in Docket RM18-1).

[9] Commonwealth of Kentucky Staff at the Energy and Environment Cabinet, "The Vulnerability of the United States Economy to Electricity Price Increases" (Mar. 2015), *available at* http://energy.ky.gov/Programs/Data%20Analysis%20%20Electricity%20Model/Vulnerability_to_Electricity_Prices.pdf.

[10] Initial Comments of the R Street Institute in Docket RM18-1, Oct. 18, 2017, at p. 2 fn 3.

are cash flow negative, and these resources recover only costs which are not currently received through market payments, in the form of uplift payments. Even under this constrained, the total cost exceeds $2 billion per year.[11] Under their worst-case cost interpretation, in which all eligible units are assumed to be compensated for their full costs through a mechanism outside the market, and these units operate up to their maximum potential output, the costs reach $10.6 billion annually.

- Preliminary analysis by *ICF* indicated that the coal and nuclear bailouts would increase electricity costs by up to $3.8 billion annually, or $53 billion between now and 2030. This estimate assumes no new capital expenditures at existing plants, and only accounts for plants that are at risk of retirement. The actual cost impacts could be much greater, depending on how the rule is implemented, how many plant operators opt for cost-of-service regulation over competition in the wholesale energy and capacity markets, and how the markets themselves react to a significant amount of capacity being suddenly guaranteed cost recovery.[12]

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[11] Energy Innovation and Climate Policy Initiative, "The Department of Energy's Grid Resilience Pricing Proposal: A Cost Analysis" at 3, http://energyinnovation.org/wpcontent/uploads/2017/10/20171021 Resilience-NOPR-Cost-Research-Note-FINAL.pdf.

[12] ICF analysis, as reported in RTO Insider, *ICF Analysis: DOE NOPR Cost Could near $4B/Year* (October 4, 2017), https://www.rtoinsider.com/icf-doe-nopr-76642/; ICF International, Inc., *DOE Acts to Transform the Energy Landscape*, at 27 [Webinar] (Oct. 4, 2017), *available at h*ttps://www.icf.com/resources/webinars/2017/doe-nopr.

- Assuming that more than 52 gigawatts of coal and nuclear generation are compensated at cost-plus, the *Public Utility Commission of Ohio* averred that this could potentially increase costs on consumers and businesses in PJM's retail choice states by $8.1 billion annually.[13]

- Another assessment of the Proposal, by the *Sierra Club*, estimated the cost at up to $14 billion annually.[14]

- An affidavit of *Paul M. Sotkiewicz, Ph.D., President of E-Cubed Policy Associates* and former Chief Economist in PJM's Market Service Division, estimated additional costs of as much as $4.5 billion annually in PJM alone.[15]

- An affidavit of *David W. DeRamus, Ph.D., and Collin Cain, M.SC., Partner and Principal respectively at the economic consulting firm Bates White LLC* estimated additional costs of over $2 billion annually.[16]

In conducting its activities including its interactions with other federal agencies, the Commission must always remember, in applying the Federal Power Act's statutory responsibility requiring rates to be "just and reasonable," that the Commission has the

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[13] Comments of the Public Utility Commission of Ohio in Docket RM18-1, Oct 23, 2017, at pp 11-12.

[14] Sierra Club, *New Analysis Finds Dramatic Costs of Perry's Directive to FERC,* (Oct. 16, 2017) available at http://www.sierraclub.org/press-releases/2017/10/new-analysis-finds-dramatic-costs-perrys-directive-ferc.

[15] Attachment A to the Initial Comments of the Electric Power Supply Association in Docket RM18-1, Oct. 23, 2017.

[16] Attachment B to the Initial Comments of the Electric Power Supply Association in Docket RM18-1, Oct. 23, 2017.

mission "to 'assist consumers in obtaining reliable, efficient and sustainable energy services at a reasonable cost through appropriate regulatory and market means.'" Comments of the Bipartisan Former FERC Commissioners, Oct. 19, 2017, at 1. Since Order No. 888, establishing transmission open access, and Order No. 2000, defining the responsibilities of RTOs, the Commission has applied the principle that the most cost-effective way to deliver energy services to customers is by "requiring nondiscriminatory access to the nation's electric transmission grids, and fostering open, wholesale competitive markets for the sale of electricity over those grids." *Id.* at 2; *see* Order No. 2000 at p. 3, 89 FERC ¶ 61,285 (1999). The newly disclosed, previously nonpublic activity of the Commission raises a question about whether it is properly following its statutory mandate and appropriate procedures

CONCLUSION

Any suggestion that the Commission is not following its proper role as an independent regulatory agency would be troublesome. ELCON agrees with Public Citizen's comments that the Commission must detail—in a public, docketed filing—<u>all</u> activities, actions (including technical assistance) related to coordinating with DOE, the Department of Defense and the National Security Council around grid resilience.

More generally, ELCON urges the Commission to continue its ongoing price formation and reliability related initiatives to thoughtfully and incrementally improve the functioning of the organized markets. Although the wholesale competitive markets are not perfect, the current, historically low electricity prices that have resulted from their operation have substantially benefited the competitiveness of the U.S. manufacturing sector that depends upon affordable and reliable energy supplies. Those markets cannot be sustained if particular resources such as coal and nuclear are through federal government intervention are selected for special compensation with out-of-market payments, which cannot be supported as "just and reasonable". ELCON reiterates that the federal government should not pick winners and losers in the energy markets and must certainly not put at risk a large number of U.S. manufacturing jobs that face considerable pressure from foreign competition.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: September 7, 2018

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup