

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

Nos. 16-1023 and 16-1024 (consolidated)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF INTERVENOR
IN SUPPORT OF RESPONDENT**

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**CERTIFICATE AS TO
PARTIES, RULINGS AND RELATED CASES**

A. Parties and Amici

All parties and intervenors appearing in the proceeding below before the Federal Energy Regulatory Commission (“FERC”) are listed in the Petitioner’s Brief, at pages i-ii.

All parties, intervenors and *amici* who have appeared in this Court in these consolidated cases are listed in the Petitioner’s Brief, at pages iii-iv.

B. Rulings Under Review

References to the rulings at issue appear in the Petitioner’s Brief, at page iii.

C. Related Cases

References to related cases appear in Respondent FERC’s Brief, at pages 1-2.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the rules of this Court, the New England States Committee on Electricity (“NESCOE”) states as follows:

NESCOE is a non-profit entity governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Its general purpose is to represent the collective perspective of the six New England states in regional electricity matters. NESCOE has no parent company, is not a publicly held corporation, and there is no publicly held company that has any ownership interest in NESCOE.

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***Authorities upon which we chiefly rely are marked with asterisks.**

GLOSSARY

Br.	Brief
Capacity Commitment Period	The one-year period from June 1 through May 31, for which suppliers commit (in each Forward Capacity Auction, approximately three years in advance) to provide capacity
Complaint	Complaint of the New England Power Generators Association and Request for Shortened Comment Period and Fast Track Processing, <i>New England Generators Ass'n v. ISO New England Inc.</i> , FERC Docket No. EL15-25-000 (Dec. 3, 2014), C.R. 1, JA ____.
Complaint Order	<i>New England Generators Ass'n v. ISO New England Inc.</i> , 150 FERC ¶ 61,053 (2015), C.R. 30, JA ____.
Complaint Rehearing Order	<i>New England Generators Ass'n v. ISO New England Inc.</i> , 153 FERC ¶ 61,222 (2015), C.R. 36, JA ____.
C.R.	Record item for the Complaint proceeding, Case No. 16-1024 (FERC Docket No. EL15-25) (Complaint Record item)
FERC or Commission	Federal Energy Regulatory Commission
ISO	Independent System Operator
ISO New England	ISO New England Inc.
JA	Joint Appendix
NEPOOL	New England Power Pool
NESCOE	New England States Committee on Electricity, Inc.
NEPGA	Petitioner New England Power Generators Association, Inc. (referred to in FERC's brief as the "Generators Association" or "the Association")
P	Paragraph in a FERC order

Peak Energy Rent Adjustment	Market rule in ISO New England Tariff that requires suppliers to return to load through rebates made from capacity payments those revenues earned when real-time clearing prices exceed an administratively-determined strike price
Reserve Constraint Penalty Factors	Adds to the real-time energy market clearing price during certain shortages that act as a cap on the maximum price that ISO New England can pay to resources in the real-time energy market during scarcity conditions (referred to in Petitioner’s brief as “Shortage Price Adders”)
Strike price	The administratively-determined real-time energy price that which, when exceeded, triggers application of the Peak Energy Rent Adjustment
Tariff	ISO New England Transmission, Markets, and Services Tariff
Tariff Filing	ISO New England and New England Power Pool Tariff filing of performance incentives Market Rule Changes Part 1 of 2, <i>ISO New England Inc. and New Eng. Power Pool</i> , FERC Docket No. ER14-1050-000 (Jan. 17, 2014), T.R. 1, JA ____
Tariff Order	<i>ISO New England Inc. and New Eng. Power Pool</i> , 147 FERC ¶ 61,172 (2014), T.R. 108, JA ____.
Tariff Rehearing Order	<i>ISO New England Inc. and New Eng. Power Pool</i> , 153 FERC ¶ 61,223 (2015), T.R. 146, JA ____.
T.R.	Record item in the capacity pay for performance proceeding, Case No. 16-1023 (FERC Docket Nos. ER14-1050 and EL14-52) (Tariff Record item)

JURISDICTIONAL STATEMENT

Intervenor NESCOE concurs in the counter-statement of jurisdiction in Respondent FERC's brief. FERC Br. at 1-4.

STATEMENT OF ISSUES

NESCOE concurs in the Statement of the Issues in Respondent FERC's brief. FERC Br. at 4-5.

STATEMENT OF FACTS

A. ISO New England's Stakeholder Process

ISO New England Inc. ("ISO New England") operates the transmission grid in New England, plans for system reliability, and administers the region's wholesale electricity markets. Among the wholesale markets that ISO New England administers is a Forward Capacity Market. *See* FERC Br. at 9. These markets are governed by the ISO New England Transmission, Markets, and Services Tariff ("Tariff"), Market Rule 1.

ISO New England is governed by an independent board of directors and participates in a stakeholder process, governed by a Participants Agreement between ISO New England and the New England Power Pool approved by FERC. *ISO New England, Inc., et al.*, 106 FERC ¶ 61,280 (2004), *order conditionally accepting partial settlement and on reh'g*, 109 FERC ¶ 61,147 (2004). The New England Power Pool participants include transmission owners, generators, other

suppliers, alternative resources, public power entities, and end users. New England Power Pool Proposed Revisions to Market Rule 1 of the ISO New England Tariff, FERC Docket No. ER14-1050 (Jan. 17, 2014), at 1 n.2, T.R. 1, JA ____.

The New England Power Pool provides the sole participant process for advisory voting on ISO New England matters (except for input from state regulatory authorities and as otherwise may be provided in the ISO New England Tariff). *Id.*, JA ____ (citing Participants Agreement, § 2.2).

The matters on which the New England Power Pool, acting through the Participants Committee, votes include proposed changes to ISO New England's market rules. The vote of this stakeholder group is more than merely advisory: as FERC recognizes, the Participants Agreement confers certain filing rights on the New England Power Pool Participants Committee:

Section 11.1.5 of the Participants Agreement, commonly referred to as the “jump ball” provision, provides, in pertinent part, that if a Market Rule proposal that differs from that proposed by [ISO New England] is approved by a Participants Committee vote of 60 percent or more, [ISO New England] “shall, as part of any required Section 205 filing,” describe the alternate Market Rule proposal in sufficient detail to permit reasonable review by the Commission and also explain its reasons for not adopting the alternate proposal and why it believes its own proposal is superior. Section 11.1.5 provides that the Commission may “adopt any or all of [ISO New England's] Market Rule proposal or the alternate Market Rule proposal as it finds ... to be just and reasonable and preferable.”

ISO New England Inc. and New Eng. Power Pool, 147 FERC ¶ 61,172 at P 1 n.2 (2014) (“Tariff Order”), T.R. 108, JA ____, *order on reh’g*, 153 FERC ¶ 61,223 (2015) (“Tariff Rehearing Order”), T.R. 146, JA ____.

This “jump ball” provision enables FERC to accept a proposal made by the stakeholder group, rather than just the proposal of ISO New England as the filing utility, under Section 205 of the Federal Power Act, 16 U.S.C. § 824d. Without such provision, FERC limits its inquiry “into whether the rates proposed by a utility are reasonable – and [this inquiry does not] extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.” *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 917 (1984). As a result, the stakeholder process embodied in the Participants Agreement is one in which New England Power Pool participants have a meaningful opportunity not only to have their views heard by the administrator of the markets, but also to get these views considered by FERC without having to shoulder the burden in Section 206 of the Federal Power Act, 16 U.S.C. § 824e, demonstrating that the existing rate is unjust and unreasonable.

B. ISO New England’s Forward Capacity Market and the Peak Energy Rent Adjustment

In ISO New England’s Forward Capacity Market (described in FERC’s Br. at 9-12), those suppliers whose capacity clears the Forward Capacity Auction commit to providing capacity and associated obligations for the relevant year, three

years in the future (“Capacity Commitment Period”). Among other things, the capacity resource is obligated to offer its energy into the day-ahead energy market. In exchange for undertaking the capacity supply obligation, the resource receives capacity payments in each month of the relevant Capacity Commitment Period.¹ Tariff Order at P 1, JA _____. These payments are subject to two deductions, one of which is at issue in this petition for review—a deduction for “peak energy rents.” The “Peak Energy Rent Adjustment” requires “suppliers to return ‘peak energy rents’ (i.e., those revenues earned when real-time clearing prices exceed an administratively-determined strike price) earned in the energy market to load through rebates made by suppliers from their capacity payments.” *New England Generators Ass’n v. ISO New England Inc.*, 150 FERC ¶ 61,053 at P 3 (2015) (“Complaint Order”), C.R. 30, JA ____, *order on reh’g*, 153 FERC ¶ 61,222 (2015) (“Complaint Rehearing Order”), C.R. 36, JA _____. By doing this, the Peak Energy Rent Adjustment is intended, in part, to help mitigate incentives to create price spikes in the energy market through economic or physical withholding by removing any profits gained from the rise in energy prices above a designated level. *See, e.g.*, Complaint Rehearing Order at P 3, JA _____ (citation omitted).

¹ Each Capacity Commitment Period is a year that runs June 1-May 30, approximately three years after the Forward Capacity Auction is held. *See* FERC Br. at 12 (showing the relevant Capacity Commitment Periods).

Capacity suppliers have been subject to monthly capacity payments reductions by the Peak Energy Rent Adjustment since the inception of the Forward Capacity Market. *Devon Power LLC*, 115 FERC ¶ 61,340 at P 24 (2006), *rev'd in part on other grounds, Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom., NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010) (“*Devon Power*”). In approving the settlement agreement that created the Forward Capacity Market, FERC recognized that the Peak Energy Rent Adjustment was “designed as a hedge for load against price spikes in the energy market.” *Devon Power* at P 24. It was also “intended to help mitigate incentives to create price spikes in the energy market.” *Id.* at P 29. “[W]hile it may be profitable to raise prices in the energy market, the peak energy rent mechanism will remove any profits gained from the rise in prices because the extra revenues earned in the energy market are deducted from capacity payments.” *Id.* FERC cited to the Peak Energy Rent Adjustment as a factor that the Commission believed alleviated concerns raised about the high level of the first Forward Capacity Auction’s initial price (set at double an administratively established “cost of new entry”). *Id.* at P 130.

The Peak Energy Rent Adjustment is “based on revenues that would be earned in the energy market by a hypothetical, proxy peaking unit.” *Devon Power* at P 24. The details of the Peak Energy Rent Adjustment, contained in the ISO

New England Tariff, specify the characteristics of the hypothetical proxy unit. A key attribute of the proxy generator is its very high heat rate² of 22,000 BTUs per kWh, which as the Tariff explains, “reflect[s] a level slightly higher than the marginal generating unit in the region that would be dispatched as the system enters a scarcity condition.” Motion to Intervene and Protest of NESCOE at 6, FERC Docket No. EL15-25 (Dec. 23, 2014), C.R. 21, JA ____ (citing Tariff § III.13.7.2.7.1.1.1(b)(iii), JA ____). The unit is also indexed to the marginal fuel (*id.* (citing Tariff § III.13.7.2.7.1.1.1(b)(i), JA ____)) and is assumed simply to have no start-up, ramp rate or minimum runtime constraints (*id.* (citing Tariff at § III.13.7.2.7.1.1.1(b)(ii), JA ____)).

Recognizing that the heat rate is the key parameter driving the level of the Strike Price, the *Devon Power* settlement set forth a specific process to adjust the proxy unit’s heat rate, encapsulated in the Tariff:

Any changes to the heat rate of the [Peak Energy Rent Adjustment] Proxy Unit shall be considered in the stakeholder process in consultation with state utility regulatory agencies, shall be filed pursuant to Section

² Heat rate is “[a] measure of how efficiently a generator converts fuel into electrical energy.” *Guide to Market Oversight Glossary*, FERC, available at <http://www.ferc.gov/market-oversight/guide/glossary.asp#H>. For a generator or power plant, the heat rate is the heat content of the fuel consumed divided by input divided by the electrical energy produced, usually expressed as British Thermal Units (“BTUs”) (a measure of the heating value of a fuel) per kilowatt hour (“kWh”). *Id.* One kWh is equivalent to 3,412 BTUs. *Id.*, available at <http://www.ferc.gov/market-oversight/guide/glossary.asp#K>.

205 of the Federal Power Act, and shall be applied prospectively to the settlement of future Forward Capacity Auctions.

Tariff § III.13.7.2.7.1.1.1(b)(iii), JA ____.

C. ISO New England’s Energy Market and the Reserve Constraint Penalty Factors

In addition to the Forward Capacity Market, ISO New England administers a day-ahead energy market and a real-time energy market. *See* FERC Br. at 13-14. The ISO New England Tariff specifies the rules by which ISO New England calculates prices for the day-ahead market (on an hourly basis) and for the real-time energy market (every five minutes). Relevant here, when there is a risk of a shortage happening in the real-time energy market, and the amount of “operating reserves” (extra resources that provide a buffer) falls below a pre-determined threshold, ISO New England’s software adds one or more Reserve Constraint Penalty Factors (or, as NEPGA refers to them, the “Shortage Price Adders”) to the real-time clearing price. *See* Pet’r Br. at 7; *see also* Tariff § III.2.2, JA ____ . The Reserve Constraint Penalty Factors “act[] as a cap on the price that [ISO New England] may pay to procure additional reserves. Reaching this cap signals that the system is in a reserve deficiency.” Tariff Order at P 5 n.7, JA ____.

Prior to the Tariff Order, the Reserve Constraint Penalty Factors were modified on at least two occasions by ISO New England.³ In both cases, the changes were not protested and FERC accepted the changes. *See ISO New England Inc. and New England Power Pool*, Commission Letter Order Accepting Market Rule Revision, FERC Docket No. ER10-97-000 (Dec. 15, 2009); *ISO New England Inc. and New England Power Pool*, Commission Letter Order Accepting Reserve Constraint Penalty Factor for Thirty-Minute Operating Reserves, FERC Docket No. ER12-1314-000 (May 21, 2012).

D. Capacity Pay for Performance Stakeholder Process and Proceeding and the Peak Energy Rent Adjustment

The New England Power Pool Participants Committee voted in December 2013 on separate ISO New England and New England Power Pool proposals related to so-called capacity “pay-for-performance” rules. ISO New England proposed significant changes to the Forward Capacity Market design (Tariff Order at P 1, JA ____), and sought to implement a two-settlement process, whereby a capacity resource’s total capacity revenue would be made up of a (1) capacity base payment and (2) a capacity performance payment (*id.* at P 4, JA ____).

³ *See* Answer of ISO New England at 9, FERC Docket No. EL15-25-000 (Dec. 23, 2014), C.R. 24, JA ____ (citing ISO New England Inc. and New England Power Pool Filing of Revised Reserve Constraint Penalty Factor for Thirty-Minute Operating Reserve, FERC Docket No. ER10-97-000 (Oct. 23, 2009), and ISO New England Inc. and New England Power Pool Filing of [Reserve Constraint Penalty Factor] Value Change, FERC Docket No. ER12-1314-000 (Mar. 22, 2012)).

The New England Power Pool proposal, on the other hand, which was sponsored by one of NEPGA's members, NRG Energy, Inc. ("NRG") (ISO New England and New England Power Pool Tariff filing of performance incentives Market Rule Changes Part 1 of 2, *ISO New England Inc. and New Eng. Power Pool*, FERC Docket No. ER14-1050-000 (Jan. 17, 2014) ("Tariff Filing"), Att. N-1a, NEPOOL Transmittal Letter at 5-6, T.R. 1, JA ___-___), involved incremental changes to the energy market rules and the Forward Capacity Market rules. Tariff Order at P 1, JA _____. Specifically, in the energy market, New England Power Pool proposed to increase the Reserve Constraint Penalty Factors: for short-term energy operating reserves, from \$500/MWh to \$1,000/MWh, and for even shorter-term energy operating reserves from \$850/MWh to \$1,500/MWh. *Id.* at P 12, JA _____. Notably, while New England Power Pool proposed certain changes to the Forward Capacity Market rules (*id.* at P 13, JA ____), it did not propose any changes to the Peak Energy Rent Adjustment. Tariff Filing, Att. N-1a, NEPOOL Transmittal Letter at 11, JA ____ (the "deduction for Peak Energy Rents" is "not at issue here").

Leading up to the vote, there was discussion of and a separate vote on the possibility of eliminating the Peak Energy Rebate in conjunction with the New England Power Pool proposal. Although the generation sector supported that elimination, this amendment failed. *See* Tariff Filing, Att. N1-g at 8-9, JA ____; Tariff Filing, Att. N1-h, JA _____. At the New England Power Pool Participants

Committee meeting in December 2013, the ISO New England proposal received a vote of 10.28 percent in favor. Tariff Filing, Att. N-1a, NEPOOL Transmittal Letter at 6, , JA _____. On the other hand, the New England Power Pool proposal was approved by the Participants Committee by an 80.28 percent vote in favor. *Id.*⁴

On January 17, 2014, ISO New England filed its and the New England Power Pool's respective proposals with FERC. Tariff Filing, JA _____. NEPGA filed comments in the proceeding and did not discuss the Peak Energy Rent Adjustment. Motion to Intervene and Comments of NEPGA and the Electric Power Supply Association, FERC Docket No. ER14-1050-000, (Feb. 12, 2014), T.R. 40, JA ____-____. In the Tariff Order, FERC found that neither ISO New England's proposal nor New England Power Pool's proposal standing alone was just and reasonable. Instead, FERC initiated a proceeding pursuant to Section 206 of the Federal Power Act, 16 U.S.C. § 824e, and found ISO New England's tariff to be unjust and unreasonable "because it fails to provide adequate incentives for resource performance, thereby threatening reliable operation of the system and forcing consumers to pay for capacity without receiving commensurate reliability

⁴ Of the seven votes in the New England Power Pool generation sector, six generation sector participants, including several of NEPGA's members, were in favor of the New England Power Pool alternate proposal that raised the Reserve Constraint Penalty Factors without modifying or eliminating the Peak Energy Rent Adjustment. (Four participants abstained from the vote.) Tariff Filing, Att. N1-h, Tabulation of NEPOOL Participants Comm. Votes, JA _____.

benefits.” Tariff Order at P 23, JA _____. FERC adopted ISO New England’s proposal for a two-settlement capacity market design with certain modifications and directed ISO New England to increase the Reserve Constraint Penalty Factors to \$1,000/MWh and \$1,500/MWh, consistent with the New England Power Pool proposal. *Id.* at PP 25, 27, JA _____, _____.

FERC dismissed as outside the scope of this proceeding an argument made by one of the parties to the proceeding that increasing the Reserve Constraint Penalty Factors “will only exaggerate the inefficiency of the existing Peak Energy Rent deduction” *Id.* at P 103, JA _____ (citing Motion To Intervene and Comments of GDF Suez Energy Marketing NA, Inc. (“GDF Suez”) at 18-19, FERC Docket No. ER14-1050-000 (Feb. 12, 2014), T.R. 59, JA _____-_____). FERC explained that the purpose of increasing the Reserve Constraint Penalty Factors:

is to increase performance incentives, which can be provided in the form of either rewards or penalties, depending on whether the resource has been scheduled in the day-ahead market. However, the Peak Energy Rent deduction does not affect the incremental incentives to produce energy, because a resource’s Peak Energy Rent deduction will be the same whether or not it produces energy.

Tariff Order at P 110, JA _____. FERC directed ISO New England to include in its compliance filing any tariff adjustments it believes are necessary in light of FERC’s decision to implement the Reserve Constraint Penalty Factors or to

explain why no such adjustments are necessary (*id.* at P 27, JA ___) and reiterated this in response to GDF Suez's argument (*id.* at P 110, JA ___).

NEPGA filed a motion for clarification of the Tariff Order on an issue unrelated to the Peak Energy Rent Adjustment, asking FERC to confirm that an exemption from capacity performance payments is appropriate when there are certain transmission constraints. Motion of NEPGA, FERC Docket No. ER14-1050 (June 30, 2014), T.R. 116, JA ___. NEPGA's motion did not address the Peak Energy Rent Adjustment. Several parties sought rehearing of the Tariff Order, including a group of generators which asked FERC to eliminate the Reserve Constraint Penalty Factors or, in the alternative, to "address the negative impact of the existing Peak Energy Rent ('PER') capacity clawback" on the Shortage Price Adder increase in the Tariff Performance Order. Request for Rehearing of Exelon Corp., EquiPower Res. Mgmt., LLC, Essential Power, LLC, Dynegy Mktg. and Trade, LLC and Casco Bay Energy Co., LLC. (collectively, "Indicated Generators") at 1, FERC Docket No. ER14-1050 (June 30, 2014), T.R. 118, JA ___.

FERC denied Indicated Generators' request for rehearing. FERC explained that, while the Peak Energy Rent Adjustment may have a potential inefficiency because it could incent resources to clear in the real-time market rather than the day-ahead market, this potential inefficiency existed independent of the increase in

the Reserve Constraint Penalty Factors. Tariff Rehearing Order at P 105, JA ____.

FERC explained that it approved the Peak Energy Rent Adjustment notwithstanding this same potential inefficiency because it served as “a hedge against price spikes.” *Id.*, JA __ (citing *Devon Power* at PP 24, 29). FERC noted that it did not find the argument persuasive, particularly because it would be risky for a resource not to commit in the day-ahead market, in hopes that real-time demand would exceed ISO New England’s forecast and that the resource would be used in the real-time market. Tariff Rehearing Order at P 105 n.198, JA ____.

Finally, FERC pointed out that since the Tariff Order, it had approved ISO New England and New England Power Pool’s proposed revisions to eliminate the Peak Energy Rent Adjustment beginning with Capacity Commitment Period 10 (starting June 1, 2019). *Id.* at P 106, JA ____ (citing *ISO New England Inc.*, 151 FERC ¶ 61,096 (2015)). Accordingly, FERC encouraged any entities that believed further changes to the Peak Energy Rent Adjustment were necessary to use the stakeholder process to consider such tariff revisions. Tariff Rehearing Order at P 106, JA ____ (citing *ISO New England Inc.*, 151 FERC at P 11).

ISO New England submitted its compliance filing with FERC in Docket Nos. ER14-2419 and EL15-52 (July 2014). *See ISO New England, Inc.*, 149 FERC ¶ 61,009 at P 1 (2014), *order on reh’g*, 153 FERC ¶ 61,224 (2015). The compliance filing did not include any tariff revisions to the Peak Energy Rent

mechanism. Rather, ISO New England stated its belief that it would be appropriate to reconsider—outside of that proceeding—the Peak Energy Rent mechanism in light of the increased Reserve Constraint Penalty Factors, both in the near term (*i.e.*, Capacity Commitment Periods 5-8, for which the auction had already been completed), and in the longer term, when the Tariff Order’s two-settlement capacity market design is fully implemented (Capacity Commitment Period 10, beginning June 2019). *ISO New England Inc.*, 149 FERC ¶ 61,009 at P 15 (2014). ISO New England explained that, along with New England Power Pool, it had initiated a separate stakeholder process to review the Peak Energy Rent Adjustment. NEPGA filed a protest of this filing, and again, it did not object to ISO New England’s discussion of the Peak Energy Rent Adjustment. *See id.* at P 39 n.62, P 40 nn.64-65, 67, P 42 n.70, P 44 nn.72-73, JA ____-____. FERC accepted the compliance filing in part, subject to condition, and rejected the compliance filing in part. Relevant to this Petition, FERC “agree[d] with [ISO New England] that reconsideration of the Peak Energy Rent mechanism would be more appropriately conducted separate from the instant proceeding.” *ISO New England Inc.*, 149 FERC ¶ 61,009 at P 25 n.39 (2014).

ISO New England conducted the stakeholder process and presented a proposal to the New England Power Pool Participants Committee to increase the Peak Energy Rent’s “strike price,” which determines the magnitude of the rebate,

by \$250/MWh. In October 2014, the New England Power Pool Participants Committee voted on the proposal. With only 47.14 percent votes in favor of the proposal, ISO New England indicated it would likely not make a filing to implement this change. Answer of ISO New England at 4 n.9, FERC Docket No. EL15-25 (Dec. 23, 2014), C.R. 24, JA _____. ISO New England made no such filing.

E. NEPGA Complaint and FERC's Complaint Orders

In December 2014, NEPGA filed its complaint at FERC contending that the Peak Energy Rent Adjustment was unjust and unreasonable. NEPGA's complaint requested that FERC direct ISO New England to increase the Peak Energy Rent daily strike price by \$250/MWh for the Capacity Years associated with the fifth Forward Capacity Auction (2014-2015) through the eighth Forward Capacity Auction (2017-2018). Complaint of NEPGA and Request for Shortened Comment Period and Fast Track Processing at 2-3, FERC Docket No. EL15-25-000 (Dec. 3, 2014) ("Complaint"), C.R. 1, JA ____; Complaint Order at P 13, JA _____. NEPGA acknowledged that there would be no adverse reliability impacts associated with adjusting the Peak Energy Rent Adjustment strike price for those four periods, but argued that the reduction in capacity payments resulting from the existing Peak Energy Rent Adjustment strike price "could jeopardize reliability . . . by undermining the financial viability of a number of capacity resources in the region

that rely on their [Forward Capacity Auction] payments to cover costs.”

Complaint Order at P 18, JA ____ (citing Complaint at 22, JA ____).

FERC found that NEPGA did not meet its burden under Section 206 of the Federal Power Act, 16 U.S.C. § 824e, of demonstrating that the existing Tariff provisions governing the Peak Energy Rent Adjustment were unjust and unreasonable. FERC found that the evidence that NEPGA provided was insufficient (Complaint Order at PP 36, 40, JA ____, ____); that NEPGA ignored relevant factors in its analysis (*id.* at PP 37-38, JA ____); and that NEPGA failed to demonstrate any negative impact on reliability (*id.* at P 41, JA ____).

On rehearing, FERC explained why it found NEPGA’s evidence insufficient to meet its burden (Complaint Rehearing Order at PP 23, 28, JA ____, ____) and explained that the Commission properly engaged in a balancing of “the parties’ interests and the equities involved in determining whether ‘the benefits [of a revised rate] outweighed any settled expectations.’” Complaint Rehearing Order at P 30, JA ____ (citing *ISO New England Inc.*, 148 FERC ¶ 61,185 at P 29, 29 nn.16-18 (2014) (citing *ISO New England Inc.*, 134 FERC ¶ 61,128 at P 39 (2011); *ISO New England Inc. and New England Power Pool Participants Committee*, 132 FERC ¶ 61,136 at P 30 (2010); and *ISO New England and New England Power Pool*, 145 FERC ¶ 61,095 at PP 28, 30 (2013))).

SUMMARY OF ARGUMENT

FERC's orders finding that concerns raised by several individual companies that are also members of NEPGA (but not NEPGA itself) regarding the Peak Energy Rent Adjustment to be outside the scope of the Capacity Performance proceeding in which FERC increased the Reserve Constraint Penalty Factors were well-reasoned and supported by the record in that proceeding, and NESCOE supports FERC's brief on these points (Br. at 29-34).

NEPGA did not voice any objection to, or seek rehearing of, FERC's decision to increase the Reserve Constraint Penalty Factors without modifying the Peak Energy Rent Adjustment in that proceeding. The stakeholder process that led to the Capacity Pay for Performance "jump ball" Tariff Filing by ISO New England and the New England Power Pool was one in which the vast majority of the stakeholders, including several of NEPGA's members, voted for a proposal—sponsored by one of NEPGA's members—that increased the Reserve Constraint Penalty Factors without any corresponding change to the Peak Energy Rent Adjustment. Certain NEPGA members tried and failed to garner sufficient support for an amendment to modify the Peak Energy Rent Adjustment. Market participants and stakeholders as a whole (including the generation sector) nonetheless supported of the Reserve Constraint Penalty Factors increase.

Likewise, FERC's orders rejecting NEPGA's Complaint that the ISO New England Tariff was unjust and unreasonable because it did not eliminate or modify the Peak Energy Rent Adjustment by increasing the strike price were fully explained and supported by the record in that proceeding, and NESCOE supports FERC's brief on these points (Br. at 34-47). The Peak Energy Rent Adjustment, as FERC explained, was part of the ISO New England Forward Capacity market from its inception and served the dual goals of creating disincentives for suppliers to leverage market power by charging consumers excessive prices in energy markets and providing customers a hedge against occasional, but inevitable, energy price spikes. The Reserve Constraint Penalty Factors had been modified on at least two occasions before, with no corresponding change to the Peak Energy Rent Adjustment. NEPGA's desired remedy—an increase to the administrative strike price that determines the level of the rebate—was appropriately rejected by FERC because NEPGA had not met its burden of demonstrating that the existing Tariff provision was unjust and unreasonable. Granting this relief is also inappropriate because it is in effect a change to the heat rate, a key factor of the Peak Energy Rent Adjustment calculation, which was not made in accordance with the Tariff rule that specifies a process by which such changes can be made.

STATEMENT REGARDING ADDENDUM

The relevant statutes are reproduced in the statutory addendum to FERC's brief.

ARGUMENT

I. Standard of Review

NESCOE concurs in the description in FERC's brief regarding the standard of review (FERC Br. at 27-29).

II. **The New England Stakeholder Process on the Reserve Constraint Penalty Factors Supports FERC's Tariff Orders' Finding That Changes to the Peak Energy Rebate Were Outside the Scope of the Capacity Pay for Performance Proceeding.**

This Petition effectively amounts to “buyer’s remorse” over a package of market rule changes that several NEPGA members supported within the New England stakeholder process. NEPGA’s description of FERC’s decision to increase the Reserve Constraint Penalty Factors in the Tariff Order suggests that FERC invented this concept from whole cloth. *See, e.g.*, Pet’r Br. at 16 (FERC “therefore also directed ISO New England to significantly increase – in fact, to virtually double – the Shortage Price Adders that are added to the real-time energy market price during shortage events, effective December 3, 2014.”). This characterization and NEPGA’s brief as a whole fail to note that it was the region’s stakeholder group, New England Power Pool, that developed the proposal to “virtually double” the Reserve Constraint Penalty Factors. *See* Tariff Filing, Att.

N-1a, NEPOOL Transmittal Letter at 9, JA _____. FERC declined to adopt either the ISO New England proposal or the New England Power Pool proposal; FERC chose instead to take elements from each, including the increases to the Reserve Constraint Penalty Factors that were part of the New England Power Pool proposal. Tariff Order at P 25, JA _____.

NEPGA also omits from its brief that the proposal it now objects to was sponsored by one NEPGA member and supported by several other members. A number of NEPGA's members in the New England Power Pool Participants Committee generation sector voted in favor of the proposal to increase the Reserve Constraint Penalty Factors to these levels, with only one generation sector member voting in opposition and other remaining generation sector members abstaining from the vote. *See* Tariff Filing, Att. N-1g, Summary of NEPOOL Stakeholder Process, JA _____. This vote came after a lengthy stakeholder process lasting over a year, and which included a market participant proposal to increase the Reserve Constraint Penalty Factors and remove the Peak Energy Rent Adjustment as an alternative to ISO New England's two-settlement process. These discussions included possible amendments to the Peak Energy Rent Adjustment—amendments rejected by the majority of the participants. Despite this rejection, NEPGA members were nonetheless among those supporting the Shortage Price Adder increases even without amendments to the Peak Energy Rent Adjustment. *See*

Tariff Filing, Att. N-1g, Summary of NEPOOL Stakeholder Process, at 8-9, JA ____; Motion to Intervene and Protest of NESCOE at 12-13, JA _____. Presumably these entities would have understood the risks and interactions between Shortage Price Adder increases and the Peak Energy Rent Adjustment; nonetheless, only one generation sector member opposed the proposal.

Notwithstanding the arguments made in the Petition that FERC refused to consider the impact of the increased Reserve Constraint Penalty Factors on the Peak Energy Rent Adjustment (Pet'r Br. at 30-46), NEPGA did not ask FERC to address the impact on Peak Energy Rents in its comments filed in that proceeding. *See* Motion to Intervene and Comments of NEPGA and the Electric Power Supply Association, JA _____. Nor did NEPGA's motion for clarification of the Tariff Order filed in that proceeding raise this issue. *See* Motion of NEPGA, JA _____. Even assuming that the issue is properly before the Court, FERC's decision not to expand the scope of the Capacity Pay for Performance proceeding was not arbitrary and capricious, as explained in FERC's brief (Br. at 29-33). There is no basis for the Court to overturn FERC's finding in the Tariff Orders that changes to the Peak Energy Rent Adjustment were outside the scope of the issues being addressed in the Capacity Pay for Performance proceeding, the goal of which was to remedy ISO New England's Tariff that FERC found failed to "provide adequate incentives for resource performance, thereby threatening reliable operation of the

system and forcing consumers to pay for capacity without receiving commensurate reliability benefits.” Tariff Order at P 23, JA ____.

III. FERC’s Complaint Orders’ Finding That the Increase in Reserve Constraint Penalty Factors Did Not Necessitate a Change to the Peak Energy Rent Adjustment Is Supported by the Record and FERC Precedent.

NEPGA argues that the Court should require changes to the Peak Energy Rent Adjustment to account for the increase in Reserve Constraint Penalty Factors (*see* Pet’r Brief at 28-29), but there is no causal relationship between the two. As FERC explained, the Peak Energy Rent Adjustment “is unrelated to capacity suppliers’ incentive to perform in real-time, and the revenue transfer is unrelated to economic efficiency and reliability” Complaint Order at P 41, JA __ (citing Answer of ISO New England at 8, JA __). FERC found that leaving the Peak Energy Rent Adjustment strike price intact in conjunction with the increased Reserve Constraint Penalty Factors “will not create a disincentive for suppliers to provide energy, as NEPGA suggests” Complaint Order at P 41, JA __. FERC reasonably declined to link these two aspects of ISO New England’s complex market rules. *See* FERC Br. at 30-33.

FERC precedent contradicts NEPGA’s assertion that the increase in the Reserve Constraint Penalty Factors necessitates a change to the Peak Energy Rent Adjustment. ISO New England has filed Tariff changes in the past to increase the Reserve Constraint Penalty Factors, and in so doing has not proposed any change

to the Peak Energy Rent Adjustment. In 2009, ISO New England, joined by the New England Power Pool, filed to increase the Reserve Constraint Penalty Factors for certain operating reserves (from \$50/MWh to \$250/MWh).⁵ In 2012, ISO New England, again joined by the New England Power Pool, filed to increase the system-wide Reserve Constraint Penalty Factors for another type of operating reserves (from \$100/MWh to \$500/MWh).⁶ In neither case did any party argue that a change to the Peak Energy Rent Adjustment was also necessary, and in its letter orders accepting the Tariff changes as just and reasonable, FERC made no finding that any such corresponding change was necessary. *See ISO New England Inc. and New England Power Pool*, Commission Letter Order Accepting Market Rule Revision, FERC Docket No. ER10-97-000 (December 15, 2009); *ISO New England Inc. and New England Power Pool*, Commission Letter Order Accepting Reserve Constraint Penalty Factor for Thirty-Minute Operating Reserves, FERC Docket No. ER12-1314-000 (May 21, 2012).

Contrary to NEPGA's claims, past FERC proceedings plainly contradict NEPGA's contention that the two rules are "inextricably linked," Pet'r Br. at 35, and, consistent with past precedent, FERC found that it need not consider Peak Energy Rent Adjustment revisions in approving the Shortage Price Adder increase.

⁵ *See* Answer of ISO New England at 9, JA ____; *see* note 3 *supra*.

⁶ *Id.*

“Reasoned decisionmaking necessarily requires consideration of relevant precedent.” *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006). FERC has “articulated a rational explanation for its action,” *id.* (quoting *Eagle-Picher Indus. Ind. v. EPA*, 759 F.2d 905, 921 (D.C. Cir. 1985)) (citation omitted), and NEPGA has not demonstrated that FERC’s actions were arbitrary and capricious.

IV. The Remedy NEPGA Sought at FERC Is Contrary to the ISO New England Tariff Provision Requiring Specified Processes To Take Place To Change the Peak Energy Rent Adjustment.

NEPGA erroneously argues that FERC failed to satisfy its statutory obligation to ensure just and reasonable rates under Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a), because it “refused to consider and remedy the impact of the energy market rule change it made on the charges assessed to Suppliers” under the Peak Energy Rent Adjustment (Pet’r Br. at 2). FERC did, in fact, consider the impact of the change and reasonably determined that NEPGA failed to meet its burden to show the Peak Energy Rent Adjustment was unjust and reasonable. *See* FERC Br. at 34-47. Moreover, to the extent that the remedy NEPGA now seeks (*see* Pet’r Br. at 29, 60, requesting a revision to the Peak Energy Rent Adjustment for Capacity Commitment Periods 5 through 8) is the same as what it sought at FERC, that remedy is contrary to the Tariff’s procedures specifying a process for making this type of a change. In the Complaint, NEPGA

asked FERC to direct ISO New England, among other things, to adjust the Peak Energy Rent strike price by \$250/MWh for Capacity Commitment Periods 5 through 8. Request for Rehearing of NEPGA at 1, C.R. 32, JA ____ (citing Complaint at 2, 11-21, JA ____, ____).

ISO New England's Tariff contains a specific process to adjust the proxy unit's heat rate:

Any changes to the heat rate of the [Peak Energy Rent Adjustment] 'proxy unit' shall be considered in the stakeholder process in consultation with state utility regulatory agencies, shall be filed pursuant to Section 205 of the Federal Power Act, and shall be applied prospectively to the settlement of future Forward Capacity Auctions.

Tariff § III.13.7.2.7.1.1.1(b)(iii), JA _____. NEPGA did not challenge those Tariff procedures as unjust and unreasonable under Federal Power Act Section 206, 16 U.S.C. § 824e. Nor has FERC found them to be unjust and unreasonable.

NEPGA's request was a thinly veiled effort to increase dramatically the heat rate of the proxy unit, while circumventing the Tariff provision that details specific processes to be followed for making such a change. NEPGA, therefore, is impermissibly attempting to change the Peak Energy Rent Adjustment without following the Tariff-prescribed process for doing so.

Using an example based on a strike price that occurred in July 2013,⁷ NESCOE demonstrated in the Complaint proceeding below that increasing that strike price by \$250/MWh translates, in that case, to an equivalent heat rate of 31,861 BTUs per kWh⁸—a 44 percent increase in the heat rate. The Peak Energy Rent Adjustment provides for a deduction from generators' capacity payments equal to the peak energy rents earned by a proxy generator that, if it actually existed, would be the least efficient and highest priced of all generators dispatched by ISO New England. The Tariff states that 22,000 BTUs per kWh “reflect[s] a level *slightly higher* than the marginal generating unit in the region that would be dispatched as the system enters a scarcity condition.” Tariff § III.13.7.2.7.1.1.1(b)(iii) (emphasis added), JA _____. And the \$250/kWh increase proposed by NEPGA to the strike price would result in a substantial increase in the heat rate. *See* Motion to Intervene and Protest of NESCOE at 11, JA _____.

ISO New England presented a proposal in the New England Power Pool stakeholder process in the third quarter of 2014, to raise the strike price by \$250 per MWh. Answer of ISO New England at 6-7, JA _____. ISO New England

⁷ NESCOE used this example based on a strike price that occurred over several hours on July 19, 2013. Motion to Intervene and Protest of NESCOE at 10-11, JA _____ (citation omitted).

⁸ Dividing the \$558/MWh strike price by a 22,000 BTUs per kWh heat rate results in a \$25.36 fuel price. Increasing the \$558/MWh strike price by \$250/MWh = \$808/MWh, resulting in a heat rate of 31,861 BTUs ($\$808/\$25.36 = 31.861$, or 31,861 BTUs).

explained that it was inclined to file the proposed increase in the strike price with FERC only if the proposal received significant support from stakeholders. *Id.* at 7, JA _____. The proposal received only 47.14 percent support at the October 3, 2014 Participants Committee meeting. *Id.* at 8, JA ____; Complaint Order at P 15 n.18, JA _____. ISO New England declined to file changes under Federal Power Act Section 205 to the Peak Energy Rent Adjustment provisions. ISO New England explained that the proposal addressed revenue allocation issues that raised equity issues and did not, contrary to arguments made by NEPGA, “address[] either reliability or economic efficiency concerns.” Answer of ISO New England at 7, JA _____. The increased strike price raised concerns regarding equity for consumers who already paid for the value of the price hedge for Forward Capacity Auctions 5 through 8. Motion to Intervene and Protest of NESCOE at 20-21, JA _____.

The Tariff provision specifying the process for changing the heat rate was reflected in the *Devon Power* settlement (Motion to Intervene and Protest of NESCOE at 7 n.13, JA ___ (citing Settlement Agreement in *Devon Power* at 37)) and has gone unchanged since then. NEPGA now asks the Court to allow it to circumvent this process by implementing a change to the strike price that would produce the same end result. The argument that NEPGA made in the proceeding below, that the \$250/MWh adjustment to the strike price does not constitute an adjustment to the proxy unit’s heat rate, but rather an adder applied to product of

heat rate and fuel price (Answer of NEPGA at 12-14, FERC Docket No. EL15-25-000 (Jan. 7, 2015), C.R. 26, JA ___-___), is a semantics game. The heat rate is adjusted by an increase in the strike price. To the extent that the Petition asks the Court to direct FERC to implement a retroactive change to the Peak Energy Rent Adjustment strike price, that would produce the same end result as would have been achieved by adjusting the heat rate. This attempt to circumvent the Tariff process should be rejected as contrary to the filed rate doctrine—the Tariff, including in this case, Market Rule 1 and its procedures, are part of the rate. *See Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (discussing filed rate doctrine and rule against retroactive ratemaking).

CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Court uphold the orders on review.

Respectfully submitted,

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Dated: September 30, 2016

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Dated this 30th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to D.C. Cir. R. 25(c), service of the foregoing will be made electronically via CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated this 30th day of September, 2016.

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