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MEMORANDUM

TO: The Ohio Manufacturers' Association Energy Group

FROM: Kimberly W. Bojko, Carpenter Lipps & Leland LLP

DATE: January 10, 2017

SUBJECT: Summary of FERC Order Terminating the Notice of Proposed Rulemaking and Establishing Additional Procedures

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On January 8, 2018, the Federal Energy Regulatory Commission (FERC) issued an Order terminating the Notice of Proposed Rulemaking (NOPR) in FERC Docket No. RM18-1-000. The NOPR was submitted to FERC by the Secretary of the Department of Energy (DOE) and concerned a proposal to subsidize failing generators in the name of ensuring grid reliability and resiliency (Proposed Rule). On October 23, 2017, and again on November 7, 2017, OMAEG submitted comments opposing this rule. In its Order, FERC adopted the position of OMAEG, other customer groups, and many others that the Proposed Rule was contrary to FERC's longstanding commitment to market-based solutions and did not satisfy the legal requirements for the creation of a new rule. Ultimately, FERC determined that it had "no choice but to terminate" the docket for the Proposed Rule.

<u>The Record Did Not Support the Existence of a Reliability or Resiliency Problem</u>

The Proposed Rule would have used a consumer-funded subsidy to prop up failing coal and nuclear generators that are no longer economically viable on their own. The Proposed Rule attempted to justify this bailout by arguing that the loss of the generation supplied by these failing plants would jeopardize grid resiliency and reliability. FERC, however, correctly noted that despite the extensive comments that were submitted on the Proposed Rule by the Regional Transmission Organization (RTO) and Independent System Operator (ISO), the RTOs/ISOs did not point to a single instance (either in the past or in the future) where the retirement of a coal or nuclear generator threatened (or would threaten) grid reliability or resiliency. FERC concluded that although the goal of grid reliability and resiliency is a worthy one, the record in this case simply does not support the existence of a reliability or resiliency problem. And even if it had, the Proposed Rule did not put forth a solution that would actually solve that problem.

FERC also noted that it had consistently achieved its objectives by relying on market-based solutions and not by deploying subsidies or bailouts for some sectors of the grid. Finally, FERC recognized that the record failed to demonstrate that the Proposed Rule would not be unduly

discriminatory or preferential. As one Commissioner stated in a concurring opinion, the record did not support the need for "a multi-billion dollar bailout" to coal and nuclear generators because the record contained no evidence that affording such a bailout to these generators would meaningfully improve grid resilience.

FERC's Alternative Solution

FERC explained that it remains concerned with grid reliability and resiliency. But, rather than blindly adopt a proposal that may well have constituted a solution that does not work to a problem that does not exist, FERC chose to pursue a balanced approach to addressing reliability and resiliency concerns by first determining to what extent, if any, a problem exists, and then seeking out solutions. Understanding that reliability and resiliency challenges may vary across different regions of the country, FERC first put forward a uniform definition of resilience (as many comments, including OMAEG's, pointed out that no such definition existed) and then asked RTOs and ISOs to respond to a number of questions about their resiliency challenges within 60 days. After those comments are submitted, OMAEG and other parties will have the opportunity to respond with their own comments and concerns.

FERC's Decision Benefits OMAEG Members and All Electric Consumers

FERC's Order rejecting the Proposed Rule and terminating the NOPR will benefit OMAEG members and other consumers by not implementing a rule that would force consumers to fund a bailout to certain, select generators that can no longer compete in the market. The Order defined resiliency and set forth a process to explore through the RTOs/ISOs, on a regional basis, whether a problem even exists. The Order also appears to be stating that if a problem does in fact exist, FERC will look for market solutions on a regional basis.

Consistent with OMAEG's comments, the Order recognized FERC's support, for more than two decades, for markets and market-based solutions, citing those as a core tenet of FERC policy. The Order also explained that in regions with organized markets, FERC has largely adopted a pro-market regulatory model, relying on competition to approve market rules and procedures that, in turn, determine the prices for energy, capacity, and ancillary services products. The Order noted that under a pro-competition, market-driven system, owners of generating facilities that are unable to remain economic in the market may take steps to retire or mothball their generating facilities.

Conclusion

FERC recognized the merits of the comments submitted by OMAEG and many others and rejected a rule that would have had a negative impact on all but a few select generators that can no longer keep up with market demands. As a result, OMAEG members will be spared the obligation of subsidizing failing generators as part of an inefficient solution to an ill-defined problem.