UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association, Inc.	)	
	)	
v.	)	Docket No. EL14-17-000
	)	
ISO New England Inc.	)	

MOTION TO INTERVENE AND PROTEST OF THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rules 211, 212, and 214 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure (the "Rules"), 18 C.F.R. §§ 385.211, 385.212, and 385.214 (2012), and the Commission's January 10, 2014 Notice of Complaint, the New England States Committee on Electricity ("NESCOE") hereby files this Motion to Intervene and Protest in response to the complaint filed by the New England Power Generators Association, Inc. ("NEPGA") against ISO New England Inc. ("ISO-NE" or "ISO") on January 8, 2014 (the "Complaint").[1]

I. INTRODUCTION

The Complaint is NEPGA's second attempt in less than three months to unilaterally rewrite the Tariff[2] on the eve of the Forward Capacity Auction ("FCA") for the 2017-2018 Capacity Commitment Period ("FCA 8").[3] The Commission should reject NEPGA's now repetitive effort

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1 Complaint Requesting Fast Track Processing and Shortened Comment Period and Request for Tariff Waiver of the New England Power Generators Association, Inc., Docket No. EL14-17-000 (filed Jan. 8, 2014).

2 Capitalized terms not defined in this filing are intended to have the meaning given to such terms in the ISO-NE Transmission, Markets and Services Tariff (the "Tariff").

3 On October 31, 2013, NEPGA filed a complaint against ISO-NE, and request for Fast-Track process, seeking changes in advance of FCA 8 to certain administrative pricing rules. *See* Complaint of the New England Power Generators Association, Inc. and Request for Fast Track Processing, Docket No. EL14-7-000 (filed Oct. 31, 2013). NESCOE and numerous other parties filed protests and comments in that proceeding, which is presently pending before the Commission. *See* Motion to Intervene and Protest of New England States Committee on

to bypass the stakeholder process through a last-minute "emergency" complaint with material consumer cost implications. NEPGA has not justified the extraordinary action it is requesting of the Commission. It is effectively asking the Commission to order the removal of over 1,500 MWs from FCA 8, influencing the price outcome—and cost to consumers—of that auction by potentially hundreds of millions of dollars by NEPGA's estimate. At the same time, NEPGA requests a highly aggressive and unreasonable deadline for Commission action given the eleventh hour timing of the Complaint. This places a heavy burden on all parties. In addition to the shortened period for states and stakeholders to conduct analysis and provide comment in just nine business days, NEPGA asks that the Commission issue an order on this major rule change with substantial consumer cost implications in less than three weeks from NEPGA's Complaint date (and four business days after responses are filed) so that it may take effect in time for FCA 8.[4] NEPGA includes an alternative request to delay the FCA, an action that is unsupportable and without precedent to NESCOE's knowledge, if the Commission cannot decide the merits of the Complaint by that time.[5]

These are extremely aggressive time parameters within the context of *any* proposed rule change. That the provision NEPGA challenges implicates a core component of the Forward Capacity Market ("FCM") framework—the retention of resources needed for reliability—requires a broad and thorough evaluation, rather than one that is hurried as NEPGA proposes. In the end, NEPGA's proposal has material cost implications for consumers, and these cost implications merit a process for considering changes to the market rules that is not the result of unilateral preferences pushed forcibly in the eleventh hour through a complaint proceeding.

Electricity, Docket No. EL14-7-000 (Nov. 27, 2013), *available at* http://www.nescoe.com/uploads/NEPGA_EL14-7_11-27-13_FINAL.pdf.

4 Complaint at 2.

5 *Id.*

While this issue is neither "exceedingly simply" nor narrow as NEPGA represents,[6] the timing of the Complaint makes the decision before the Commission straightforward: a rule change of this magnitude involving the outcome of an auction beginning not even two weeks away should not be determined within the parameters of a three-week contested proceeding. There are wide-ranging and substantial consumer and market consequences of granting NEPGA's requested relief. NEPGA's proposed change could result in the procurement of capacity in excess of what is required to meet the Installed Capacity Requirement ("ICR"), contravening a bedrock principle of the FCM that the Commission has consistently found to be inviolable under the current FCM design.[7] In addition, any sudden change just weeks before the auction would without question create significant regulatory uncertainty that undermines confidence in the FCM, with implications for how potential market participants and investors view the stability of FCM prices and revenues.

According to NEPGA, there is also a potential cost implication of almost half a billion dollars for FCA 8[8]—costs ultimately borne by consumers. These increased capacity charges

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[6] *Id.* at 3, 7. *See also id* at n. 128 (". . . NEPGA has also kept the scope of this Complaint as narrow as possible.").

[7] *See New England States Committee on Electricity v. ISO New England Inc.*, 142 FERC ¶ 61,108 at P 34 (2013) ("2013 Order"), *reh'g pending*, *quoting ISO New England Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 at P 168 (2011) ("2011 Order"), *on reh'g*, 138 FERC ¶ 61,027 (2012) ("2012 Rehearing Order") ("[E]ven with an exemption for state-sponsored resources, the FCM cannot and will not procure more than the ICR. . . . In fact, the Commission ordered the [Minimum Offer Price Rule] in part because, rather than procuring capacity in excess of the ICR, the [Minimum Offer Price Rule] mechanism ensures procurement of 'just the ICR and no more.'"); 2012 Rehearing Order, citing to 2011 Order ("We maintain . . . that offer floor mitigation is just and reasonable because it spares customers the cost of procuring capacity that is not needed to meet ISO-NE's reliability objectives while simultaneously preventing new resources from offering significantly below their true net cost of entry and thereby suppressing capacity market prices."); 2011 Order at P 160 ("In balancing the cost of procuring additional capacity above the ICR on ratepayers against buyer-side market power, we agree with load parties that it is not just and reasonable or consistent with the design of the FCM to require ISO-NE to purchase additional capacity above the ICR") (footnote omitted), P 164 ("We agree . . . that limiting purchases to the ICR is a 'bedrock' principle of the FCM model."), P 167 ("Thus, unlike the two-tiered pricing proposal, offer-floor mitigation would spare customers the cost of procuring capacity in excess of the ICR – excess capacity that is not needed to meet ISO-NE's reliability objectives").

[8] Complaint at 7.

would be *in addition* to costs associated with retaining the over 1,500 MWs of capacity provided by the Brayton Point Power Station units ("Brayton Point Units") that ISO-NE has identified as needed for reliability in the 2017-2018 Capacity Commitment Period, capacity that would no longer be counted toward the ICR under NEPGA's proposal.

More systemically, for market participants seeking to maximize shareholder profits, granting NEPGA's relief on the eve of FCA 8 would establish a precedent that last-minute runs at litigation are an acceptable means of achieving a more favorable pricing outcome in an upcoming competitive auction. Establishing such a precedent could induce a steady stream of "emergency" contested proceedings as every new auction draws near.

These reasons alone provide the Commission more than sufficient basis to reject the Complaint. Another reason is that ISO-NE had already commenced a stakeholder process to consider the rule at issue *before* the Complaint was filed. The Commission should permit this deliberative process to proceed uninterrupted through to its culmination in an expected filing with the Commission in the first half of this year. NEPGA had ample time to raise concerns about the Non-Price Retirement Request ("NPRR") rules through the stakeholder process. NEPGA chose not to.

However, even if the Commission were to consider the merits of the Complaint, NEPGA has failed to show how the NPRR rules it challenges, that were approved by the Commission as just and reasonable and have been in effect for over five years, are now suddenly no longer just and reasonable and not working as they were intended. NEPGA likewise fails to demonstrate that its proposal is just and reasonable. To the contrary, its replacement provisions could result in an over-procurement of resources, a market outcome that the Commission has found to be

unacceptable under the current FCM structure. Accordingly, for these reasons, the Commission should dismiss the Complaint.

II. COMMUNICATIONS

Pursuant to Rule 203, 18 C.F.R. § 385.203 (2012), the person to whom correspondence, pleadings, and other papers in regard to this proceeding should be addressed and whose name is to be placed on the Commission's official service list is designated as follows:

Jason R. Marshall
Senior Counsel
New England States Committee on Electricity
655 Longmeadow Street
Longmeadow, MA 01106
Tel: (617) 913-0342
Email: jasonmarshall@nescoe.com

III. BACKGROUND AND BRIEF DESCRIPTION OF THE COMPLAINT

NEPGA asserts in the Complaint that it is unjust and unreasonable to count resources toward the ICR that have had a NPRR rejected for reliability reasons.[9] As recounted in the Complaint, the Commission accepted changes to the FCM rules in 2008 that incorporated an option for resources with a Capacity Supply Obligation ("CSO") to submit a NPRR as a pre-requisite to exiting the market.[10] ISO-NE proposed this change, along with provisions detailing the compensation for resources held for reliability (both in the case of Permanent De-List Bids and NPRRs), as an enhancement to the FCM rules filed pursuant to the 2006 FCM settlement agreement ("FCM Settlement").[11]

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[9] *Id.* at 1-2, 18-28.

[10] *Id.* at 12-14, citing to *ISO New England Inc.*, 125 FERC ¶ 61,102 (2008).

[11] *See* Complaint at 11-12, citing to Explanatory Statement in Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues, Docket Nos. ER03-563-000, et al. (filed Mar. 6, 2006) ("FCM Settlement") and ISO New England Inc. and New England Power Pool, Tariff Revisions Relating to Resources Needed for Reliability in the Forward Capacity Market, Docket No. ER08-1209-000 (filed July 1, 2008).

Under the NPRR option, a resource submitting a NPPR is subject to the same ISO-NE reliability review that takes place in the case of Permanent De-List Bids, and ISO-NE can reject a NPRR if the resource is needed for reliability.[12] Even if ISO-NE rejects the NPRR for reliability reasons, the resource can still retire.[13] Alternatively, if the resource instead elects not to exit the market, Section III.13.2.5.2.5.1(c) of the Tariff sets forth the payment that such resource will receive. In the case of a NPRR for the entire resource, the resource has the option of pursuing a cost-of-service payment or receiving the FCA clearing price.[14] Like resources submitting Permanent De-List Bids rejected for reliability reasons, a resource submitting a NPRR that is rejected to address a reliability need and elects to remain in the auction will be counted toward meeting the ICR for the relevant Capacity Commitment Period.[15]

According to NEPGA, the driver of the Complaint was ISO-NE's December 20, 2013 rejection of the NPRR request submitted for roughly 1,500 MWs of capacity that the Brayton Point Units provide.[16] NEPGA asks the Commission to order ISO-NE to revise the FCM rules in advance of FCA 8 so that resources with NPRRs that are rejected for reliability reasons will not have their capacity counted toward the ICR.

IV. MOTION TO INTERVENE

NESCOE is the Regional State Committee for New England. It is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff that ISO-NE

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[12] *See* Complaint at 12, citing Tariff §§ III.13.1.2.3.1.5, III.13.2.5.2.5(a)(i).

[13] *See* Complaint at 12, citing Tariff § III.13.1.2.3.1.5.1.

[14] *See* Tariff § III.13.1.2.3.1.5.1(c)(i). *See also* ISO New England, Resources Retained for Reliability: Conceptual Details, Oct. 8-9, 2013 Markets Committee ("MC Presentation"), at Slide 3, *available at* http://www.iso-ne.com/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2013/oct892013/index.html.

[15] *See* Complaint at 13, citing Tariff § III.13.2.5.2.5(b).

[16] *See* Complaint at 3.

administers.[17] NESCOE's mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest reasonable cost over the long-term, consistent with maintaining reliable service and environmental quality.

The Complaint described above has system reliability, consumer cost and environmental implications. NESCOE has a direct, immediate, and substantial interest in this proceeding, which will not be adequately represented by any other party. In addition, NESCOE's participation in this proceeding as the representative of the New England Governors will serve the public interest. NESCOE respectfully requests leave to intervene in this matter.

V. PROTEST

NEPGA bears a dual burden under Section 206 of the Federal Power Act ("FPA") in bringing this Complaint. First, it must demonstrate that the existing rate, rule, or practice is "unjust and unreasonable, unduly discriminatory or preferential."[18] Then, NEPGA must demonstrate that its proposed change is a just and reasonable alternative.[19] As set forth below, NEPGA has failed to meet either requirement under Section 206 of the FPA. The Commission should reject the Complaint, and the ongoing stakeholder process regarding the rules at issue should be allowed to continue.

A. The Complaint Fails to Demonstrate that the NPPR Rules Are Unjust and Unreasonable.

1. The Complaint Inappropriately Attempts to Influence the Pricing Outcome of an Auction that Is Two Weeks Away and to Make Unilateral Market Rule Changes in Isolation.

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[17] *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

[18] 16 U.S.C. § 824e(a).

[19] *See Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009), *quoting Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 10 (D.C. Cir. 2002).

Since the FCM Settlement was approved over seven years ago, there has always been an expectation that some resources would seek to exit the market. Retirements, and the business judgment leading to them, are not entirely predictable: the market rules do not include an underlying assumption, as NEPGA's Complaint suggests, that *if* a retirement occurs that was not entirely foreseen *then* the market rules must need immediate revision. The announced retirement of the Brayton Point Units is no reason for unreasonably hurried and significant changes to long-standing market rules, especially where such changes will have substantial consumer cost and market implications.

As detailed above, rules have been in place from the outset of the FCM governing the compensation of resources that are retained for reliability reasons and how they would be treated for purposes of satisfying the ICR. The Commission accepted the rules related to Permanent De-List Bids in 2007 and the provisions relating to NPRRs in 2008 as an enhancement to the rules. Contrary to NEPGA's attempt to create a sense of profound urgency around the rule changes it wants implemented immediately and without stakeholder process, this is not an instance where a gap in the rules was just discovered and warrants immediate attention. The Commission accepted the rules that NEPGA now challenges over five years ago, and during the past five years the potential has always existed that the rules could affect the procurement of resources needed to meet the ICR.

NEPGA's position is, in essence, that so long as the rule in question was never triggered, it was not a problem.[20] This position is untenable. Additionally, while NEPGA attempts to describe this proceeding as involving an emergency situation due to the large number of resources retained for reliability reasons in FCA 8, over the last seven auctions, other FCAs have

[20] Complaint at 33 ("This only became a serious issue for FCA 8 when the NPRRs for the Brayton Point Units were rejected on December 20, 2013").

experienced significant levels of resources retained for reliability that also would have affected the amount of excess supply in the market and the effective payment rate to existing generators.[21] For example, almost 1,200 MWs of de-list bids were rejected for reliability reasons in FCA 4, with over 600 MWs of de-list bids retained for reliability in FCA 5.[22] That the operation of the rule in FCA 8 might impact the auction price in a way that certain generators disfavor does not mean that the rules are not working as intended or that the rules have suddenly become unjust and unreasonable. In fact, as discussed in detail below, by counting retained resources toward the ICR, the design of the NPRR rules prevents an over-procurement of resources needed for resource adequacy. NEPGA has not met its burden to demonstrate that the rules are unjust and unreasonable and that abrupt changes are required.

Moreover, revisions to the NPRR rules should not be made on a stand-alone basis without considering as a whole the package of costs and benefits reflected in the FCM Settlement. NEPGA acknowledges in the Complaint that the NPRR rules were an extension of the rules arising from the FCM Settlement. Stakeholders agreed to an FCM framework reflecting significant trade-offs and compromises. According to the explanatory statement filed with the FCM Settlement, the FCM Settlement "reflects a complex compromise among all affected parties. Each Settling Party might well oppose at least some individual components within the Agreement if taken in isolation, but the Settling Parties together have agreed to the package as a whole."[23] NEPGA attempts to characterize the scope of the Complaint as

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21 *See* ISO New England Inc., Forward Capacity Auction #7 (FCA #7) Results Summary, Mar. 19, 2013 Reliability Committee Meeting, at Slide 15, *available at* http://www.iso-ne.com/committees/comm_wkgrps/relblty_comm/relblty/mtrls/2013/mar192013/index.html.

22 *Id.*

23 FCM Settlement at 5.

"narrow."[24] But it is not. To make a change in one aspect of the rules that alters costs and benefits without even a stakeholder discussion of the proposal tilts the balance of the settlement in favor of the entity that files the latest complaint, and over time, to those with the resources to continually litigate elements of the settlement. Just as it is inappropriate to view price floors as they have existed over the first seven FCAs[25] on a stand-alone basis, it is inappropriate to consider on a piece-meal basis the changes that NEPGA seeks to make through its Complaint. These market rules are inextricably linked and must be considered as part of an integrated package. While NEPGA may desire expediency and seek to cast the Complaint as narrow in scope, its last-minute proposal implicates the FCM rules as a whole.

2. NEPGA Had Ample Time to Seek Changes to the NPRR Rules.

There have been many opportunities since the Commission accepted the NPRR rules for NEPGA and others to initiate discussion of the changes requested in the Complaint. However, NEPGA never offered its proposed changes in the stakeholder process. NEPGA now seeks to circumvent the stakeholder process through an unreasonably aggressive Fast-Track schedule that places a heavy burden on states and others to conduct analysis, retain their own expert testimony, and respond to NEPGA's claims. The Commission has stated that Fast-Track processing "will be employed in only limited circumstances because of the extraordinarily compressed time schedule that would place a heavy burden on all parties to the proceeding," with parties "strongly encourage[d] . . . to seek Fast Track processing sparingly and only in the most unusual cases that demand such accelerated treatment."[26] In this stream of complaints, NEGPA is not requesting

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24 Complaint at 7, n. 128.

25 The price floor was to be removed after FCA 6 but was extended through FCA 7 after the Commission granted a one-time extension. *See ISO New England Inc.*, 138 FERC ¶ 61,238 at P 27 (2012). The granting of this extension followed extensive stakeholder discussions around FCM design changes and was strongly supported by NEPOOL and received support from a majority of states.

26 *Complaint Procedures*, Order No. 602, 86 FERC. ¶61,324 at 31 (1999).

Fast Tracking sparingly, the burden on others is indeed heavy, and the potential market and consumer cost implications are material.

Discussions regarding the treatment of de-list bids and NPRRs have taken place at a number of stakeholder meetings over the last several years. For example, in late 2012 and early 2013, NRG Energy, Inc. ("NRG"), a NEPGA member, proposed to the New England Power Pool ("NEPOOL") Markets Committee two alternative designs that would either eliminate ISO-NE's right to terminate the CSO of a resource retained for reliability reasons or implement a standby payment for such a right.[27] NRG also focused on adding different options for existing resources to exit the market. One such change was to "establish a compensatory rate for potential reliability service in advance of the auction."[28] In early 2012, Exelon Corporation, another NEPGA member, also addressed certain components of the NPRR rules related to enhancing the ability of demand response resources to submit NPRRs.[29] Even earlier, the interpretation of the NPRR rules and stakeholder review of the relevant planning procedures were discussed in 2011 in other NEPOOL technical committees.[30] NEPGA could have pursued further action on the rules it now challenges through the normal course, which would have afforded ISO-NE, states, and stakeholders an opportunity to engage before a filing was made with the Commission. Instead, NEPGA requests a last-minute change with minimal opportunity for input, even under NEPGA's alternative request that the Commission delay the start of FCA 8.

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[27] NRG Energy, Inc., Proposals for FCM: Standby Payments (and Delist Bids), Jan. 9, 2013 Markets Committee, *available at* http://www.iso-ne.com/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2013/jan92013/index.html.

[28] *Id.* at Slide 14.

[29] Exelon Corporation, FCM – Non-Price Retirements, May 10, 2012 Markets Committee Meeting, *available at* http://www.iso-ne.com/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2012/may9102012/index.html.

[30] *See* ISO New England Inc., Rejected De-List Bids, July 25-27, 2011 Joint Reliability Committee and Transmission Committee meeting, *available at* http://www.iso-ne.com/committees/comm_wkgrps/trans_comm/tariff_comm/mtrls/2011/jul26272011/a11_presentation_rejected_delist_bids.pdf.

Furthermore, neither NEPGA nor its members could have been surprised by the announcement of resource retirements in 2013. NEPGA contends that the rejection of NPRRs for the Brayton Point Units was "a further 'abrupt change in the supply demand balance.'"[31] The potential for resource retirements in New England has been raised by ISO-NE and discussed in the stakeholder process for years due to, among other factors, the expected removal of the capacity offer floor price in the FCA[32] and anticipated regulatory requirements that would necessitate significant capital investments. In 2011, ISO-NE identified the potential for substantial generator retirements as a strategic risk for the region that needed to be addressed.[33]

Every market experiences last-minute changes and unexpected events. The operation of the NPRR rules due to the NPRR submitted by the Brayton Point Units, while of course not perfectly foreseeable, could not have been unanticipated. To the contrary, it is unimaginable that sophisticated investors and market participants did not consider that resources will retire over time and that those resources could be sizeable. To the extent changes to the NPRR rules would provide a benefit to the market and ultimately consumers, NEGPA and others had ample time and occasion to propose revisions through the normal course.

3. Granting NEPGA's Request Weeks Before FCA 8 Would Invite Future Last-Minute Complaints and Increase Regulatory Uncertainty That Could Inhibit Market Participation.

Allowing a significant market rule change weeks from FCA 8 that could influence the auction price by hundreds of millions of dollars would set a troubling precedent. In any market, including the FCM, conditions affecting the market price are fluid. As discussed above, the

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31 Complaint at 3 (footnote omitted).

32 *See supra* n. 25 (stating that the price floor was to be removed after FCA 6 but was extended through FCA 7 after the Commission granted a one-time extension).

33 ISO New England Inc., *Strategic Planning – Risk Summary, Initial Assessment* (April 21, 2011), at 6 (emphasis removed), *available at* http://www.iso-ne.com/committees/comm_wkgrps/strategic_planning_discussion/materials/spd_risk_summary_apr_2011.pdf.

announced retirement of the Brayton Point Units could have been reasonably expected, and long-standing rules have been in place to address this possibility. To grant NEPGA's last-minute requested relief has the real potential to open a floodgate of filings—which heavily burden ISO-NE, states, and stakeholders—on the eve of future auctions in the hope that last-minute rule changes influencing the pricing outcome will be ordered. The Commission should reject NEPGA's extraordinary request. Under these circumstances, an aggressively scheduled contested proceeding should not be a viable avenue for parties to affect an auction result.

Granting NEPGA's unilateral request so close to FCA 8, or altering the long-standing date for FCA 8, would also create additional regulatory uncertainty for potential and existing FCM participants. NEPGA did not bring its proposal through the regional stakeholder process. Given this lack of process, NEPGA cannot claim that there is broad stakeholder support for its proposed change. Such a sudden rule change, especially without an opportunity for stakeholder consideration, should give potential market participants pause and states deep concerns about a market that imposes complaint-driven and sudden consumer cost increases. Potential new resources rely, in part, on revenue projections to determine whether to enter the New England market. These potential new entrants, and their investors, may view the Commission's intervention at this late stage as evidence that the FCM is too unpredictable to rely upon. Both new and existing resources alike should have a common interest in promoting market stability by reducing regulatory uncertainty.

B. An Order Imposing Tariff Changes to the NPRR Rules is Premature, and the Process Underway to Consider Revisions Should Be Allowed to Continue.

The Complaint recounts ISO-NE's presentation at the October 8-9, 2013 Markets Committee meeting regarding resources retained for reliability and associated market rules.[34] As

[34] Complaint at 14-15.

NEPGA acknowledges, ISO-NE "set forth a conceptual proposal" and outlined a schedule for further stakeholder process and implementation of any rule changes.[35] In addition, ISO-NE has recently conveyed to stakeholders through its Draft 2014 Work Plan that "the stakeholder process is underway" on this issue and that ISO-NE plans to make a filing with the Commission in the second quarter of 2014.[36]

It is necessary for New England states and stakeholders to have an opportunity to continue discussions, and potentially reach agreement on, the NPRR rules at issue in the Complaint. ISO-NE has set forth a timeline for concluding stakeholder discussions and filing changes with the Commission in the first half of this year. Contrary to NEPGA's claim, ISO-NE has not "essentially conceded" in its presentation to the Markets Committee that the NPRR rules at issue are unjust and unreasonable.[37] The MC Presentation is itself labeled "*Conceptual* Details." (emphasis added). ISO-NE reinforced this description in responding to a NEPGA member in a separate proceeding, confirming that the MC Presentation "was only a conceptual presentation to stakeholders for further consideration and development. The ISO has not yet developed or discussed any formal rules or design parameters, which it would want to vet through the stakeholder process. The ISO merely presented and discussed concepts and questions."[38] In these circumstances, the Commission should give weight to the fact that ISO-NE, as market administrator, has not identified the NPRR rule changes that NEPGA seeks as warranting expedited treatment prior to the commencement of FCA 8.

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35 *Id.* at 15, citing to MC Presentation at Slide 15.

36 *See* ISO New England Inc., Discussion of the 2014 Work Plan, Jan. 10, 2014 NEPOOL Participants Committee, at Slide 32, *available at* http://www.nepool.com/uploads/NPC_20140110_Composite_4.pdf.

37 Complaint at 18.

38 Motion for Leave to File Answer and Answer of ISO New England Inc., Docket No. ER14-329-000 (filed Dec. 6, 2013), at 12.

Consistent with clear Commission policy, NEPGA should not be permitted to bypass the ongoing stakeholder process that is considering revisions to NPRR and de-list bid rules.[39] Instead, NEPGA should be directed to bring its concerns to the stakeholder process *before* requesting the Commission's intervention.[40] NEPGA and its market participant members can play a significant role in developing changes to the current rules, including sponsoring an alternative proposal that, if supported by NEPOOL, would be given the same weight by the Commission as ISO-NE's proposal pursuant to a so-called "jump ball" provision of the Participants Agreement.[41] In any case, if after the conclusion of the stakeholder process NEPGA is still not satisfied with the proposed changes, it is free to bring another complaint before the

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[39] *See, e.g., ISO New England Inc.*, 138 FERC ¶ 61,042 at P 114 (2012) ("ISO-NE's stakeholder process is the appropriate venue for Joint Parties to propose and develop appropriate rules . . . ."); *ISO New England Inc.*, 128 FERC ¶ 61,266 at P 55 (2009) (declining to require ISO-NE to make tariff changes where it would end-run the stakeholder process); *New England Power Pool*, 107 FERC ¶ 61,135 at PP 20, 24 (2004) (rejecting an entity's proposed changes because the "suggested revisions have not been vetted through the stakeholder process and could impact various participants.").

[40] *See, e.g., FirstEnergy Solutions Corp. and Allegheny Energy Supply Company, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,158 at P 46 (2012) ("Given that a sufficient record does not exist for the Commission to resolve this issue, and PJM has committed to providing additional evidence as to such causes by May 1, 2012, we find it would not be an efficient use of Commission or industry resources for the Commission to circumvent PJM's processes by establishing our own proceedings to evaluate the complaint at this time."); *PJM Power Providers Group v. PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 27 (2011) ("With respect to P3's request to defer addressing certain issues not raised in PJM's filing, we find that those issues should first be considered by PJM's stakeholders. Accordingly, we deny P3's request without prejudice with respect to the deferred issues as noted above. P3 can file another complaint if these issues are not resolved to its satisfaction.").

[41] Under Section 11.1.5 of the Participants Agreement:

> If the Participants Committee vote relating to an ISO Market Rule proposal results in the approval by the Participants Committee by a Participants Vote equal to or greater than 60% of a Market Rule proposal that is different from the one proposed by ISO, including, but not limited to, a Governance Participant proposal, ISO shall, as part of any required Section 205 filing, describe the alternate Market Rule proposal in detail sufficient to permit reasonable review by the Commission, explain ISO's reasons for not adopting the proposal, and provide an explanation as to why ISO believes its own proposal is superior to the proposal approved by the Participants Committee. The Commission will not be required to consider whether the then-existing filed rate is unlawful, and may adopt any or all of ISO's Market Rule proposal or the alternate Market Rule proposal as it finds, in its discretion, to be just and reasonable and preferable.

Commission. For NEPGA to ask the Commission to act now and under a highly aggressive Fast-Track process is a premature request.

Moreover, as discussed above, to the extent changes to the NPRR rules are warranted, such changes cannot be considered in isolation. Rather, the changes must be evaluated together with other market rules that might be implicated and as part of an interrelated FCM package. That is the benefit of engaging the stakeholder process. Only through a deliberative stakeholder process can the revisions NEPGA seeks be vetted for how the changes might impact other provisions and the FCM framework as a whole—giving consideration to the costs that consumers will bear—with the potential for alternative suggestions and consensus to emerge from the discussions.

C. NEPGA's Proposal Could Result in an Over-Procurement of Capacity in Violation of the Commission's Orders and Therefore NEPGA Has Not Shown that its Revisions are Just and Reasonable.

Even if the Commission were to find that the current rules are unjust and unreasonable, NEPGA has not demonstrated that its proposed alternative is just and reasonable. NEPGA emphasizes the *possibility* that the Brayton Point Units might ultimately retire before the Capacity Commitment Period "either because the owner exercises its right to retire notwithstanding rejection of its NPRR or because ISO-NE subsequently concludes that the resource is not actually needed for reliability."[42] NEPGA is correct that this is one possible outcome under the current rules. However, NEPGA fails to mention that an opposite result is equally possible. In such a case, the Brayton Point Units would not retire and would be providing capacity during the Capacity Commitment Period. Under NEPGA's proposal, this capacity would not count towards the ICR. That outcome, which NEPGA does not address,

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42 Complaint at 23. *See also id.* at 2.

would be fundamentally in contravention of Commission orders rejecting the procurement of capacity in excess of the ICR.

In the 2011 Order, the Commission found that "ISO-NE has not offered a persuasive reason why, in the particular context of the design, purpose, and history of New England's FCM it is just and reasonable to require customers to incur unnecessary costs in order to purchase more capacity than the FCM was established to procure and that is needed for reliability."[43] The Commission stated that, in contrast to NYISO and PJM, "the New England market design contains no possibility of procuring less than its capacity target" and that "limiting purchases to the ICR is a 'bedrock' principle of the FCM model."[44] In directing ISO-NE to implement an offer-floor mitigation program, the Commission found that such a regime "would spare customers the cost of procuring capacity in excess of the ICR – excess capacity that is not needed to meet ISO-NE's reliability objectives."[45]

In two subsequent orders, the Commission reinforced the prohibition against procuring capacity in excess of the ICR. In the 2012 Rehearing Order, the Commission stated:

> We maintain . . . that offer floor mitigation is just and reasonable because *it spares customers the cost of procuring capacity that is not needed to meet ISO-NE's reliability objectives* while simultaneously preventing new resources from offering significantly below their true net cost of entry and thereby suppressing capacity market prices.[46]

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[43] 2011 Order at P 163.

[44] *Id.* at P 164.

[45] *Id.* at P 167. *See also id.* at P 160 ("In balancing the cost of procuring additional capacity above the ICR on ratepayers against buyer-side market power, we agree with load parties that it is not just and reasonable or consistent with the design of the FCM to require ISO-NE to purchase additional capacity above the ICR") (footnote omitted).

[46] 2012 Rehearing Order at P 28.

The Commission definitively stated in the 2013 Order that "the FCM cannot and will not procure more than the ICR."[47]

NEPGA fails to acknowledge in the Complaint that its proposal could lead to an over-procurement of capacity. Nor does NEPGA provide any justification for why its changes should be exempt from the Commission's explicit finding that purchasing excess capacity under the current FCM design is unacceptable. To the extent NEPGA could even demonstrate that the NPRR rules are unjust and unreasonable, which it has not for the reasons discussed above, its proposal would replace the rules with provisions that are manifestly unjust and unreasonable under recent FERC precedent. In so doing, NEPGA fails to meet its burden as complainant.

VI. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission (i) grant its Motion to Intervene, (ii) deny the Complaint, including the alternative relief requested, and (iii) take other necessary and appropriate actions consistent with the foregoing protest.

Respectfully submitted,

/s/ Jason R. Marshall

Jason R. Marshall
Senior Counsel
New England States Committee on Electricity
655 Longmeadow Street
Longmeadow, MA 01106
Tel: (617) 913-0342
Email: jasonmarshall@nescoe.com

Date: January 21, 2014

[47] 2013 Order at P 34.

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts this 21st day of January, 2014.

Respectfully submitted,

/s/ Jason R. Marshall

Jason R. Marshall
Senior Counsel
New England States Committee on Electricity
655 Longmeadow Street
Longmeadow, MA 01106
Tel: (617) 913-0342
Email: jasonmarshall@nescoe.com