STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
Attorney General

DIVISION OF SOCIAL JUSTICE
Environmental Protection Bureau

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Filed Electronically Through FERC.gov
The Honorable Neil Chatterjee, Chairman
The Honorable Cheryl A. LaFleur, Member
The Honorable Robert F. Powelson, Member
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Grid Resiliency Pricing Rule
Docket No. RM18-1-000

To the Honorable Chairman and Members of the Commission:

New York Attorney General Eric T. Schneiderman submits these initial comments on the Notice of Proposed Rulemaking entitled Grid Resiliency Pricing Rule that Secretary of Energy Perry issued on September 28, 2017 (the "Notice"), 82 Fed. Reg. 46940 (Oct. 10, 2017). The Notice proposes that the Federal Energy Regulatory Commission ("FERC") promulgate a rule under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, that would require cost-of-service ratemaking for certain electricity generating units with a 90-day fuel supply on site, principally coal and nuclear generating units (the "Proposed Rule").

The Proposed Rule would be unlawful because it lacks any legitimate purpose and fails to consider or analyze the possible impacts it might have, which include, among other things, increased emissions of carbon dioxide and other pollutants from coal-fired power plants that cause illness and other harm in New York. As the saying goes, "if it ain't broke, don't fix it." Nothing in the Notice demonstrates that the Proposed Rule will solve any existing problem in our Nation's electricity supply or in the wholesale electricity markets. New York already has a reliable, resilient grid, and to the extent that any issues regarding New York's electricity infrastructure currently exist or arise in the future, they can be addressed by the New York Independent System Operator ("NYISO"), the New York State Public Service Commission, or other state agencies can address them, with FERC approval as necessary.

At the same time, the Notice fails to consider that the Proposed Rule has the potential to cause harm by providing financial support that would encourage increased generation from coal-fired power plants, resulting in increased emissions of (a) carbon dioxide that contributes to climate change and its associated adverse impacts to grid resilience, health, and the environment and (b) conventional pollutants, including fine particulate matter (PM2.5) and nitrogen oxides

(NOx) – a prime contributor to ground level ozone or smog, that also harm health and the environment. Indeed, because the Proposed Rule would worsen climate change, it would contribute to making storms more intense and thus create more occasions for storm resiliency problems on the electric grid – directly contrary to its purported goal of reducing such problems. Because the Proposed Rule would provide no benefit and does not evaluate the risk of harm it might create, FERC should decline to promulgate it.

I. The New York Attorney General's Work on Resiliency

The Attorney General's office enforces consumer and environmental protection laws and represents the State's interests in judicial and administrative proceedings involving energy and environmental matters. In many proceedings, including those before FERC, the Attorney General has sought to ensure that federal agencies fulfill their obligations under the National Environmental Policy Act ("NEPA") to identify and examine the climate change and other environmental impacts that their actions could cause.

In 2012, Superstorm Sandy caused almost two million electric utility customer outages in New York: tens of thousands of customers were without power for weeks, and the outages caused significant disruptions to hospital and emergency care services, as well as drinking water, wastewater treatment, and transportation systems. Of the over 40 billion dollars in damage caused by the storm, experts have estimated that at least $2 billion in flood-related damage in and around New York City was attributable to climate change-induced sea level rise.[1] The Attorney General's office subsequently intervened in a ratemaking proceeding concerning the utility serving New York City, Consolidated Edison, to ensure that the utility (a) comprehensively analyze its system's vulnerabilities to the impacts of climate change, and (b) reconstruct its infrastructure to protect against projected future flooding and other weather-related risks, including the impact of rising sea levels and increased temperatures associated with climate change.

II. The Proposed Rule

On September 28, 2017, Secretary of Energy Perry signed the Notice. The Notice directs FERC to consider promulgating a rule that would provide financial support to electric generating sources with a 90-day supply of fuel on site, principally coal and nuclear plants. 82 Fed. Reg. at 46945, 46948. The Notice notes that coal and nuclear plants have closed or plan to close in the future as a result of market conditions in the wholesale electricity markets. *See*, *e.g.*, *id*. at 46942.

Secretary Perry's Notice assumes that the retirement of these sources is a threat to the reliability and resiliency of the U.S. electric system. That stated concern arises out of a meteorological event during the winter of 2014 known as the Polar Vortex, which was a front of

[1] *See* Harvey Leifert, *Sea level rise added $2 billion to Sandy's toll in New York City*, *Eos* (March 16, 2015), *available at* https://eos.org/articles/sea-level-rise-added-2-billion-to-sandys-toll-in-new-york-city.

very cold weather that passed across the eastern and central United States. The Notice states that during the Vortex, the PJM regional transmission organization had difficulty meeting the high cold-weather demand for electricity because certain generation capacity was not available to run. *Id.*

The Notice asserts that keeping coal and nuclear plants in operation would be a bulwark against similar supply shortages in the future. The Notice describes coal and nuclear as "baseload generation sources," that have "on-site fuel" and can arguably operate irrespective of the weather. *Id*. at 46943. Nonetheless, the Notice asserts, the wholesale power markets as currently structured do not adequately price the resiliency value of these "fuel-secure" plants. *Id*. at 46942-43.

To address the asserted pricing problem and keep these plants in operation, the Proposed Rule would require regional transmission organizations and independent system operators (collectively, "System Operators") to establish tariffs for wholesale electricity provided by generators with a 90-day fuel supply on site. The rule would require System Operators to price electricity from those sources using traditional cost-of-service methodology, rather than market-based pricing used for other types of sources. The price would include compensation for reliability and resilience costs including fuel expenses. *Id*. at 46948.

III. The Proposed Rule Is Unlawful

A. The Notice Establishes No Need or Other Basis for the Proposed Rule

The Federal Power Act requires that any wholesale electricity rates, and any rules and regulations regarding such rates, be "just and reasonable." 16 U.S.C. §§ 824d(a), 824e(a). The Notice provides no basis for concluding that the Proposed Rule meets that standard. The Notice provides no support for the proposition that a lack of reliability or resiliency due to inadequate "fuel security" is a problem or that the cost-of-service ratemaking tariff contemplated in the Proposed Rule would solve any such problem. This lack of foundation for the Proposed Rule makes it arbitrary and capricious in violation of the Administrative Procedure Act. 5 U.S.C. § 706.

An analysis of FERC data by the Rhodium Group, shows that of the approximately 3.4 billion customer-hours of major electricity disruption from 2012 through 2016, only 2,382 hours---0.00007 percent---resulted from fuel supply problems.[2] And the vast majority of those hours of fuel supply problems---2,333 of the 2,382 hours---resulted from fuel supply unavailability at a *coal-fired* power plant in northern Minnesota. Accordingly, only 49 of the approximately 3.4 billion customer-hours of electricity disruption nation-wide---roughly 0.0000015 percent---was due to fuel-supply problems at non-coal-fired electric generating plants. It would be hard to imagine a less significant problem than the one the Notice purports to identify.

[2] The Rhodium Group, *The Real Electricity Reliability Crisis, at* http://rhg.com/notes/the-real-electricity-reliability-crisis.

Moreover, because the Notice does not address the circumstances or causes of those 49 hours that fuel was unavailable at non-coal-fired plants, nothing in the Notice demonstrates that the tariffs that would be paid to coal plants under the Proposed Rule would address those problems. In particular, the Notice does not even establish that these hours of fuel supply problems occurred in the grid areas managed by the System Operators that the Proposed Rule would regulate. At best, the remedy set out in the Notice and Proposed Rule is grossly disproportionate to the stated problem.

In its rush to subsidize "fuel-secure" generators, the Proposed Rule ignores the fact that states like New York are already home to a reliable, resilient electricity grid. In New York, where almost all coal-fired generating units have already retired, natural gas, nuclear, and hydropower are the baseload resources most often dispatched to provide power on days when wind resources are limited. While the use of natural gas-fired generation and renewables is increasing in New York, NYISO's most recent Reliability Needs Assessment concludes that New York's bulk power system will meet system adequacy criteria through 2026.[3]

To be sure, NYISO recognizes that increasing reliance on natural gas-fired generation sources could pose reliability challenges.[4] But in a recent overview of challenges facing the electricity grid, NYISO concluded—based in part on a study by the North American Electric Reliability Corporation—that New York is "currently well positioned to address natural gas demand for generators as well as firm residential and commercial natural gas customers."[5] This is so, at least in part, because New York requires that natural gas-fired units connected to local distribution companies maintain duel-fuel capability, and also because multiple pipelines supply natural gas to New York's gas-fired generators.[6] In addition, many New York natural gas-fired generators have firm or quasi-firm fuel contracts that should prevent supply-related outages.[7] In sum, there is no pressing fuel-related reliability emergency in New York and, to the extent fuel assurance may be a future concern, New York has and will continue to take rational steps to assure system reliability for all users.

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[3] *See 2016 Reliability Needs Assessment*, NYISO, 63 (October 18, 2016), http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Planning_Studies/Reliability_Planning_Studies/Reliability_Assessment_Documents/2016RNA_Final_Oct18_2016.pdf.

[4] *See Power Trends 2017*, NYISO, 32, http://www.nyiso.com/public/webdocs/media_room/publications_presentations/Power_Trends/Power_Trends/2017_Power_Trends.pdf.

[5] *Id.* at 34.

[6] *See id.*; *see also Short Term Special Assessment: Operational Risk Assessment with High Penetration of Natural Gas-Fired Generation*, NERC, 5 (May 2016), http: //www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC%20Short-Term%20Special%20Assessment%20Gas%20Electric_Final.pdf (concluding that "the New York region is not projected to experience tight operational margins for upcoming seasons").

[7] *See Short Term Special Assessment*, note 6 above, at 5.

In addition, the Proposed Rule fails to meet the Federal Power Act standard of "just and reasonable" tariffs and is arbitrary and capricious because its result would be to *increase* the likelihood of storm-related resiliency problems rather than address those problems. Climate change produces storms of greater intensity, and those severe storms present greater risk to grid reliability and resiliency.[8] By allowing coal-fired plants to fully recover their costs, however, the Proposed Rule, would give those plants an incentive to run more frequently and generate additional carbon dioxide emissions that would make climate change worse, thereby increasing the intensity of storms and increasing the storm-related risk to grid reliability and resiliency. This result is directly contrary to the Proposed Rule's purported goal of reducing such risks to the grid, and leaves the Proposed Rule with no just or reasonable basis.

In short, the Proposed Rule would produce no benefit: the Notice provides no evidence that fuel unavailability has created a reliability or resilience problem and no analysis demonstrating that the Proposed Rule would solve that nonexistent problem.

B. FERC Has Not Provided Public Participation Opportunities Sufficient to Meet Legal Requirements

Even without considering the merits of the Proposed Rule, FERC should decline to finalize it because it does not meet the requirements of notice-and-comment rulemaking under the Administrative Procedure Act. FERC has provided only 21 days from the date of FERC's public notice, and only 12 days from the date of publication in the Federal Register, for initial public comments, and 14 additional days for reply comments. But FERC has provided no legitimate ground for requiring consideration of the Proposed Rule on such an accelerated timeframe for public participation. According to the Notice, FERC must promulgate the Proposed Rule quickly to ensure the "resiliency" of the wholesale electricity markets in time for winter weather. 82 Fed. Reg. at 46945, 46948. But as discussed above, the Notice does not make any showing that the wholesale electricity markets do not otherwise already have the capacity to meet energy needs this winter or at any other time, or that such extreme weather is even likely to occur.[9]

Moreover, the Notice is also deficient under the Administrative Procedure Act for failing to "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell International Inc. v. EPA*, 372 F.3d 441, 449 (D.C. Cir. 2004). The Notice fails to set forth the basis for the Proposed Rule required under the Administrative Procedure Act. The Notice and Proposed Rule fail to define key concepts such as "resiliency" and fail to address questions such as how "resiliency" is measured or on what basis the wholesale markets do not already address the "resiliency" concerns the Rule purports to address. The Notice fails to provide any basis to explain how the cost-of-service tariff under the

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[8] *See, e.g.*, Executive Office of the President, *Economic Benefits of Increasing Grid Resilience to Weather Outages* at 3 (August 2013).

[9] Quite the opposite, FERC Staff recently concluded that "at this time we do not see major risk factors that would likely lead to significant market disruptions during this winter." FERC Winter 2017-2018 Energy Market Assessment, Docket No. AD06-3 (October 2017).

Proposed Rule would benefit "resiliency" or on what basis a 90-day fuel supply – as opposed to a fuel supply of some other length, or alternative measures – would be a reasonable means for addressing reliability or resiliency. The Notice provides no basis for the Proposed Rule's need or analysis of possible impacts, such as ascertaining the costs to ratepayers, which may well be significant. In short, the Notice and Proposed Rule raise so many unanswered questions that informed public participation consistent with the Administrative Procedure Act is not possible, particularly in FERC's rushed timeframe.

C. The Proposed Rule Lacks the Required NEPA Analysis

The Notice incorrectly concludes that FERC may promulgate the Proposed Rule without analyzing its potential environmental impacts. *See* 82 Fed. Reg. at 46,947. As the Notice concedes, NEPA mandates that any federal agency considering a "major [f]ederal action[]" shall prepare a "detailed statement" analyzing, among other things, "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. § 4332(C). The Notice attempts to avoid this basic requirement by invoking FERC's categorical exclusion for ratemaking. *See id.*; *see also* 18 C.F.R. § 380.4(a)(15). But because the scale and effect of the Proposed Rule is much more environmentally significant than the type of rulemakings covered by the categorical exclusion, the categorical exclusion does not apply.

Even if the exclusion did apply, FERC's NEPA regulations provide that, notwithstanding any categorical exclusions in those regulations, FERC "*will* independently evaluate environmental information supplied . . . in comments by the public" to determine whether it should nevertheless conduct a full NEPA review. *See* 18 C.F.R. § 380.4(b)(1) (emphasis added).

Accordingly, FERC has an obligation to perform a NEPA analysis regarding the environmental impacts the Proposed Rule might have. For example, the avowed purpose of the Proposed Rule is to provide financial support for coal-fired power plants that would encourage their use. Thus, at a minimum, the Proposed Rule raises questions that need to be evaluated regarding (a) whether and to what extent the Proposed Rule would lead to increased use of coal-fired generating units; (b) whether and to what extent increased coal combustion would worsen air quality, in New York and elsewhere and contribute to climate change; and (c) whether other, less harmful alternatives exist.

The Proposed Rule might also cause many other environmental impacts, as described in section III.D below. Because FERC has not analyzed any of these impacts, FERC has violated its NEPA duties and the Proposed Rule is unlawful.

D. In Particular, the Notice Fails to Analyze the Potential for Adverse Environmental Impacts from the Proposed Rule's Effects on New York's Efforts to Fight Climate Change and Improve Public Health

The Proposed Rule may impede New York's efforts to ensure a diverse, resilient, efficient and affordable electric system. New York's affirmative policy decisions regarding its

electricity use reflect the State's concern that its energy choices progressively reduce climate change and conventional air pollution that adversely affects the health and safety of its citizens. FERC's failure to address the inconsistencies between the Proposed Rule and New York's efforts on these points is a particularly important way in which FERC is violating the environmental review requirements of NEPA.

In 2015, through the New York State Energy Plan ("SEP"), New York adopted ambitious clean energy targets for its energy infrastructure. Under the SEP, by 2030, New York will achieve a 40 percent reduction in carbon emissions from 1990 levels; obtain 50 percent of its electricity generation from renewable energy sources, including distributed energy and large-scale renewables; and achieve 600 trillion British thermal units ("Btus")in energy efficiency gains.[10] Actions the State has taken to meet these targets have put the State on a path to achieve its longer-term goal of decreasing its carbon emissions 80 percent by 2050.[11]

The Proposed Rule may impede achievement of the State's environmental goals in several ways. First, New York is transitioning away from coal-fired generation. While a decade ago New York's coal plants produced approximately 14 percent of the total electricity generated in New York, today, coal plants produce less than one percent of the State's electricity.[12] The orderly phase-out of the remaining coal plants operating in in the State would advance achievement of New York's "50 percent by 2030" goals by eliminating these plants' carbon emissions, and the Proposed Rule's unjustified financial support for coal plants may impede that.

The Proposed Rule may also impede New York's climate change and clean energy objectives because it provides additional financial support for these polluting power facilities, both in New York and in upwind States whose generation is controlled by FERC-regulated System Operators that would be subject to the Proposed Rule. Aside from its efforts to reduce greenhouse gas emissions, New York has spent decades seeking reduction in the sulfur dioxide and nitrogen oxide emissions from those out-of-state plants because these emissions contribute to illness, acid rain and other health and environmental impacts in New York when they blow into New York on the prevailing winds. The Proposed Rule could reverse the progress made to date on that important health and environmental issue.

Second, in August 2016, the New York State Public Service Commission approved a Clean Energy Standard ("CES") to incentivize the development of renewable generation sources

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[10] 2015 New York State Energy Plan, at 112, available at https://energyplan.ny.gov/Plans/2015.

[11] By Executive Order, it is a goal of New York to reduce carbon emissions from all sources within the State 80 percent below levels emitted in the year 1990 by the year 2050. 9 N.Y.C.R.R. §§ 7.24 & 8.2.

[12] New York Independent System Operator. "Power Trends 2015 Rightsizing the Grid," 2015 available at http://www.nyiso.com/public/webdocs/media_room/publications_presentations/Power_Trends/Power_Trends/ptrends2015_FINAL.pdf.

in New York. Again, the Proposed Rule could undercut New York's efforts because it favors electricity generation from polluting, nonrenewable, coal-fired sources.

Third, New York has taken aggressive action in reducing carbon emissions and air pollution along with its neighboring States. The Regional Greenhouse Gas Initiative ("RGGI") aims to lower total energy-related carbon dioxide emissions from the nine participating RGGI states by 40 percent below 1990 levels by 2030 and by 80 percent by 2050. Through successive annual reductions in its emissions allowances, RGGI will cap carbon dioxide emissions from power plants at approximately 84.3 million short tons in 2017 and 55.7 million short tons by 2030.[13] In 2015, over $410 million in RGGI proceeds were invested in programs that will save participants almost $2.31 billion on their energy bills and avoid the use of over 9 million MWh of electricity and 28.0 trillion Btu of fossil fuel.[14] The Proposed Rule could counter these gains by providing unjustified financial support for older coal-fired plants in in upwind states, increasing not only carbon emissions but also emissions of sulfur dioxide and nitrogen oxide that harm New York, as mentioned above.

Cumulatively, New York's energy policies have led to a significant reduction in climate change-causing pollutants. New York's clean energy goals have led to the State sourcing nearly 25 percent of its power from renewable sources.[15] In addition, from 2000 to 2016, sulfur dioxide and nitrogen oxide emissions from New York's power sector dropped 98 percent and 87 percent respectively.[16] Imposing the Proposed Rule – particularly in the absence of any demonstrated need for coal plants to receive compensation through cost-of-service regulation – would be inconsistent with these hard won reductions in pollution because it would favor coal-fired generation sources when New York has determined that those sources create unnecessary harm. FERC's failure to provide a NEPA analysis of these inconsistencies is an important reason why promulgation of the Proposed Rule would be unlawful.

IV. Conclusion

The Proposed Rule serves no purpose: nothing in the Notice demonstrates that a fuel uncertainty problem exists, or that the Proposed Rule would solve that purported problem or otherwise provide any benefits. The Proposed Rule does, however, risk harm to New York by creating financial reward for increased generation from coal-fired power plants that could contribute to climate change, illness and environmental harm in New York. That increased generation from coal plants would also be inconsistent with New York's legitimate efforts to address important reliability, public health and environmental protection problems arising from climate change and coal-fired power plant emissions. FERC's failure to analyze these potential

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[13] Regional Greenhouse Gas Initiative, Inc., "The RGGI CO2 Cap," available at: https://www.rggi.org/design/overview/cap.

[14] Regional Greenhouse Gas Initiative, Inc., "The Investment of RGGI Proceeds in 2015," at 5-6 (October 2017), available at: http://www.rggi.org/docs/ProceedsReport/RGGI_Proceeds_Report_2015.pdf.

[15] *See id.*

[16] *See Power Trends 2017*, at 11.

harms violates NEPA. There is no reason for FERC to adopt a rule that creates no benefits but may well be contrary to legitimate State interests, particularly through a rushed, inadequate administrative process.

New York has addressed reliability and resiliency issues, as it continues to work toward a progressively cleaner, more sustainable and more affordable energy future, and will continue to do so in the future, with FERC approval as may be needed. For all the reasons discussed above, FERC should decline to promulgate the Proposed Rule.

Sincerely,

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL OF THE STATE
OF NEW YORK

By: /s/ Lemuel M. Srolovic

Lemuel M. Srolovic
Chief, Environmental Protection Bureau
120 Broadway
New York, NY 10271
(212) 416-8271

Michael J. Myers
Senior Counsel, Air Pollution and Climate Change Litigation

Mihir A. Desai
Andrew G. Frank
Joshua M. Tallent
Assistant Attorneys General

Peter C. Washburn
Policy Advisor
Jeremy Magliaro
Policy Analyst