UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association, Inc.	)	
v.	)	Docket Nos. EL16-120-000
	)	EL16-120-001
ISO New England Inc.	)	

ANSWER OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. § 385.213, the New England States Committee on Electricity ("NESCOE") files this Answer to the Request for Clarification or, in the Alternative, Rehearing of the New England Power Generators Association, Inc. ("NEPGA") of the Commission's order issued on January 19, 2017,[1] in the above-captioned proceeding ("Request for Clarification").[2]

I. ANSWER[3]

At the outset, NEPGA's request for clarification "regarding refunds for unjust and unreasonable [Peak Energy Rent ("PER")] payments charged to NEPGA's members after the

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1 *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, 158 FERC ¶ 61,034 (2017) ("January 19 Order").

2 Request for Clarification or, in the Alternative, Rehearing of the New England Power Generators Association, Inc., *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, Docket No. EL16-120-001 (Feb. 15, 2017).

3 Although FERC's rules provide a right to answer a motion, Rule 213(a)(2) prohibits an answer to a request for rehearing or protest unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2). NESCOE's answer responds to NEPGA's motion for clarification but, to the extent necessary, NESCOE seeks leave to answer the portion of NEPGA's pleading that is a request for rehearing. NESCOE's answer clarifies the issues and will assist the Commission in making a reasoned decision. *See, e.g., Cal. Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,241, P 16 (2009) ("[w]e will accept the answers and responses to the requests for rehearing because they provide information that assisted us in our decision-making process").

September 30, 2016 refund effective date"[4] needs to be put in context. First, the PER Adjustment[5] is not a payment that generators make to customers. Rather, the PER Adjustment "requires capacity suppliers to return Peak Energy Rents . . . earned in the energy market to load, by means of rebates (or credits) against capacity suppliers' capacity payments."[6] In other words, the PER Adjustment lowers the amount of capacity payments that generators—*i.e.*, the suppliers—receive from load-serving entities ("LSEs")—*i.e.*, those entities securing energy for end-use customers. Second, the Commission did not set for hearing what refunds might be appropriate in this case; rather, the Commission clearly stated that it "will determine refunds, if any."[7] Much of NEPGA's pleading is premised on the assumption that the Commission will grant suppliers refunds. The Commission has not yet ruled on whether it will grant refunds to generators. Because this issue is premature, nothing in NESCOE's answer should be construed as conceding that any refunds from LSEs to generators are proper, and NESCOE reserves its right to protest any such ruling at the appropriate time.

NEPGA asks the Commission to clarify that it is directing ISO New England Inc. ("ISO-NE" or "ISO") to recalculate PER Adjustment charges based on a revised PER Strike Price, which is currently the subject of the settlement/hearing procedures the Commission initiated in the January 19 Order. Specifically, NEPGA asks the Commission to clarify that ISO-NE "must recalculate PER Adjustment charges to capacity suppliers by applying the just and reasonable Strike Price to all PER event hours that affect the PER Adjustment included in invoices issued

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4 Request for Clarification at 3.

5 Capitalized terms used but 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").

6 January 19 Order at P 3.

7 *Id*. at P 59.

after the refund effective date."[8] NEPGA's request that the Commission "clarify" that the ISO must use the modified PER Strike Price prior to September 30, 2016, in order to recalculate the hourly PER rates for events occurring prior to September 30, 2016, should be rejected.

While styled as a request for clarification, NEPGA asks the Commission to rule differently on an issue that the Commission clearly settled in the January 19 Order. The Commission explained that:

> any changes to the calculation of the PER Strike Price under ISO-NE Tariff section III.13.7.2.7.1.1.1 would be *prospective only* from September 30, 2016, as required by [Federal Power Act ("FPA")] section 206, and would *not impact the application of any PER Adjustment occurring before September 30, 2016.*[9]

NEPGA's request for clarification should be denied as flatly inconsistent with the Commission's January 19 Order.

Consistent with the terms of its Tariff, the steps that ISO-NE takes to calculate the PER Adjustment include the following:

1. Pursuant to ISO-NE Tariff Section III.13.7.2.7.1.1.1, ISO-NE:
    a. Calculates the PER Strike Price for each capacity zone; and
    b. Calculates hourly PER rates for each capacity zone.
2. Pursuant to ISO-NE Tariff Section III.13.7.2.7.1.1.2, ISO-NE:
    a. Calculates monthly PER rates for each capacity zone;
    b. Calculates an average monthly PER rate for each capacity zone; and
    c. Calculates a monthly PER Adjustment for each resource in each capacity zone.[10]

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[8] Request for Clarification at 9.

[9] January 19 Order at P 61 (emphasis added).

[10] *See* Ben Hon, Associate Settlement Analyst, ISO-NE, *Peak Energy Rent* at 26 (Oct. 17, 2016), *available at* https://www.iso-ne.com/static-assets/documents/2016/10/20161017-16-fcm101-fcm-credits-per.pdf.

The Commission's order was clear that (i) the issue being set for hearing concerns how the PER Strike Price is calculated pursuant to ISO-NE Tariff Section III.13.7.2.7.1.1.1, *not* how the monthly settlements are implemented pursuant to ISO-NE Tariff Section III.13.7.2.7.1.1.2, and (ii) changes to the PER Strike Price pursuant to ISO-NE Tariff Section III.13.7.2.7.1.1.1 are *prospective only* from September 30, 2016.

NEPGA argues that recalculating the PER Adjustment payments as it suggests is consistent with Commission precedent and would not violate the rule against retroactive ratemaking.[11] As support for this argument, NEPGA states that the Commission has already agreed with NEPGA by finding that "granting relief to the capacity suppliers would not violate the filed rate doctrine."[12] NEPGA's attempt to prove its point fails. The Commission's finding in relation to the filed rate doctrine is not, and cannot be, premised on the Commission exercising authority that has not been granted under the FPA. NEPGA's complaint was filed pursuant to FPA section 206,[13] and the Commission set the question of the appropriate method of calculating the PER Strike Price for hearing and settlement judge procedures pursuant to FPA section 206.[14] Section 206(a) of the FPA requires the Commission, upon finding a rate to be unjust and unreasonable, to determine the just and reasonable rate "to be thereafter observed and in force, and shall fix the same by order."[15] However, section 206(a) does not permit retroactive rate

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[11] Request for Clarification at 10.

[12] *Id*. at 11 (citing January 19 Order at P 56).

[13] *See* January 19 Order at P 1.

[14] *Id*. at P 57.

[15] 16 U.S.C. § 824e(a).

increases.[16] Section 206(b) of the FPA requires the Commission to set a refund effective date, and *permits* the Commission to order refunds of amounts paid "for the period *subsequent to* the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force."[17] Leaving aside the (premature) question of whether section 206(b) gives the Commission authority to require LSEs to "refund" capacity payment credits to generators,[18] section 206(b) in any event does not permit the Commission to direct refunds prior to the effective date. Such a limitation is dispositive in this case and forecloses the relief NEPGA seeks.

NEPGA attempts to support its position by drawing an analogy between the PER Adjustment formula and a transmission formula rate.[19] But even in the formula rate context, the Commission does not permit retroactive ratemaking. In a recent proceeding in which the Commission accepted formula rate tariff revisions effective January 1, 2017, the filing parties had argued that the tariff revisions should be applicable to the 2016 annual true-up calculation because that true-up calculation was to be performed by June 1, 2017, *i.e.*, after the January 1, 2017 effective date. The Commission rejected this argument, finding that "such a proposal would result in retroactive ratemaking, as it would apply to a period—the 2016 rate year—that is

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[16] *See, e.g.*, *City of Redding, Calif. v. FERC*, 693 F.3d 828, 838 (9th Cir. 2012) ("FERC's authority under [FPA section 206(a)], however, is limited by being prospective only, and does not permit retroactive adjustments to rates" (citing *City of Anaheim v. FERC*, 558 F.3d 521, 523 (D.C. Cir. 2009) and *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211 (D.C. Cir. 2009)).

[17] 16 U.S.C. § 824e(b) (emphasis added).

[18] NESCOE believes it does not. *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (FPA section 206(b) "authorizes only retroactive refunds (rate decreases), not retroactive rate increases like those at issue here," *i.e.*, where the complainant sellers alleged that the rates received were too low).

[19] Request for Clarification at 11.

historical."[20] The Commission explained that "the Tariff provisions in force for the 2016 rate year do not permit the proration methodology to be applied to the 2016 Annual True-Up Calculation" and found "that this aspect of the Filing Parties' proposal is barred by the filed-rate doctrine and the rule against retroactive rulemaking."[21] Using NEPGA's analogy, the revised PER Strike price–the revised formula rate provision–cannot apply to periods prior to the refund effective date, notwithstanding the fact that the monthly settlement process taking place after the refund effective date of September 30, 2016, incorporates calculations made with the current PER Strike Price.

The case that NEPGA cites in support of its position that "[u]nder section 206, the Commission can direct a utility to apply a revised formula rate to historical data inputs"[22] does not support NEPGA's desired outcome. In the *ABATE v. MISO* complaint, the Commission directed MISO and the MISO transmission owners to provide refunds with interest for a 15-month refund period from November 13, 2013 through February 11, 2015. However, in that case, the Commission did not direct the parties to use the revised formula rate provision (a 10.32 percent return on equity ("ROE") replacing a 12.38 percent ROE) prior to the refund effective date in its calculations. That, in essence, is what NEPGA seeks and that request is contrary to the rule against retroactive ratemaking.

NEPGA's argument that "the Commission indisputably has the power to remove the PER Adjustment, including the obligation to make future payments, from the tariff entirely"[23] also

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[20] *Midcontinent Indep. Sys. Operator, Inc.*, *et al.*, 157 FERC ¶ 61,250, P 27 (2016).

[21] *Id*. (citing *Pub. Serv. Co. of Colo.*, 155 FERC ¶ 61,028 (2016); *PJM Interconnection, L.L.C. and Va. Elec. and Power Co.*, 147 FERC ¶ 61,254, *order on compliance*, 154 FERC ¶ 61,126 (2016).

[22] Request for Clarification at 11 n.46 (citing *Ass'n of Bus. Advocating Tariff Equity v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,234 (2016) ("*ABATE v. MISO*")).

[23] Request for Clarification at 12.

fails. As NEPGA points out, the Commission accepted ISO-NE's proposal to eliminate the PER Adjustment beginning with Forward Capacity Auction 10, with PER payments to stop as of June 1, 2019.[24] NESCOE agrees that the Commission had the authority under section 205 of the FPA[25] to approve the proposed elimination of the PER Adjustment mechanism from the ISO-NE Tariff effective June 1, 2019, regardless of whether a PER event occurs within twelve months of that date.[26] This section 205 authority, however, has no bearing on or in any way expands the Commission's authority under FPA section 206, and it does not confer authority on the Commission to make a retroactive rate change under FPA section 206.

Finally, NEPGA's arguments that it would be inequitable for the Commission to take any action other than granting its request for the PER Strike Price to be modified prior to the refund effective date are without merit. NEPGA states that the Commission should follow its general policy of "granting full refunds."[27] But the case that NEPGA cites for this proposition does not help its cause. In *ConEd v. FERC*, the Court found that NYISO had violated the plain language of its tariff but noted that FERC, in its appellate brief, insisted that even if it had found a tariff violation, it would have exercised its discretion to deny refunds.[28] Because the Commission had not determined that NYISO violated the tariff, however, the Court remanded the case to FERC "for it either to follow 'its general policy' of providing refunds, or to explain . . . its divergence

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[24] *Id*. (citing *ISO New England Inc.*, 151 FERC ¶ 61,096 (2015)).

[25] 16 U.S.C. § 824d.

[26] Under FPA Section 205, absent the granting of a waiver, any change to a rate is prospective from 60 days of the date of the filing. *New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,065 (2014), *reh'g denied*, 150 FERC ¶ 61,207 (2015) (waiving 60-day prior notice requirement to permit filing to become effective nearly five months prior to filing date).

[27] Request for Clarification at 12 (citing *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003) ("*ConEd v. FERC*")).

[28] *ConEd v. FERC*, 347 F.3d at 973.

from this policy."[29] The policy at issue in that case was the Commission's policy of issuing full refunds upon a finding of a tariff violation pursuant to FPA section 309,[30] not the Commission's policy of issuing refunds upon a finding pursuant to FPA section 206 that a tariff was unjust and unreasonable. "Under section 206 . . . FERC may not order refunds for any period prior to the filing of the complaint. In contrast, FPA section 309 gives FERC authority to order refunds if it finds violations of the filed tariff."[31] NEPGA's complaint did not allege and the Commission did not find that ISO-NE failed to implement the tariff correctly. NEPGA's argument that equities require "full" refunds–defined by NEPGA as application of the revised PER Strike Price to a period preceding the refund effective date–is not consistent with FERC precedent and should be rejected.

NEPGA further argues that equities require the Commission to direct a revision to the PER Strike Price prior to the refund effective date because of NEPGA's "warning of harm on several occasions . . . . especially given that over two years have passed since this issue was first brought to the Commission's attention."[32] As the Commission is well aware, it rejected NEPGA's earlier complaint about the PER Adjustment mechanism (and indeed, the Commission's orders so doing are pending on appeal by NEPGA at the D.C. Circuit Court of Appeals).[33] The Commission did not impose any moratorium on NEPGA's filing a second complaint with more evidence of harm, and the fact that "over two years have passed since this

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29 *Id.* (citation omitted).

30 16 U.S.C. § 825h.

31 *ConEd v. FERC*, 347 F.3d at 967 (citation omitted).

32 Request for Clarification at 12-13.

33 *New England Generators Ass'n v. ISO New England Inc.*, 150 FERC ¶ 61,053 (2015), *reh'g denied*, 153 FERC ¶ 61,222 (2015), pet. for review docketed, *New England Power Generators Ass'n, Inc. v. FERC*, Nos. 16-1023 and 16-1024 (D.C. Cir. Mar. 31, 2015).

issue was first brought to the Commission's attention" is simply due to the timing of NEPGA's second complaint. Neither the prior rejection of its first complaint nor the passage of time until NEPGA filed its second complaint is a basis for the Commission to direct a revision to the PER Strike Price that pre-dates the refund effective date.

II. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission deny NEPGA's request for clarification/rehearing, and if necessary, grant NESCOE leave to file the answer to NEPGA's request for rehearing.

Respectfully Submitted,

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Dated: March 2, 2017

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 Washington, DC this 2nd day of March, 2017.

/s/ Phyllis G. Kimmel

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