



NOPR within 60 days from publication in the *Federal Register*, or as an alternative, issue the NOPR as an interim final rule, effective immediately. In addition, the Letter suggests that the Commission allow 45 days for notice and comment on the NOPR – thereby requiring the Commission to “complete final action on the rule” within 15 days after receiving comments – and that organized markets be required to submit compliance filings within 15 days of the effective date of the rule.

The Letter does not justify its suggestion that the Commission should issue an interim final rule within the narrow provision for such rules in the Administrative Procedure Act (“APA”), and as a result, the Commission should not pursue this alternative. The APA allows an agency to issue an interim final rule without first publishing a proposed rule only when it can show “good cause” for doing so.<sup>2</sup> The good cause exemption “is to be ‘narrowly construed and rarely countenanced,’” and is generally “‘limited to emergency situations.’”<sup>3</sup> To demonstrate good cause, an agency must establish: the existence of an emergency; that prior notice would subvert the underlying statutory scheme; or that Congress intended to waive notice and comment rulemaking requirements. None of these circumstances exists such that the extraordinary use of an interim final rule would be justified, and the Letter does not even attempt to suggest they do.

To the extent the Letter implies that an emergency exists to justify the proposed interim final rule<sup>4</sup> (although it provides no justification for this action whatsoever), publicly available information from the Department of Energy (“DOE”) and North American Electric Reliability Corporation (“NERC”), as well as other experts, all demonstrate that no emergency exists that

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<sup>2</sup> See 5 USC § 553.

<sup>3</sup> See *Tennessee Gas Pipeline Co. v. FERC*, 969 F. 2d 1141, 1144 (D.C. Cir. 1992) (citations omitted).

<sup>4</sup> See, e.g., *Jifry v. FAA*, 370 F.3d 1174, 1179-90 (D.C. Cir. 2004) (approving the Federal Aviation Administration’s use of an emergency interim rule regarding the suspension and revocation of pilot certificates after the September 11, 2001, terrorist attacks).

would justify such an action.<sup>5</sup> To the contrary, both DOE and NERC recently released reports categorically concluding that there is no 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>6</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>7</sup> The Letter also makes no attempt to argue that notice and comment would subvert the statutory scheme of the Federal Power Act, or that Congress intended for the Commission to waive notice and comment requirements for such a far-reaching rule.

In light of the importance and potential implications of the NOPR for Commission-jurisdictional markets, the suggestion in the NOPR for the Commission to only allow for 45 days of public comment does not establish a reasonable and adequate time for the submission of comments in response to the NOPR. 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>8</sup> As the time frame laid out in the Letter and NOPR for notice and comment is unreasonable on its face, the

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<sup>5</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 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>6</sup> DEPARTMENT OF ENERGY, STAFF REPORT TO THE SECRETARY ON ELECTRICITY MARKETS AND RELIABILITY, 63.

<sup>7</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>8</sup> 42 USC §7173(b) (emphasis added).

Commission is justified in setting its own schedule for seeking comments on the NOPR, should it choose to notice it or a similar proposed rule for comment at all.

This is one of the most significant proposed rules in decades related to the energy industry and, if finalized, 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 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 (indeed, it is a statutory requirement, but for an extraordinary showing that DOE fell well short of here) 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>9</sup>

Given the importance and complexity of this issue, the Energy Trade Associations recommend that the Commission provide at least 90 days for interested parties to provide initial comments on any proposed rule, as well as affording an opportunity for reply comments, to ensure reasoned decision-making and a robust record to help inform the Commission in developing any final rule. The time frame provided in the Letter for comments is far too short to allow stakeholders to submit careful analysis on this complex and significant rulemaking, and as no emergency exists, the Commission should reject the directive from DOE to circumvent the required bare minimum of a 60-day comment period.

Furthermore, in recognition of the significance of the proposed changes in the NOPR, convening a technical conference prior to the comment deadline would provide affected parties

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<sup>9</sup> Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993).

the opportunity to better understand key aspects of the proposed regulations and, ultimately, facilitate the submission of more meaningful comments. These reasonable steps would allow for meaningful public input from all stakeholders, including from energy market participants, grid operators and regulators and the power-consuming public, and will provide the Commission with more detailed and carefully considered comments that will help ensure that it can make a reasoned decision in this matter based on the best-available information.

Finally, the Energy Industry Associations note that the other time frames set out in the Letter for consideration of the issues presented in the NOPR are wholly unreasonable and insufficient to allow for an informed consideration of the significant issues proposed therein. For instance, the Letter directs the Commission to complete a final rule 15 days after the end of the proposed comment deadline; this is patently insufficient to allow the Commission time to meaningfully consider the comments submitted and draft a thoughtful final rule. Similarly, the proposed deadline in the Letter for organized markets to submit compliance filings 15 days after the rule becomes effective is clearly inadequate time for these markets to consider, draft and file the type of major reforms contemplated in the NOPR,<sup>10</sup> let alone give their stakeholders time to weigh in on these filings before they are sent to the Commission.

The Energy Industry Associations urge the Commission to reject the proposed unreasonable timelines and instead proceed in a manner that would afford meaningful consideration of public comments and be consistent with the normal deliberative process that it typically affords such major undertakings, should it decide to proceed with a rulemaking of this type at all.

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<sup>10</sup> Compare with *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) (providing that compliance filings were due within 18 months of the effective date of the rule).

## II. CONCLUSION

For the foregoing reasons, the undersigned Energy Industry Associations respectfully request that the Commission: deny the request for an interim final rule; initiate a technical conference; allow for at least a 90-day comment period for initial comments in this proceeding; provide for an opportunity for reply comments; and reject the expedited timeline for finalization of the rule by the Commission and compliance filings from organized markets thereto. We look forward to working with the Commission as it considers the issues set forth in the Letter and the NOPR.

Respectfully submitted,

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