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Via Electronic Mail

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

On behalf of the Environmental Defense Fund ("EDF") and the Natural Resources Defense Council ("NRDC"), we write to object to First Energy Solutions Corp.'s request for an emergency order under section 202(c) of the Federal Power Act. NRDC and EDF are national environmental advocacy organizations with millions of members and activists across the country, including in Ohio and the PJM service territory who would be harmed by the costs and environmental and public health impacts of such an order.

On March 29, 2018, FirstEnergy Solutions Corp. ("FirstEnergy" or "FES") formally requested a section 202(c) of the Federal Power Act ("FPA") emergency order.[1] FES requests that all merchant coal and nuclear generating units in the PJM Interconnection ("PJM") footprint (all or parts of 13 states and Washington D.C.) with at least 25 days of onsite fuel be provided non-market, cost-of-service rates and guaranteed profits for at least four years (the "profit guarantee request"). FirstEnergy argues that its profit guarantee request is necessary to ensure resilience, despite the Federal Energy Regulatory Commission ("FERC") recently dismissing this same issue and proposal, finding that "the extensive comments submitted by the RTOs/ISOs do not point to any past or planned generator retirements that may be a threat to grid resilience."[2] PJM's has reaffirmed this finding recently, stating in response to FES's request that "[t]his is not an issue of reliability. There is no immediate emergency,"[3] and that "[n]othing we have seen suggests there is any kind of emergency from these units retiring."[4]

FES's profit guarantee request suffers from already examined and dismissed errors and fundamental deficiencies. Namely, the request: (1) is premised on legal flaws; (2) ignores prior and current FERC activity and finding; (3) would impose enormous cost upon American homes and businesses without benefit; and (4) undermine the competitive marketplace. For these reasons, EDF and NRDC agree with the assessments of others, including Sierra Club, the Advanced Energy Economy, the American Council on Renewable Energy, the American Forest & Paper Association, the American Petroleum Institute, the American Wind Energy Association, the Electric Power Supply Association, the Electricity Consumers Resource Council, the Independent Petroleum Association of America, the Interstate Natural Gas Association of

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[1] Letter from FirstEnergy Solutions Corporation to the Honorable James Richard Perry (Mar. 29, 2018) (hereinafter "FirstEnergy").

[2] *Grid Reliability and Resilience Pricing*, 162 FERC ¶61,012, at P 15 (2018), FERC Docket RM18-1-000 at paragraph 15. Both the FirstEnergy profit guarantee request and proposal at issue before FERC in RM18-1 centered upon an out-of-market cost-of-service plus profit guarantee for resources with onsite fuel, a condition only coal and nuclear assets are able to meet. Both proposals likewise based the rationale for the guarantee on a need to ensure grid resilience. FirstEnergy's profit guarantee request departs from that at issue in RM18-1 by requesting action only on assets in the PJM footprint (rather than in other RTO/ISOs with capacity markets) and by reducing the onsite fuel requirement to 25 days (rather than 90 days).

[3] PJM Statement and Letter to U.S. DOE Secretary Perry.

[4] Scott DiSavino & Valerie Volcovici, *FirstEnergy seeks emergency lifeline for U.S. nuclear, coal plants*, REUTERS (Mar. 29, 2018, 12:10 PM), https://www.reuters.com/article/us-firstenergy-nuclear-coal/firstenergy-seeks-emergency-lifeline-for-u-s-nnuclear-coal-plants-idUSKBN1H52ET (quoting PJM's Senior Vice President Vincent Duane).

America, the Natural Gas Supply Association, the Solar Energy Industries Association, and PJM, that FirstEnergy's request is problematic and flawed.[5]

EDF and NRDC therefore urge the Department to reject FirstEnergy's profit guarantee request.

1. PJM is not facing an emergency and FES's attempt to use Section 202(c) is unlawful.

Section 202(c) expressly is limited to "emergencies" or other "sudden" events.[6] The Department acknowledges on its own website that Section 202(c) only enables it to impose temporary measures due to an "emergency" or other "sudden" circumstance.[7] While Section 202(c) does not define either "emergency" or "sudden," the dictionary definitions of these words reinforce that they mean an imminent crisis that is often unexpected.[8]

The so-called "emergency" that FES raises in its profit guarantee request is nothing of the sort. The nuclear facility closures upon which FES primarily relies are scheduled to retire *2-3 years from now*.[9] The other examples are no more convincing. First, FES cites facilities that *may* retire[10]—a mere possibility does not rise to an imminent crisis. Second, FES cites facilities that retired in 2017 or announced their future retirement in March 2017. What FES ignores is that in June 2017, PJM *itself* sought Section 202(c) authority to keep the Yorktown coal-fired units

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[5] *See* https://epsa.org/wp-content/uploads/2018/03/FINAL-request-for-comment-period-on-FES-202c-filing.pdf; *See* https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/2018.03.30_Sierra%20Club%20letter%20to%20DOE.pdf.

[6] 16 U.S.C. § 824a(c)(1).

[7] "DOE's Use of Federal Power Act Emergency Authority," DOE, https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use.

[8] *See* "Emergency," BLACK'S LAW DICTIONARY 2d Ed., https://thelawdictionary.org/emergency/ ("Situation requiring immediate attention and remedial action. Involves injury, loss of life, damage to property, or catastrophic interference with the [*sic*] normal activities. A sudden, unexpected, or impending situation"); "Sudden," OXFORD ENGLISH DICTIONARY ONLINE, https://en.oxforddictionaries.com/definition/sudden ("Occurring or done quickly and unexpectedly or without warning.").

[9] FirstEnergy at 8, 20 (noting that Davis-Besse, Perry, and Beaver Valley are scheduled to retire in 2020 or 2021).

[10] *Id.* at 21 (noting that units at the W.H. Sammis coal-fired plant "are in danger of being closed.)

online,[11] and yet it did not feel compelled to file a similar request here or for the incidents cited by FES. This is likely because it, too, recognizes that there is no "emergency" or "sudden" event requiring a handout to coal and nuclear generation. As noted by PJM:

> PJM does not believe that operating outside of the market to preserve a particular class or type of generation is needed at this time for reliability. The markets have been resilient in attracting new investment. In addition, a variety of tools exist as a backstop should specific generation be needed in a particular area.[12]

While FES selectively quotes PJM's assertions about the role coal and nuclear generation played during recent weather events in an effort to supports its facilities' necessity,[13] PJM's comments only reinforce the lack of "emergency" present here, given that, notwithstanding these assertions, PJM has not deemed the FES closures to be an "emergency" requiring Section 202(c) action.[14] FES also ignores PJM's statements that its "operations and planning processes [have] ensure[d] margins on the system [that] are robust enough to operate through extreme weather scenarios."[15]

Case law further supports that FES's profit guarantee request does not identify a basis for an "emergency" under Section 202(c). For example, in *Richmond Power & Light v. FERC*, in response to the 1973 oil embargo, the Commission chose not to invoke its emergency authority, despite concerns of "dire oil shortfalls."[16] As noted by the D.C. Circuit in upholding the Commission's decision:

> We are fully mindful, of course, that current national policy is to discourage reliance on foreign oil, but we cannot fault the Commission for reading Section

[11] DOE, Federal Power Act Section 202(c) – PJM Interconnection & Dominion Energy Virginia, 2017, at https://www.energy.gov/oe/downloads/federal-power-act-section-202c-pjm-interconnection-dominion-energy-virginia-2017-0.

[12] U.S. Sen. Comm. on Energy and Nat. Res., *The Performance of the Electric Power System in the Northeast and Mid-Atlantic During the Recent Winter Weather Events, Including the Bomb Cyclone*, Questions for the Record Submitted to Mr. Andrew Ott, Response to Question 1 from Sen. Lisa Murkowski (Jan. 23, 2018).

[13] FirstEnergy at 6 (citing PJM's President Andrew Ott).

[14] DiSavino & Volcovici, *supra* note 4 ("PJM, in response, rejected the need for an emergency order.")

[15] U.S. Sen. Comm. on Energy and Nat. Res., *The Performance of the Electric Power System in the Northeast and Mid-Atlantic During the Recent Winter Weather Events, Including the Bomb Cyclone*, Questions for the Record Submitted to Mr. Andrew Ott, Response to Question 1 from Sen. Lisa Murkowski (Jan. 23, 2018).

[16] *Richmond Power & Light v. FERC*, 574 F.2d 610, 613 (D.C. Cir. 1977).

> 202(c) as devoid of a solution. ***That section speaks of 'temporary' emergencies, epitomized by wartime disturbances, and 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***.[17]

The situation described in *Richmond Power & Light* is precisely the type of situation at issue here: inefficient and old coal and nuclear generation are now uneconomic in PJM's competitive markets and PJM and FERC repeatedly have confirmed that there is not a reliability crisis. As stated by PJM, FirstEnergy's profit guarantee request is not based on an emergency nor reliability or resilience crisis and instead "fundamentally a corporate issue."[18] FES's interest in a bailout for coal and nuclear generation, particularly its own, is not basis for a Section 202(c) order.

2. FirstEnergy seeks to undermine the recent FERC decision and ongoing FERC resilience docket

FirstEnergy's profit guarantee request substantially mirrors the Grid Resiliency Pricing proposal that FERC unanimously rejected less than three months ago, finding there was no urgent threat to the grid's reliability.[19]

Like that proposal, the FirstEnergy profit guarantee request asks for utility customers to pay above-market "cost-of-service" rates (including a guaranteed profit) to owners of all merchant coal and nuclear generating units with a certain amount of on-site fuel on the theory that those assets are necessary for resilience.

FirstEnergy's rationale and favored outcome has been rejected. FirstEnergy had opportunity to ask for the reconsideration it seeks now before DOE, but declined to request rehearing at FERC on its January 8 order rejecting the Grid Resiliency Pricing proposal. Instead, FirstEnergy seeks to re-litigate the same issues at DOE without confronting the large body of record evidence amassed at FERC from industry, experts, RTOs and ISOs, states, and other stakeholders demonstrating that the relief FES requests is unnecessary and unrelated for reliability or resilience and would result in unjust and unreasonable rates as well as undue discrimination.

Although FERC found no urgent threat to the grid's reliability to justify the extraordinary action proposes again now, it did initiate an administrative proceeding to better define and

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[17] *Id.* at 615 (emphasis added) (internal citations omitted).

[18] https://www.reuters.com/article/us-firstenergy-nuclear-coal/firstenergy-seeks-emergency-lifeline-for-u-s-nuclear-coal-plants-idUSKBN1H52ET.

[19] Reliability and Resilience Pricing, Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures, 162 FERC ¶ 61,012 (Jan. 8, 2018).

understand resilience and determine whether addition steps are needed to ensure resilience.[20] FirstEnergy attempts to side-step and undermine that proceeding with its request to DOE.

Rather than confront the voluminous evidence and analysis presented before FERC, FirstEnergy relies primarily on a recently released National Energy Technology Laboratory report ("NETL Report") that incorrectly concludes that power plants with onsite fuel were critical to preserving "resiliency" during the "Bomb Cyclone" in late December to early January.[21] The NETL Report departs from the majority of studies on the subject. This departure is primarily due to a misinterpretation embedded in the report: that the fact that coal generation increased more in comparison to other forms of generation during stressful winter events was a sign that coal provided resiliency. The actual explanation is far simpler: there are many coal units that are rarely used due to their high-cost, and thus those coal plants are only used when demand is far higher than usual.[22] This fundamental mistake is directly attributable the fact that the report does not rigorously define or measure resilience.[23] In contrast, PJM's analysis of its systems performance during that weather event shows that there is no looming "resiliency" crisis.[24]

In fact, coal and nuclear don't provide many of the reliability services the grid needs. Many types of generators far outperform coal and nuclear generators in their capability to provide

[20] Jan. 8 Order at 17-20.

[21] FirstEnergy Request at 3-8, 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

[22] 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/.

[23] https://www.nrdc.org/experts/jennifer-chen/whats-resilience-doe-should-know-spending-your-mone.

[24] 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. PJM has also noted that it had 5,400 MWs of emergency demand response available during the Bomb Cyclone that it did not end up needing to utilize. U.S. Sen. Comm. on Energy and Nat. Res., *The Performance of the Electric Power System in the Northeast and Mid-Atlantic During the Recent Winter Weather Events, Including the Bomb Cyclone*, Questions for the Record Submitted to Mr. Andrew Ott, Response to Question 2 from Sen. Lisa Murkowski (Jan. 23, 2018).

services like flexibility, frequency regulation, and primary frequency response, as noted in a PJM chart included in DOE's August 2017 Staff Report.[25]

PJM likewise disagrees with FES's position, stating that: "This is not an issue of reliability. There is no immediate emergency." … "Diversity of the fuel supply is important, but the PJM system has adequate power supplies and healthy reserves in operation today, and resources are more diverse than they have ever been. Nothing we have seen to date indicates that an emergency would result from the generator retirements. The potential for the retirements has been discussed publicly for some time. In anticipation, PJM took a preliminary look at the effect of the retirements on the system. We found that the system would remain reliable. We have adequate amounts of generation available." [26]

3. FirstEnergy Seeks to Impose Enormous Cost Upon the American Public

FirstEnergy seeks compensation for "operating expenses, costs of capital and debt, and a fair return on equity and investment." It specifically seeks cost and profit guarantees antithetical to how markets operate, with "full cost recovery consistent with ratemaking standards and principles or…full recovery of all costs necessary to ensure continued operations." FirstEnergy does not estimate in its application the amount of money it requests DOE take from the ratepayer and give to uneconomic coal and nuclear plants in PJM. However, because the profit guarantee request mirrors the already examined and denied proposal at issue before FERC in RM18-1-000, rough estimates are available.

Independent analysis found that guaranteeing costs and profits to coal and nuclear assets would potentially increase costs on consumers and businesses in PJM's retail choice states by $8.1 billion annually, a roughly 19% increase in total costs.[27]

4. FirstEnergy Seeks to Undermine Competitive Markets

FirstEnergy's profit guarantee request asks that coal and nuclear plants in PJM be provided a non-market cost-of-service plus profit rate. This rate would be substantially higher than what a competitive marketplace provides. Higher prices are inherent to the profit guarantee request; as FirstEnergy previously explained in 2011, "competition is the best way to offer lower

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https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf at 86.

26 https://www.rtoinsider.com/pjm-ferc-resilience-rick-perry-first-energy-89464/

27 http://energyinnovation.org/wp-content/uploads/2017/12/20171025_Resilience-NOPR-Cost-Research-Note-UPDATED.pdf at 4-5.

generation prices to customers, increased productivity and efficiencies from existing generating facilities, provide the appropriate market signals regarding the need for new generation, and promote jobs and economic growth."[28]

Although FirstEnergy no longer agrees with its own statement, FERC continues to favor competitive marketplaces to ensure a reliable, resilient electric grid at just and reasonable rates on the basis of "substantial and well-documented economic benefits that these markets provide to consumers."[29] By seeking out-of-market profit guarantees for an entire class of resources throughout PJM's territory, FirstEnergy strikes at the core of FERC's statutory mission and mandate by seeking to substantially (if not fatally) impair competitive wholesale markets. Such a sweeping refutation of competitive markets would not only undermine a policy meant to protect the public interest but also the investment decisions made throughout the energy sector.

FirstEnergy's profit guarantee request suggests that it no longer believes in competitive markets, citing to already raised and denied argument.[30] FirstEnergy's assertion to this effect, as described above, has thus already been heard, considered, and found to be inaccurate. Improvements to wholesale markets are possible, but generally over-, not under-procurement has been consistently observed.[31] Nor does FirstEnergy's repeated request suggest that market structures are so fundamentally flawed that FERC's reliance upon markets is misplaced; indeed, "[a]s part of its ongoing oversight of wholesale electric markets, the Commission continues to evaluate its current rules and has issued several orders to ensure that our rates in our markets remain just and reasonable and not unduly discriminatory or preferential."[32] Because of this, "[t]he Commission's endorsement of markets does not conflict with its oversight of reliability, and the Commission has been able to focus on both without compromising its commitment to either."[33]

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[28] https://seekingalpha.com/article/284013-firstenergys-ceo-discusses-q2-2011-results-earnings-call-transcript?page=2.

[29] RM18-1 at paragraph 11.

[30] FirstEnergy at 8, "'Distorted price signals' in the organized markets overseen by [FERC], such as PJM, 'have resulted in under-valuation of grid reliability and resiliency benefits provided by traditional baseload resources, such as [those powered by] coal and nuclear' fuel."

[31] https://www.nrdc.org/experts/jennifer-chen/our-grid-needs-go-diet-get-leaner-and-greener

[32] RM18-1 at paragraph 10.

[33] RM18-1 at paragraph 11.

5. Conclusion

For the foregoing reasons, EDF and NRDC ask the Department of Energy to deny the FirstEnergy profit guarantee request.

Sincerely,

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