



HARVARD LAW SCHOOL

Environmental Law Program

POLICY INITIATIVE

THE DEPARTMENT OF ENERGY'S “GRID RESILIENCY PRICING RULE”

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Presentation Outline

- I. What did DOE do?
- II. What Does DOE's NOPR Say?
- III. How Is the NOPR Legally Deficient?
- IV. What Are FERC's Options?



I. What Did DOE Do?

DOE invoked its authority under the DOE Organization Act (42 U.S.C. § 7173) to propose a rule under the Federal Power Act

- DOE has not invoked this authority to propose a rule since 1985; has never proposed a rule under the FPA
- DOE's NOPR instructs FERC to “consider and take final action” within 60 days
 - Only FERC can finalize the proposal



II. What Does DOE's NOPR Say?

DOE purports to identify a problem:

- “There have been significant retirements of **fuel-secure** generation”
- “DOE Staff Report warns that premature retirements of **fuel-secure** resources impose serious risks”
- “Wholesale power markets are not adequately pricing resiliency attributes of **fuel-secure** power”



II. What Does DOE's NOPR Say?

DOE proposes a solution to its problem:

- “ensure that the reliability and resiliency attributes of generation **with on-site fuel** are fully valued”
- “ensure fair compensation in order to stop the imminent loss of generators **with on-site fuel**”
- Directs FERC to “issue a final rule requiring [RTO/ISOs*] to develop and implement market rules that accurately price generation resources necessary to maintain the reliability and resiliency” of the grid.



II. What Does DOE's NOPR Say?

DOE's proposed "Reliability and Resiliency Rate"

- (A) "provides . . . for the (1) purchase of electric energy from an eligible [] resource and (2) recovery of costs and a return on equity for such resource dispatched during grid operations" and
- (B) "shall include pricing to ensure that each eligible resource is fully compensated for the benefits and services it provides to grid operations, including reliability, resiliency, and on-site fuel, and that each eligible resource recovers its fully allocated costs and a fair return on equity."

II. What Does DOE's NOPR Say?

DOE's proposed "eligible resource"

- Located in an RTO/ISO*
- Able to provide essential energy and ancillary reliability services
- "Has a **90-day fuel supply on site** enabling it to operate during an emergency, extreme weather conditions, or a natural or man-made disaster"
- Is not subject to state cost-of-service regulation

III. How is the NOPR Legally Deficient?

A rule based on the NOPR would be vulnerable to legal challenge under the Federal Power Act (FPA) and Administrative Procedure Act (APA)

- *FPA*: FERC's authority to order changes to wholesale rates premised in finding current rates unjust and unreasonable
- *APA*: Proposed rule must provide opportunity for meaningful comment



III. How is the NOPR Legally Deficient?

Would a final rule be “unduly discriminatory”?

- Yes: Providing a special rate to only merchant-owned plants in some markets based on their fuel supply is unsupportable
- Maybe not: “Nothing in applicable law requires a rate standard to result in no disparate impact on any power resource whatsoever.” D.C. Circuit, 2017.
 - FPA only prohibits undue discrimination when entities are “similarly situated”



III. How is the NOPR Legally Deficient?


Would a final rule be “arbitrary and capricious”?

- Probably not, assuming the final rule points to some evidence in the record for support.
- Courts defer to FERC’s technical, policy, and ratemaking judgments.



IV. What Are FERC's Options?

Might FERC finalize the NOPR?

- Powelson: "We will not destroy the marketplace . . . FERC does not do . . . energy politics." (Oct. 4)
- Does LaFleur's Retweet  ("Great Message") = Endorsement?
- Chatterjee: wants to "correct market deficiencies that aren't properly valuing the attributes of these assets in a legally defensible manner that doesn't blow up the markets."



IV. What Are FERC's Options?

If FERC rejects the NOPR, what else might it do?

- Chatterjee said FERC might:
 - Issue its own NOPR based on the record
 - Issue a notice of inquiry / advanced NOPR
 - Request additional comments
 - Host a technical conference

