UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association, Inc.	)))	
v.	)	Docket No. EL15-21-000
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 (2014), and the Commission's November 14, 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 November 14, 2014 (the "Complaint").[1]

I. INTRODUCTION

The Complaint draws sweeping and premature conclusions about the Commission's statutory authority over demand response ("DR") resource participation in the ISO-NE Forward Capacity Market ("FCM").[2] It claims that the decision of the U.S. Court of Appeals for the

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[1] *New England Power Generators Ass'n., Inc. v. ISO New England, Inc.*, Complaint Requesting Fast Track Processing of the New England Power Generators Association, Inc., Docket No. EL15-21-000 (filed Nov. 14, 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").

District of Columbia Circuit (the "D.C. Circuit") in *Electric Power Supply Association v. FERC*[3] compels the Commission to take expedited action to ensure that, going forward, Demand Response Capacity Resources[4] ("Active DR Resources") are permanently prohibited from serving as supply-side resources in the FCM.[5] The Complaint should be rejected. It both fails to meet its burden under the Federal Power Act ("FPA") of demonstrating that ISO-NE's Tariff is unjust and unreasonable and fails to demonstrate that its proposed alternative construct is just and reasonable.

If granted, the Complaint would have significant implications for the New England capacity market and for electricity consumers. The Complaint would preclude potentially hundreds of Active DR Resources, comprising over 800 MW, that cleared the most recent Forward Capacity Auction ("FCA")[6]—as well as any new qualified Active DR Resources—from participating in the upcoming FCA for the 2018-2019 Capacity Commitment Period ("FCA 9").[7] Excluding these resources would reduce the overall supply in FCA 9, benefitting NEPGA members by reducing the amount of lower cost supply-side resources in the auction and almost certainly increasing clearing prices. By doing so at this late point in the FCA process, there is no ability by any other participant to recognize and respond to the additional need for supply in FCA 9. For consumers, disqualification at this late point could increase costs to a level possibly

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[3] 753 F.3d 216 (D.C. Cir. 2014) ("*EPSA*"). In separate rulings issued on September 17, 2014, the D.C. Circuit denied the Commission's petition for rehearing *en banc* and other such petitions filed by several parties to the proceeding. *Electric Power Supply Ass'n v. FERC*, No. 11-1486, slip op. (D.C. Cir. Sept. 17, 2014).

[4] The Complaint states that while it only focuses on Demand Response Capacity Resources, NEPGA reserves the right to challenge other demand resources participating in the FCM (*e.g.*, energy efficiency). Complaint at n. 26.

[5] *Id.* at 1-2, 7.

[6] *See* ISO-NE, Distributed Generation/PV in the Forward Capacity Market, Distributed Generation Forecast Working Group, Sept. 15, 2014, at Slide 29, *available at* www.iso-ne.com/static-assets/documents/2014/09/dg_pv_forward_capacity_mrkt_09152014.pdf.

[7] Complaint at 1-2.

in the hundreds of millions of dollars depending on the actions of the actual supply now qualified to participate in FCA 9.[8]

These DR resources are a critically important component of New England's energy mix. Over the past decade, as DR resources have been increasingly incorporated into wholesale markets, they have provided electric consumers with enhanced reliability, cost savings, and environmental benefits. ISO-NE has recognized that DR resources "help defer the need to build expensive power system infrastructure to support infrequent system peaks, decrease reliance on expensive fuels, balance variable resources, and reduce New England's 'out-of-market' costs by eliminating the need to start up additional power plants on peak days."[9] DR resources provide the system with much-needed fuel diversity and an ability to manage power system conditions during peak demand. These contributions to the New England power system are especially valuable now, when New England is facing both risks to reliability and extraordinary price increases due to, among other factors, constrained pipeline capacity into New England causing limited access to supply by gas-fired generators during high demand periods.[10] The Commission is well aware of this problem and has identified New England "as a market particularly at risk for service disruption due to limited pipeline capacity into the region."[11]

The Commission has explicitly recognized the connection among the participation of DR resources, economic efficiency, and just and reasonable rates. For example, in Order No. 719-A,

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8 *See generally* ISO-NE, Informational Filing for Qualification in the Forward Capacity Market, Docket No. ER15-328-000 (filed Nov. 4, 2014), *available at* www.iso-ne.com/static-assets/documents/2014/11/er15-___-000_11-3_14_fca_9_info_filing_public_version.pdf.

9 ISO-NE, 2014 Regional Energy Outlook, at 34, *available at* www.iso-ne.com/aboutiso/fin/annl_reports/2000/2014_reo.pdf.

10 *See, e.g.*, *Testimony of Peter Brandien on Behalf of the ISO*, in Docket No. ER14-1050-000 (filed Jan. 17, 2014); Black & Veatch, *New England Natural Gas Infrastructure and Electric Generation: Constraints and Solutions*, Phase II, Prepared for the New England States Committee on Electricity, Apr. 16, 2013, at 1, 5-6, *available at* www.nescoe.com/uploads/Phase_II_Report_FINAL_04-16-2013.pdf.

11 Federal Energy Regulatory Commission, Office of Enforcement, Division of Energy Market Oversight, *2012 State of the Markets Report* (July 3, 2013), at 2.

the Commission stated that "because demand response directly affects wholesale rates, reducing barriers to demand response in the organized wholesale markets helps the Commission to fulfill its responsibility, under sections 205 and 206 of the FPA, for ensuring that those rates are just and reasonable."[12] In considering whether competitive market structures are just and reasonable, the Commission "must approve market designs and rate policies that elicit sufficient investment in energy, transmission, and *demand response*."[13]

It is a fact that *EPSA* presents complex and challenging questions about the Commission's jurisdictional boundaries in the context of DR resources. Those questions have not yet been settled. Instead of acknowledging that uncertainty exists in light of *EPSA*,[14] NEPGA asks the Commission to direct significant and precipitous changes to the FCM in order to impose NEPGA's interpretation of *EPSA*. The Commission should reject NEPGA's request. For one thing, *EPSA* lacks finality in light of the possibility that the Commission might seek review from the United States Supreme Court.[15] Moreover, *EPSA* does not in the first instance squarely address DR resource participation in capacity markets. Indeed, even if the appellate process concerning *EPSA* is exhausted and the D.C. Circuit's ruling stands, it would be prudent for the Commission to open a remand proceeding that, among other issues, would explore the implications, if any, of *EPSA* on DR participation in capacity markets. As appropriate, such a proceeding could allow for a considered transition to ensure that DR continues to contribute to

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[12] *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719-A, 128 FERC ¶ 61,059 (2009) at P 47, *reh'g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) (citation omitted).

[13] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006) at P 1 (emphasis added).

[14] *See, e.g.,* Answer of PJM Interconnection, L.L.C. to Complaint, Docket No. EL14-55-000 (filed Oct. 22, 2014) ("PJM Answer"), at 14 ("[D]ebate as to the extent of *EPSA*'s reach is understandable . . . there is no question that *EPSA* has fostered great uncertainty regarding the status of demand response in wholesale markets . . . .").

[15] Although the Complaint acknowledges that the issuance of the mandate is stayed through December 16, 2014, it does not mention that, if FERC does seek review from the Supreme Court and notifies the D.C. Circuit, issuance of the mandate will be further stayed pending the Supreme Court's final disposition. *See infra*, notes 22 and 30 and accompanying text.

grid stability, reliability, and just and reasonable costs. That proceeding would provide a greater opportunity than does a contested FPA Section 206 complaint for broad, holistic analysis of the role of DR resources in the wholesale markets and could elicit participation from parties that might not participate in the litigated proceeding at issue. The Commission should decline to limit its own authority when such authority is both subject to further appellate process and is not clearly implicated by the underlying D.C. Circuit decision relied upon by the Complaint.

In addition, as separate grounds for rejecting NEPGA's request for relief, the Complaint cannot go forward because it fails to meet the requirements of FPA Section 206. NEPGA has not demonstrated that current rules concerning Active DR Resource participation in the FCM are "unjust and unreasonable, unduly discriminatory or preferential."[16] Nor can NEPGA show, as it must under a Section 206 complaint, that its proposed changes are just and reasonable. NEPGA has failed to meet its burden under FPA Section 206.

II. COMMUNICATIONS

Pursuant to Rule 203, 18 C.F.R. § 385.203 (2014), 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

A. *EPSA*

[16] 16 U.S.C. § 824e(a).

In 2011, the Commission issued Order No. 745, which established a uniform compensation structure for DR resources participating in the day-ahead and real-time wholesale energy markets.[17] In *EPSA*, the D.C. Circuit vacated Order No. 745 on two grounds. First, it found that FERC had no authority under the FPA to issue the order because it impermissibly regulated retail rates, an area subject to states' exclusive control pursuant to FPA Section 201.[18] Second, the court determined that even if FERC were not statutorily precluded under Section 201 from issuing Order No. 745, that Final Rule was still impermissible because the Commission failed to engage in reasoned decision-making by not addressing arguments against the rule.[19] Nowhere in *EPSA* does the D.C. Circuit address the reach of its holding in the context of capacity markets or other wholesale markets beyond the day-ahead and real-time markets that were the subject of Order No. 745.

In separate rulings issued on September 17, 2014, the D.C. Circuit denied the Commission's petition for rehearing *en banc* and other such petitions filed by several parties to the proceeding.[20] Pursuant to an October 20, 2014 *per curium* order, the D.C. Circuit granted the Commission's request to withhold issuance of the mandate until at least December 16, 2014.[21] Provided that the Commission notifies the D.C. Circuit that a writ of *certiorari* has been filed with the Supreme Court, the mandate will be withheld until that court's final disposition.[22]

B. NEPGA's Complaint

NEPGA makes two requests in the Complaint. First, it asks the Commission to require

[17] *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187 (2011), *order on reh'g and clarification,* Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012).

[18] *EPSA*, 753 F.3d at 222-23.

[19] *Id*. at 225.

[20] *Electric Power Supply Ass'n v. FERC*, No. 11-1486, slip op. (D.C. Cir. Sept. 17, 2014) (*per curium*).

[21] *Electric Power Supply Ass'n v. FERC*, Nos. 11-1486, slip op. (D.C. Cir. Oct. 20, 2014) (*per curium*).

[22] *Id*., *citing* Fed. R. App. P. 41(d)(2)(B); D.C. Cir. Rule 41(a)(2).

ISO-NE to disqualify Active DR Resources from participating in FCA 9.[23] Second, NEPGA requests that the Commission direct ISO-NE "to revise its Tariff to exclude such resources from participating as supply in the [FCM] going forward.[24]

The Complaint is grounded in NEPGA's interpretation of *EPSA*. NEPGA claims that the ruling "compels" the action sought by the Complaint.[25] The Complaint acknowledges that *EPSA* was considered within the context of the energy markets, but NEPGA contends that "the reasoning of the D.C. Circuit's decision applies equally to FCM and other wholesale markets . . . ."[26] The Complaint further asserts that "[e]ven assuming *arguendo* that there were some reasonable basis for interpreting *EPSA* as being limited to energy markets," Active DR Resources should still be disqualified from participating in FCA 9 "because those resources will be unable to fulfill their obligations to submit offers into the Day-Ahead and Real-Time Energy Markets if they clear and assume Capacity Supply Obligations."[27]

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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[23] Complaint at 1, 7.

[24] *Id.* at 1. *See also id.* at 7.

[25] *Id.* at 2, 7.

[26] *Id.* at 2. The Complaint mirrors a request made in a complaint by a generator, FirstEnergy Service Company ("FirstEnergy"), against PJM Interconnection, L.L.C. ("PJM") just hours after *EPSA* was issued. *FirstEnergy Services Company v. PJM Interconnection, L.L.C.*, Complaint of FirstEnergy Service Co., Docket No. EL14-55-000 (filed May 23, 2014) ("May 23 Complaint"), as amended Sept. 22, 2014 ("Amended Complaint") (together, the "FirstEnergy Proceeding"). In that proceeding, FirstEnergy requested, *inter alia*, that PJM remove all portions of its tariff "allowing or requiring PJM to include demand response as suppliers to PJM's capacity markets[.]" May 23 Complaint at 1; *see* Amended Complaint at 4. The Commission has not yet acted substantively in the FirstEnergy Proceeding.

[27] Complaint at 2.

administers.[28] 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 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

A. An Order Requiring Market Rule Changes to Preclude the Participation of DR Resources in the FCM is Premature and is not "Compelled" by *EPSA*

The Complaint would have the Commission do what the four corners of the *EPSA* ruling did not do: order the exclusion of DR resources in the wholesale capacity market. It should be rejected. *First*, the D.C. Circuit, in staying issuance of the mandate pending possible review by the Supreme Court, recognized that the finality of its ruling is subject to further appellate process.[29] In its motion requesting a stay of the issuance, the Commission made its request to "preserve the status quo" while federal governmental parties consider whether to file a writ of *certiorari*.[30] The Commission further stated that "[i]mplementation of [*EPSA*'s] jurisdictional

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

[29] Likewise, the Commission recognizes that until an appellate court's mandate is issued, the order is not final, and the court retains jurisdiction over a matter. *See, e.g., People of the State of California, ex rel. v. Powerex Corp. et al.*, 139 FERC ¶ 61,210 (2012) at P 67 ("[w]hile it is true that the Commission could not act on the CPUC proceeding until the issuance of the Ninth Circuit mandate in that case on April 15, 2009…"); *Mechanisms for Passthrough of Pipeline Take-or-Pay Buyout and Buydown Costs*, 53 FERC ¶ 61,348 (1990) at n. 5 ("[t]he court of appeals decision became effective on October 17, 1990, when the court's mandate issued.").

[30] Motion of the Federal Energy Regulatory Commission to Stay Issuance of Mandate, No. 11-1486 (filed Sept. 22, 2014), at 3 ("Motion to Stay"). As the Commission noted, "the ultimate decision whether the federal government will petition the Supreme Court for a writ of certiorari lies not with the Commission, but with the Solicitor General and the Department of Justice." *Id.* at n. 2 (citations omitted).

finding holds significant financial, market stability, and electric grid reliability implications."[31] The Commission has vigorously defended through its own administrative process and then through the courts its statutory authority to issue Order No. 745. It should not now, at the same time an appeal to the Supreme Court is considered, take action on a complaint that would effectively cede the jurisdictional question raised by *EPSA* and extend it to the capacity markets. To do so would have significant implications for ensuring reliability, market stability, and just and reasonable capacity costs—as the Commission has underscored—and for advancing important environmental laws and objectives.

Second, contrary to NEPGA's assertions about *EPSA*'s reach, there is great uncertainty regarding the application of *EPSA* to markets other than the day-ahead and real-time markets. As described by the Commission in its Motion to Stay:

> [T]he disruptive effect of [*EPSA*] depends on the scope of its jurisdictional ruling. It is unclear whether the panel majority intended simply to invalidate [Order No. 745], for lack of jurisdiction, to the extent it offers a particular high level of compensation for demand response resources participating in particular energy markets, or whether the panel majority intended its jurisdictional ruling to reach beyond the particular rulemaking on review and to extend to other levels of compensation or to capacity and ancillary markets as well.[[32]]

The holding in *EPSA* is, as NEPGA acknowledges, "in the context" of the day-ahead and real-time energy markets.[33] There is nothing on the face of the ruling that speaks to capacity markets or "compels" the granting of the Complaint. To the extent the mandate is issued, NESCOE expects the Commission will—as it should—explore through a remand rulemaking proceeding the range of jurisdictional issues that *EPSA* raises. NEPGA can raise its jurisdictional challenge

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31 *Id.* at 7.

32 *Id.* at 8 (citations omitted).

33 Complaint at 2.

at the core of the Complaint during that proceeding or it can file another FPA Section 206 complaint when it is no longer premature.

The Commission should reject NEPGA's request that Active DR Resources be precluded from participating in the FCM. Changes to ISO-NE's Tariff provisions, which will have significant ramifications on the market, public policies and consumers, should not be made before final resolution of *EPSA* has been provided through the courts. Nor should they be made, to the extent necessary following exhaustion of the appellate process, before the Commission considers, through its own process, the full range of implications for DR resources and its own authority.

B. The Complaint Fails to Meet the Threshold Requirements under FPA Section 206

Under FPA Section 206, NEPGA bears a dual burden in bringing this Complaint. First, it must demonstrate that the existing rate, rule, or practice is "unjust and unreasonable, unduly discriminatory or preferential."[34] Then, NEPGA must show that its proposed alternative is just and reasonable.[35] The Complaint has failed to meet either one of these threshold requirements.

1. The Complaint Does Not Demonstrate that the FCM Rules Are Unjust and Unreasonable

As explained above, *EPSA* does not on its face preclude DR resource participation in the FCM and does not compel DR resource exclusion from FCA 9 and auctions going forward. Its jurisdictional reach is an open and vigorously debated question that, depending on the status of the appellate process in *EPSA*, could well become the subject of further court review. At the same time, there is clear precedent affirming the Commission's authority over capacity

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[34] 16 U.S.C. § 824e(a).

[35] *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).

markets.[36] NEPGA falls short in demonstrating, as it must as the complainant, that the current rules are unjust and unreasonable.

EPSA is devoid of any discussion regarding the effect of the D.C. Circuit's opinion on capacity markets. NEPGA cannot point to any such language in *EPSA*, even in *dicta*. Instead, NEPGA attempts to direct a fundamental change to the FCM—beginning less than three months from the Complaint—on the premise that *EPSA* applies with the same force to capacity markets.[37] The Complaint focuses, *inter alia*, on the D.C. Circuit's analysis of DR compensation, its nexus to the retail market, and the limitations of FERC's authority under Section 201 of the FPA.[38]

As an initial matter, as described above, *EPSA* is subject to further appellate process and the D.C. Circuit has withheld issuance of its mandate pending potential Supreme Court review. There is thus not even finality regarding the invalidation of Order No. 745, let alone any clarity on the legal implications of *EPSA*'s application to capacity markets that NEPGA claims as the underpinning of the Complaint.

In addition, NEPGA takes an unreasonably narrow view of how DR resource participation in capacity markets might be transacted. NEPGA appears not to consider, for example, that a wholesale customer (*e.g.*, a load-serving entity) engaging in DR could bid its wholesale energy reduction into the capacity market.[39] As PJM describes in the FirstEnergy Proceeding:

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[36] *See infra*, notes 43-45.

[37] Complaint at 2, 8.

[38] *See id.* at 8-10.

[39] *See, e.g.,* PJM, *The Evolution of Demand Response in the PJM Wholesale Market*, Oct. 6, 2014 ("PJM DR Paper"), at 6, *available at* http://pjm.com/~/media/documents/reports/20141007-pjm-whitepaper-on-the-evolution-of-demand-response-in-the-pjm-wholesale-market.ashx. This example is illustrative only and is not

> A wholesale customer's decision to purchase less power for resale can affect the clearing price in PJM's single-clearing price wholesale market; indeed, that reduction in wholesale market demand will often directly affect the wholesale price. . . . [W]hile end user demand response and wholesale-customer demand response both can directly affect the wholesale price, the former, according to *EPSA*, requires FERC to intrude impermissibly in the retail market that is the exclusive province of the states, while the latter does not.[40]

Accordingly, even assuming *arguendo* that *EPSA*'s reach extends to capacity markets, NEPGA cannot support its claim that all Active DR Resources must be excluded from the FCM going forward. The Complaint fails to consider the wholesale dimensions that can define the participation of DR in the FCM.[41]

In stark contrast to the unknown implications of *EPSA*'s reach to capacity markets, courts have expressly and unambiguously held that the Commission has jurisdiction over capacity markets.[42] The D.C. Circuit alone has repeatedly affirmed the Commission's jurisdiction over such markets. For example, in *Conn. Dept. of Pub. Util. Control v. FERC*, the D.C. Circuit rejected claims that the Commission's authority over the Installed Capacity Requirement ("ICR") was inconsistent with its jurisdiction under the FPA, finding that the ICR affects

intended to be exhaustive of various ways to structure DR participation in the capacity market, which could, for example, include the involvement of non-utility aggregators.

[40] PJM Answer at 18.

[41] By underscoring how DR resource participation in capacity markets can be viewed solely though the lens of a wholesale transaction—and, as discussed below, how courts have affirmed FERC's authority over capacity markets—NESCOE is not suggesting that DR resource participation in the energy markets is jurisdictionally separate. Rather, NESCOE is articulating the many ways in which NEPGA has failed to meet its burden of demonstrating that the current rules are unjust and unreasonable.

[42] NEPGA has recognized this fact in a prior complaint filed with the Commission. *New England Power Generators Association Inc. v. ISO New England Inc. and New England Power Pool*, Complaint Requesting Fast Track Processing By New England Power Generators Association, filed in Docket No. EL10-55-000 (Mar. 15, 2010) at 49 ("The sole effect of an [Alternative Price Rule] is on the price of capacity—a matter undisputedly within the Commission's exclusive jurisdiction.").

wholesale capacity rates that are squarely within the Commission's authority.[43] It is relevant that in defining "capacity," the D.C. Circuit recognized the ability to curtail load when needed:

> "Capacity" is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce or *consume less when required*.[[44]]

More recently, in *New England Power Generators Ass'n Inc. v. FERC*, the D.C. Circuit rejected claims that the Commission lacked authority over market mitigation measures, stating in relevant part that "the price of capacity is *indisputably* a matter within the Commission's exclusive jurisdiction."[45]

NEPGA also attempts to justify its claim by arguing that even if *EPSA* is viewed as limited to energy markets, Active DR Resources must still be excluded from the FCM because they would not be able to fulfill the energy market obligations that are required of resources with a Capacity Supply Obligation ("CSO").[46] The Complaint points out its view of a nexus between capacity payments and energy market performance, particularly under a "Pay for Performance" design that will be implemented beginning with the 2018-2019 Capacity Commitment Period.[47]

Again, NEPGA takes an overly narrow view that is fatal to its claim. If DR resources cannot be compensated in the energy market through the Tariff, NEPGA's view apparently is that no other structure could emerge to fill this void or that such a structure could not be harmonized with the ISO-NE capacity market construct. While permanent solutions to this

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[43] *Conn. Dept. of Pub. Util. Control v. FERC,* 569 F.3d 477 (D.C. Cir. 2009) ("*Conn. Dept.*"). *See also Maine Public Utilities Comm'n v. FERC*, 520 F.3d 464, 480 (D.C. Cir. 2008) ("…the Forward Market does not exceed FERC's jurisdiction merely because it incorporates the exogenously-determined installed capacity requirement into the auction mechanism."), *rev'd in part on other grounds* sub nom., *NRG Power Mktg., LLC v. Me. Pub. Utilities Comm'n*, 558 U.S. 165 (2010).

[44] *Conn. Dept*., 569 F.3d at 479 (emphasis added).

[45] 757 F.3d 283, 290 (D.C. Cir. 2014) (emphasis added).

[46] Complaint at 10-13.

[47] *Id.* at 12.

challenge are not ripe—and may never be necessary pending the outcome of possible further appellate review—it is in no way a forgone conclusion that DR resources would be precluded from assuming CSOs because energy market payments cannot be made under the Tariff. For example, under one illustrative construct, state programs could pay Active DR Resources for their participation in the energy markets. Rules governing the participation of these resources could include the protocols and verification necessary for ISO-NE to integrate these resources into its capacity market structure.[48] Simply put, if the rules for DR participation in capacity markets change, the market and its stakeholders should have an opportunity to react and adapt, an opportunity NEPGA would preclude.

2. The Complaint Fails to Show that NEPGA's Alternative is Just and Reasonable

Even if NEPGA had demonstrated that the current rules are unjust and unreasonable, its proposed alternative is not just and reasonable. NEPGA proposes to wholly strip Active DR Resources from the FCM beginning with FCA 9. For the same reasons described above, that proposed solution fails to consider the potential for viable approaches to continued participation by Active DR Resources. NEPGA instead offers an overly broad, blanket prohibition that would be most favorable to its members' shareholders. In essence, the NEPGA approach to DR is to eliminate it from the market, and thus constrain capacity supply that could compete with NEPGA's members. The loss of DR's competitive discipline could cost New England electricity customers hundreds of millions of dollars each year. Nothing in *EPSA* compels or even invites a result so contrary to the public interest.

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[48] Like the example above, this is intended for illustrative purposes only and should not be construed as a NESCOE or states' endorsement of any particular approach.

As illustrated above, assuming both that the mandate is issued in connection with *EPSA* and that its jurisdictional reach is ultimately determined to extend to capacity markets, there are potential approaches that need to be explored to continue the DR resource participation in the FCM that has provided significant reliability, market and other consumer benefits. Moreover, even if Active DR Resources are precluded from participating in the FCM, NEPGA's proposed approach gives no consideration to modifying the market rules to ensure that such resources are taken into account on the load side in calculating the ICR. In comments in this proceeding, the New England Power Pool Participants Committee ("NEPOOL") highlights this issue as an example of the complexity of potentially removing Active DR Resources from the Tariff and the need to discuss such issues in the NEPOOL participant process. NEPOOL states that:

> ISO-NE's proposed ICR value [for FCA 9] specifically reflects load that presumes demand response will be treated as a supply resource. If demand response is not to be so treated, at a minimum, the region should consider whether and to what extent the ICR value should be adjusted to account for current or future state-approved demand response programs where demand response is treated on the load side rather than the supply side. That issue has not been identified by NEPGA, let alone studied or discussed.[[49]]

The Complaint gives no consideration to more thoughtful and less drastic approaches that would preserve the benefits of DR for consumers and the power system, despite well-known publicly available materials that have discussed potential paths forward.[50] Given the importance of DR resources in ensuring just and reasonable rates—a connection that the Commission has explicitly

[49] Comments of the New England Power Pool Participants Committee, Docket No. EL15-21-000 (filed Nov. 26, 2014), at 7.

[50] *See, e.g.,* PJM DR Paper.

recognized[51]—the Commission should not accept an extreme "alternative" solution that completely ignores other approaches to continued participation.

NEPGA's failure to recognize and propose any real alternative is fatal to its claim. Even if the Commission were to find that the current rules are unjust and unreasonable, NEPGA has not demonstrated that its proposed solution is just and reasonable. In so doing, NEPGA fails to meet its burden as the complainant.

VI. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission (i) grant its Motion to Intervene, (ii) deny the Complaint, 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: December 4, 2014

[51] *See supra*, pp. 2-3.

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 4th day of December, 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