

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

New England Power Generators Association, Inc.	)	
	)	
	)	
v.	)	Docket No. EL16-120-000
	)	
ISO New England Inc.	)	

**PROTEST OF THE  
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), 18 C.F.R. § 385.211, and the Commission’s October 3, 2016 Notice of Complaint, the New England States Committee on Electricity (“NESCOE”)<sup>1</sup> files this Protest in response to the complaint filed by the New England Power Generators Association, Inc. (“NEPGA”) against ISO New England Inc. (“ISO-NE”) in this docket on September 30, 2016 (the “Complaint”). The Complaint requests that the Commission find that provisions of the ISO-NE Transmission, Markets and Services Tariff (“Tariff”) governing the Peak Energy Rent (“PER”) Adjustment are unjust and unreasonable.<sup>2</sup> NEPGA requests that the Commission direct ISO-NE to file revisions to the provisions of the Tariff governing the PER Adjustment, establish a refund effective date as of the date of the Complaint (*i.e.*, September 30, 2016), and direct ISO-NE to provide refunds of any PER

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<sup>1</sup> NESCOE filed a motion to intervene in this docket on October 3, 2016.

<sup>2</sup> Capitalized terms not defined in this pleading are intended to have the meaning given to such terms in the Tariff.

Adjustment charges that are in excess of those produced by any replacement PER Tariff provisions.

## I. INTRODUCTION

The Complaint is the sequel to the similar complaint that NEPGA filed on December 3, 2014,<sup>3</sup> which the Commission denied on January 30, 2015.<sup>4</sup> In the December 2014 Complaint, NEPGA requested that the Commission require ISO-NE to increase the PER daily strike price by \$250/MWh for Capacity Commitment Periods (“CCPs”) 5 through 8 and eliminate or modify the PER Adjustment mechanism for CCPs 9 and beyond. NEPGA alleged that the PER Adjustment was unjust and unreasonable in light of the increases in the Reserve Constraint Penalty Factors in ISO-NE’s energy market put in place in late 2014. In dismissing the December 2014 Complaint, the Commission stated, among other things, that if NEPGA or others are “able to provide specific evidence that the interaction between the new Reserve Constraint Penalty Factors and the existing PER Adjustment mechanism has rendered the capacity rates for CCPs 5 through 8 unjust and unreasonable,” it would consider such complaints.<sup>5</sup>

Although NEPGA now provides information in this Complaint about additional PER events that it says have cost suppliers additional revenue, the Complaint omits critical information about the relevant Forward Capacity Auctions (“FCAs”). For FCAs 5 through 8, suppliers had the ability to include in their bids a “premium” reflecting the expected operation of the PER Adjustment. Consumers would pay this premium in the form of higher capacity market

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<sup>3</sup> Complaint of the New England Power Generators Association and Request for Shortened Comment Period and Fast Track Processing, *New England Power Generators Ass’n v. ISO New England Inc.*, Docket No. EL15-25-000 (Dec. 3, 2014) (“December 2014 Complaint”).

<sup>4</sup> *New England Power Generators Ass’n v. ISO New England Inc.*, 150 FERC ¶ 61,053 (2015) (“PER I Complaint Order”), *reh’g denied*, 153 FERC ¶ 61,222 (2015) (“PER I Rehearing Order”).

<sup>5</sup> PER I Complaint Order at P 40.

clearing prices and, in return, would receive the hedge against price volatility that the PER Adjustment provides that was negotiated in the development of the Forward Capacity Market (“FCM”). The Complaint’s singular focus on the costs to suppliers in connection with PER tells only one side of the story and leaves unanswered whether suppliers continue to profit when accounting for premiums reflected in FCA clearing prices: The fact that suppliers might earn less money in these CCPs does not, in itself, demonstrate that the PER Adjustment has become unjust and unreasonable, and NEPGA has not met its burden in the Complaint to so demonstrate.

In addition, the approximately 21 months of data that NEPGA claims as “substantial evidence” of an unjust and unreasonable PER Adjustment is based on the flawed premise that FCM revenues are based solely on a snapshot in time. The net cost of new entry (“Net CONE”) calculation is “an administrative estimate of the capacity clearing price *on average over time* that prospective new entrants would require” to enter the market.<sup>6</sup> NEPGA’s characterization of less than two years’ experience with higher Reserve Constraint Penalty Factors as clear evidence of unjust and unreasonable rates is contradicted by the long-term view of FCM revenues inherent in its design.

NESCOE respectfully urges the Commission to reject the Complaint. If, however, the Commission decides not to reject the Complaint, the appropriate remedy would not be to rush ISO-NE into filing Tariff changes that have not been vetted, as NEPGA requests. Instead, in the event the Commission finds the Tariff provisions unjust and unreasonable, the Commission should direct ISO-NE to initiate a stakeholder process to determine a remedy that would be

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<sup>6</sup> *ISO New England Inc. and New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023, P 17 n. 41 (2016) (emphasis supplied).

tested through stakeholder discussions and that would be more equitable than what NEPGA proposed unilaterally.

## II. BACKGROUND

### A. Peak Energy Rent Mechanism and the Forward Capacity Market

The amount of capacity purchased in the FCM is generally designed to accommodate New England's expected future demand for the annual summer peak season. When demand is at an annual high, supply is tight and prices in the day-ahead and real-time markets reach their highest levels. At these times and other times when supply is tight, energy suppliers have an incentive to economically or physically withhold supply in an attempt to increase and potentially manipulate prices.<sup>7</sup> To counter such an incentive, the FCM has, since its inception, included the PER Adjustment as a mechanism to reduce the capacity market payments that supply resources receive when prices reach an extraordinary level.<sup>8</sup> The PER mechanism thus has two primary purposes that are important to consumers: (i) deterring anti-competitive behavior in the energy market, and (ii) serving as a hedge against high prices.<sup>9</sup>

The PER mechanism employs a so-called "strike price" that is administratively set based on the costs of a proxy peaking generator and, when real-time energy market prices reach the strike price, a portion of capacity revenues are reduced. Specifically, the PER Adjustment

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<sup>7</sup> See, e.g., *ISO New England Inc.*, 155 FERC ¶ 61,029, P 5 (2016) (ISO explained that "where capacity supply conditions are tight, a supplier could seek to retire an existing resource to reduce available supply and increase prices in order to benefit the remainder of that supplier's resource portfolio."); *ISO New England Inc.*, 153 FERC ¶ 61,338, P 12 (2015) (discussing concerns with vertical demand curve "because a small decrease in supply can lead to a significantly higher price, sellers may have an incentive to withhold certain resources").

<sup>8</sup> Catherine McDonough, Ph. D, ISO-NE, Presentation to NEPOOL Markets Comm. Peak Energy Rent ('PER') Mechanism: A Review (Jan. 5, 2011), available at [http://www.iso-ne.com/static-assets/documents/committees/comm\\_wkgrps/mrks\\_comm/mrks/mtrls/2012/jan10112012/a13\\_iso\\_presentation\\_01\\_11\\_12.pdf](http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2012/jan10112012/a13_iso_presentation_01_11_12.pdf); see also *Devon Power LLC*, 115 FERC ¶ 61,340, PP 24, 29 (2006) ("FCM Settlement Order"), *rev'd in part on other grounds, Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (2008), *rev'd in part on other grounds sub nom., NRG Power Mktg.*, 558 U.S. 165 (2010).

<sup>9</sup> FCM Settlement Order at PP 24, 29.

provides for a reduction in capacity payments equal to the “peak energy rents” that are expected to be earned by a hypothetical, proxy peaking generator with characteristics that make it the least efficient generator on the system.<sup>10</sup> A key attribute of the proxy generator is its very high heat rate 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.”<sup>11</sup> The proxy peaking unit is also indexed to the marginal fuel and is assumed simply to have no start-up, ramp rate or minimum runtime constraints.<sup>12</sup>

In reaching a comprehensive settlement establishing the FCM, the settling parties, including a number of suppliers, recognized the PER Adjustment’s dual purpose to “act as both [a] disincentive for suppliers to raise prices in the energy market and a hedge for load against energy price spikes.”<sup>13</sup> As the Commission recognized in approving the FCM Settlement Agreement, if a generator has market power and, by withholding, can create price spikes, the PER Adjustment dampens the generator’s incentive to abuse its market power because revenues it would earn above the PER strike price are deducted from its capacity payments.<sup>14</sup> The Commission cited to the PER Adjustment as a factor that FERC believed alleviated concerns raised about the high level of the first FCA’s initial price (set at double the administratively established CONE price).<sup>15</sup>

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<sup>10</sup> See FCM Settlement Order at P 24. See also Explanatory Statement of the Settling Parties in Support of Settlement Agreement and Request for Expedited Consideration at 12, *Devon Power LLC*, Docket Nos. ER03-563-030, *et al.* (Mar. 6, 2006) (“FCM Settlement Agreement”).

<sup>11</sup> Tariff, § III.13.7.2.7.1.1.1(b)(iii) (Hourly PER Calculations).

<sup>12</sup> Tariff, § III.13.7.2.7.1.1.1(b)(i)-(ii).

<sup>13</sup> FCM Settlement Agreement at 13.

<sup>14</sup> FCM Settlement Order at PP 24, 29.

<sup>15</sup> *Id.* at P 131.

Recognizing that the heat rate is the key parameter driving the level of the Strike Price, both the Tariff and the FCM Settlement Agreement set forth a specific process to adjust the proxy unit's heat rate:

Any changes to the heat rate of the PER 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.<sup>[16]</sup>

**B. Increased Reserve Constraint Penalty Factors and the Pay for Performance Proposal/Order**

On January 17, 2014, ISO-NE and the New England Power Pool ("NEPOOL") made a "jump ball" filing with FERC including their respective proposals to address capacity performance. (The lengthy stakeholder process that preceded this filing is discussed below, in Section III.C.) On May 30, 2014, the Commission issued an order establishing section 206 proceedings to address ISO-NE's "Pay for Performance" ("PFP") proposal and the "jump ball" alternative supported by NEPOOL.<sup>17</sup> In that decision, the Commission combined elements of both proposals, including adopting NEPOOL's alternative proposal to increase the Reserve Constraint Penalty Factors for 30-Minute Operating Reserves and 10-Minute Non-Spinning Reserves. The higher Reserve Constraint Penalty Factors, the Commission noted, would "enhance performance incentives in the near-term" and "should help address in the near-term the gas-electric coordination issues that have contributed to resource non-performance."<sup>18</sup> The Commission subsequently accepted ISO-NE's compliance filing of the increases to the Reserve

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<sup>16</sup> Tariff, § III.13.7.2.7.1.1.1(b)(iii); *see also* FCM Settlement Agreement at 37.

<sup>17</sup> *ISO New England Inc. and New England Power Pool*, 147 FERC ¶ 61,172 (May 30, 2014) ("PFP Order"), *reh'g denied*, 153 FERC ¶ 61,223 (2015) ("PFP Rehearing Order").

<sup>18</sup> PFP Order at PP 108-09.

Constraint Penalty Factors to become effective on December 3, 2014, and the PFP rule changes effective for CCP 9 (*i.e.*, June 1, 2018).<sup>19</sup>

FERC dismissed as outside the scope of the PFP proceeding an argument that increasing the Reserve Constraint Penalty Factors “will only exaggerate the inefficiency of the existing Peak Energy Rent deduction,”<sup>20</sup> explaining 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.<sup>[21]</sup>

The Commission directed ISO-NE to include in its compliance filing any tariff adjustments it believed necessary in light of its decision to require ISO-NE to implement the Reserve Constraint Penalty Factors or to explain why no such adjustments are necessary.<sup>22</sup>

The Commission denied a request for rehearing of the PFP Order filed by a group of generators who 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 Reserve Constraint Penalty Factors increase in the PFP Order.<sup>23</sup> The Commission explained that, while the PER Adjustment may have a potential inefficiency

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<sup>19</sup> *ISO New England Inc.*, 149 FERC ¶ 61,009, PP 1, 23, 33 (2014), *reh’g denied*, 153 FERC ¶ 61,224 (2015).

<sup>20</sup> PFP Order at P 103 (citing Motion To Intervene and Comments of GDF Suez Energy Marketing NA, Inc. (“GDF Suez”) at 18-19 (Feb. 12, 2014)).

<sup>21</sup> PFP Order at P 110.

<sup>22</sup> *Id.* at PP 27, 110.

<sup>23</sup> 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, *ISO New England Inc. and New England Power Pool*, Docket No. ER14-1050 (June 30, 2014).

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.<sup>24</sup> The Commission explained that it approved the PER Adjustment notwithstanding this same potential inefficiency because it served as “a hedge against price spikes.”<sup>25</sup> The Commission noted that it did not find the “inefficiency” 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-NE’s forecast and that the resource would be used in the real-time market.<sup>26</sup> Finally, the Commission pointed out that since the PFP Order, it had approved ISO-NE and NEPOOL’s proposed revisions to eliminate the Peak Energy Rent Adjustment beginning with Capacity Commitment Period 10 (starting June 1, 2019).<sup>27</sup> Accordingly, FERC encouraged any entities that believed further changes to the PER Adjustment were necessary to use the stakeholder process to consider such tariff revisions.<sup>28</sup>

ISO-NE submitted its compliance filing with FERC on July 14, 2014. The compliance filing did not include any tariff revisions to the Peak Energy Rent mechanism. Rather, ISO-NE stated its belief that it would be appropriate to reconsider—outside of that proceeding—the PER mechanism in light of the increased Reserve Constraint Penalty Factors, both in the near term (*i.e.*, CCPs 5-8, for which the auction had already been completed), and in the longer term, when the PFP Order’s two-settlement capacity market design is fully implemented (CCP 10, beginning June 2019). ISO-NE explained that, along with NEPOOL, it had initiated a separate stakeholder

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<sup>24</sup> PFP Rehearing Order at P 105.

<sup>25</sup> *Id.* (citing FCM Settlement Order at PP 24, 29).

<sup>26</sup> PFP Rehearing Order at P 105 n.198.

<sup>27</sup> *Id.* at P 106 (citing *ISO New England Inc.*, 151 FERC ¶ 61,096 (2015)).

<sup>28</sup> PFP Rehearing Order at P 106 (citing *ISO New England Inc.*, 151 FERC ¶ 61,096 at P 11).



process to review the Peak Energy Rent Adjustment.<sup>29</sup> The Commission “agree[d] with ISO-NE that reconsideration of the Peak Energy Rent mechanism would be more appropriately conducted separate from the instant proceeding . . . .”<sup>30</sup>

ISO-NE conducted the stakeholder process and presented a proposal to the NEPOOL Participants Committee to increase the PER strike price by \$250/MWh. In October 2014, the NEPOOL Participants Committee voted on the proposal. With only 47.14 percent votes in favor of the proposal, ISO-NE indicated it would likely not make a filing to implement this change.<sup>31</sup> ISO-NE made no such filing.

### **C. December 2014 Complaint**

In December 2014, NEPGA filed its first PER complaint at FERC contending that the PER Adjustment was unjust and unreasonable. NEPGA’s complaint requested that the Commission direct ISO-NE to increase the PER daily strike price by \$250/MWh for the CCPs associated with FCA 5 (CCP 2014-2015) through FCA 8 (CCP 2017-2018).<sup>32</sup> The Commission found that NEPGA did not meet its burden under Federal Power Act (“FPA”) section 206 to demonstrate that the existing Tariff provisions governing the PER Adjustment were unjust and unreasonable. FERC found that the evidence that NEPGA provided was insufficient,<sup>33</sup> that

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<sup>29</sup> Compliance Filing of Two-Settlement Forward Capacity Market Design at 5, *ISO-NE ISO New England Inc. and New England Power Pool*, Docket Nos. ER14-2419 and EL14-52-000 (July 14, 2104)

<sup>30</sup> *ISO New England, Inc.*, 149 FERC ¶ 61,009 at P 25 n.39 (2014), *reh’g denied*, 153 FERC ¶ 61,224 (2015).

<sup>31</sup> Answer of ISO New England at n.9, 4-5, *New England Power Generators Ass’n v. ISO New England Inc.*, Docket No. EL15-25 (Dec. 23, 2014).

<sup>32</sup> December 2014 Complaint at 2-3.

<sup>33</sup> PER I Complaint Order at PP 36, 40.

NEPGA ignored relevant factors in its analysis;<sup>34</sup> and that NEPGA failed to demonstrate any negative impact on reliability.<sup>35</sup>

On rehearing, the Commission explained why it found NEPGA’s evidence insufficient to meet its burden<sup>36</sup> 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.’”<sup>37</sup>

### III. ARGUMENT

NEPGA has not met its burden of demonstrating that the PER Adjustment mechanism is unjust and unreasonable. NEPGA’s arguments focus almost exclusively on the financial harm it says suppliers are suffering. However, as discussed below, the Complaint only discusses one side of the equation. It does not address, other than in a passing reference, that (i) suppliers had the ability in FCAs 5 through 8 to earn additional revenues through premiums charged to consumers in exchange for assuming the risk of PER reductions, and (ii) consumers would have paid for the value of the PER rebate through increased capacity market prices. NEPGA provides no meaningful information on the profits earned by suppliers in connection with such PER Adjustment premiums and, in turn, the difference between those profits and the purported revenue reductions experienced over the 21-month period that is the Complaint’s focus. Nor is

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<sup>34</sup> *Id.* at PP 37-38.

<sup>35</sup> *Id.* at P 41.

<sup>36</sup> PER I Rehearing Order at PP 23, 28.

<sup>37</sup> *Id.* at P 30 (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 Comm.*, 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))). NEPGA has petitioned the D.C. Circuit Court of Appeals for review of these orders, which was consolidated with another NEPGA petition and is pending before the court in Case Nos. 16-1023 and 16-1024.

the 21-month period dispositive of unjust and unreasonable capacity market pricing, where, as discussed below, the Net CONE calculation is tied to a *long-term* revenue outlook.

NEPGA would have the Commission force through changes to the PER Adjustment that market participants and stakeholders have considered and rejected on multiple occasions in recent years. The Commission should decline to reorder the negotiated package of rule changes that New England's stakeholder group filed to effect an increase to the Reserve Constraint Penalty Factors *without* a corresponding change to the PER Adjustment. While NEPGA has not demonstrated that there is a need to revisit this issue, the appropriate venue for determining an equitable remedy based on new information, should one be needed in this instance, is the stakeholder process.

**A. NEPGA Provides No Information on the Costs Consumers Have Paid for the PER Hedge and It Has Not Met Its Burden of Demonstrating That the PER Adjustment Has Become Unjust and Unreasonable.**

Notwithstanding the extra effort in responding to the Commission's concerns about its first PER Complaint, NEPGA's second PER Complaint continues not to meet the burden of demonstrating that the PER Adjustment is unjust and unreasonable and that it should be modified in the ways that NEPGA suggests. NEPGA's argument that the PER is unjust and unreasonable is premised on the harm NEPGA says has befallen capacity suppliers between December 2014 and August 2016, during which time NEPGA says that 37 PER hours have caused suppliers "to suffer an estimated \$193 million in financial penalties through the PER Adjustment mechanism."<sup>38</sup> Even assuming *arguendo* that the dollar amounts are correct, NEPGA's Complaint does not tell the full story, and NEPGA has not met its burden under FPA section 206 of demonstrating that the PER Adjustment is unjust and unreasonable. The fact that the PER

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<sup>38</sup> Complaint at 3.

rebates were larger than suppliers would have liked during those months does not in and of itself render the PER Adjustment unjust and unreasonable.

NEPGA presents a look at only one side of the ledger. For the periods about which NEPGA complains, suppliers were able to reflect in their auction bids a premium to assume the risk that the PER Adjustment mechanism would trigger and suppliers would need to provide rebates. Consumers would have paid this premium through higher auction prices in return for the price hedge that PER provides. NEPGA acknowledges this in its Complaint, although it downplays the amount that load pays: “Load in theory ‘purchases’ a hedge in the form of slightly higher capacity market clearing prices, since the marginal unit’s offer may include an expected Rebate value.”<sup>39</sup> Although NESCOE believes the amount is more than NEPGA implies, the precise amount of such a premium is not available to NESCOE. The omission of this information is material, however, and without it, the Commission should not grant NEPGA’s Complaint.

The Net CONE value used for FCA 9 (and discontinued in FCA10) is informative. In the filing that ISO-NE made in Docket No. ER15-1184 to eliminate the PER Adjustment mechanism beginning with CCP 10 (*i.e.*, June 1, 2019-May 31, 2020), ISO-NE recognized that “[t]he elimination of the PER mechanism is expected to result in lower capacity prices and costs because capacity suppliers will no longer need to reflect the expected costs of monthly PER payment adjustments in their offers to supply capacity,” and explained that “[t]he assumption that capacity suppliers are subject to PER adjustments is built into the Net CONE value that is reflected in the FCM demand curve.”<sup>40</sup> Accordingly, as part of eliminating the PER mechanism,

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<sup>39</sup> Complaint at 18-19.

<sup>40</sup> PER Mechanism Changes Filing at 5, *ISO New England Inc. and NEPOOL*, Docket No. ER15-1184 (Mar. 6, 2015).

ISO-NE reduced the Net CONE value used for FCA 10 and FCA 11 by \$0.43/kW-month, and explained that future recalculations of Net CONE will no longer include estimated PER costs.<sup>41</sup> To put this in context of the Complaint—recognizing that the number is an imperfect proxy for premiums actually reflected in bids for FCAs 5 through 8—NEPGA’s claimed \$193 million in PER rebates over the 21-month period of December 2014 through August 2016,<sup>42</sup> when annualized, is equivalent to \$110,285,714 in rebates,<sup>43</sup> or approximately \$0.279/kW-month.<sup>44</sup> When viewed against a PER premium cost to consumers of \$0.43/kW-month, even with rebates equaling \$0.279/kW-month, suppliers still come out *ahead*, approximately to the tune of \$0.151/kW-month, or by \$59.7 million.<sup>45</sup>

This may not be as much money as suppliers would have liked to have made but it by no means demonstrates that the suppliers are suffering “severe financial harm”<sup>46</sup> or “extraordinary financial harm;”<sup>47</sup> that there is a gross inequity at play here; or that the PER mechanism has become unjust and unreasonable. Indeed, without knowing how much consumers have already paid for the price hedge PER provides, any modification to the PER Adjustment mechanism could result in a windfall to suppliers. In light of this, any after-the-fact changes to the PER

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<sup>41</sup> *Id.*

<sup>42</sup> Complaint at 12-14.

<sup>43</sup> \$193 million divided by 21 months (December 2014-August 2016) times 12 months to annualize the amount, or  $\$193,000,000/21 * 12 = \$110,285,714$  per year.

<sup>44</sup> To convert this figure, NESCOE used the FCA 7 Net Installed Capacity Requirement of 32,968 MW (*ISO New England Installed Capacity Requirement, Local Sourcing Requirements, and Maximum Capacity Limit for the 2016/17 Capability Year* (Jan. 2013), at 2, available at [https://www.iso-ne.com/static-assets/documents/genrntion\\_resrcs/reports/nepool\\_oc\\_review/2013/icr\\_2016\\_2017\\_report\\_final.pdf](https://www.iso-ne.com/static-assets/documents/genrntion_resrcs/reports/nepool_oc_review/2013/icr_2016_2017_report_final.pdf)), and divided the annualized amount of \$110,285,714 by 32,968 MW = \$3,345.24/MW, divided by 12 months = \$278.77/MW-month, or \$0.279/kW-month.

<sup>45</sup> To calculate this figure, NESCOE used the FCA 7 Net Installed Capacity Requirement of 32,968 MW, and multiplied it by (i) 1,000 times, (ii) \$0.151/kW-month, and (iii) 12 months:  $32,968 \times 1,000 \times \$0.151 \times 12 = \$59.7$  million.

<sup>46</sup> Complaint at 15.

<sup>47</sup> *Id.* at 9.

Adjustment mechanism would raise concerns about excessive rates and encourage action on behalf of consumers to determine whether refunds are required for any portion of capacity costs already incurred in relation to PER premiums.

Separate from NEPGA's characterization of losses, the Complaint suffers from an additional fatal flaw. NEPGA's description of the harm reflects a short-term view, while capacity market revenues are in fact based on a long-term outlook. Such revenues are viewed in relation to the average costs over time that a supplier needs to recover through the FCM.<sup>48</sup> The demand curve is set to ensure that the market clears at Net CONE *on average*,<sup>49</sup> which assumes some years the clearing price will be higher and other years it will be lower, so that "on average" ISO-NE is able to maintain system reliability at the 1 day in 10 year standard.<sup>50</sup> A 21-month snapshot of suppliers' revenues by definition fails to conform to the FCM's long-term view of revenue requirements.

In addition, to the extent NEPGA hints or suggests that the current PER Adjustment is causing reliability issues, those claims lack merit. In Attachment A, Affidavit of Dr. David Hunger in support of the Complaint, Dr. Hunger states (at P 8) that "[a]ny policy that artificially reduces capacity prices impedes the necessary investment in deliverable resources, and thus jeopardizes the system reliability that the FCM construct was designed to ensure." Any notion that there is a reliability concern at issue here has been dispelled previously by ISO-NE, which,

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<sup>48</sup> See *ISO New England Inc. and NEPOOL Participants Comm.*, 155 FERC ¶ 61,023, P 17 n. 41 (2016).

<sup>49</sup> *ISO New England Inc.*, 147 FERC ¶ 61,173, P 30 (2014), *reh'g denied*, 150 FERC ¶ 61,065 (2015).

<sup>50</sup> The reliability principle requires that the market be designed to procure sufficient capacity to meet the 1-day-in-10 Loss of Load Expectation planning standard. The sustainability principle requires that the market be designed so that the average clearing price over the long term is sufficient to attract new entry when needed (for market design purposes, this clearing price is represented by the estimated cost of new entry, *i.e.* Net CONE). See Demand Curve Design Improvements Filing at 7, *ISO New England Inc. and NEPOOL*, Docket No. ER16-1434 (Apr. 15, 2016).

FERC recounted, explained that the PER Adjustment “is wholly unrelated to capacity suppliers’ incentive to perform in real-time, [and] the revenue transfer is unrelated to economic efficiency and reliability . . . .”<sup>51</sup>

**B. The Specific Remedy of Increasing the PER Strike Price by \$250/MWh Is Inappropriate, as Is Any Comparison to the Level of Rebates Produced by the \$250/MWh Increase in the PER Strike Price.**

NEPGA’s Complaint creates a straw man for comparison against the PER rebates that purports to quantify objectively the portion of the \$193 million in PER rebates that are excessive. However, this straw man is based on a proposal that was rejected in the New England stakeholder process, and rejected by the Commission in the PER I Complaint Order. Specifically, NEPGA claims that the \$193 million in total PER rebate charges represents an increase of more than \$100 million “from what the Rebate should have been had the Rebate mechanism’s strike price been increased to properly account for the [Reserve Constraint Penalty Factor] increases.”<sup>52</sup> The premise that the means for evaluating a just and reasonable level of PER rebates is tied to what the PER mechanism would have produced using a hypothetical increase in the PER strike price is a faulty one.

The notion of the “properly” increased strike price is based on NEPGA’s proposed remedy in the December 2014 Complaint of increasing the PER strike price by \$250/MWh. This proposed remedy had previously not been supported in the stakeholder process and accordingly was not filed by ISO-NE,<sup>53</sup> and was rejected by the Commission in the PER I Complaint Order,<sup>54</sup> and therefore is not a useful point of comparison.

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<sup>51</sup> PER I Complaint Order at P 27.

<sup>52</sup> Complaint at 15.

<sup>53</sup> See *supra* 9 & n. 30.

<sup>54</sup> PER I Complaint Order at n. 48.

In fact, as NESCOE explained in its protest of the December 2014 Complaint,<sup>55</sup> increasing the PER strike price to \$250/MWh is a *retroactive* increase that is disallowed under the Tariff. As explained above, there is a specific process pursuant to the Tariff and settlement to adjust the proxy unit's heat rate:

Any changes to the heat rate of the PER 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 [FPA], and shall be applied prospectively to the settlement of future [FCAs].<sup>56]</sup>

In other words, changes to the heat rate are allowed, but only *prospectively*. Using an increase of the \$250/MWh strike price as the basis for evaluating what portion of the PER rebates may be unjust and reasonable makes no sense in light of the fact that the Tariff forecloses the retroactive changes NEPGA wishes to effect for CCPs 5 through 8.

As described above, a key attribute of the PER is the proxy generator's very high heat rate of 22,000 BTUs per kWh, which, as the Tariff states, "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."<sup>57</sup> NEPGA's proposal for CCPs 5 through 8 would impose a substantial increase in that level. For example, using the \$558 strike price that occurred over several hours on July 19, 2013,<sup>58</sup> translates to a \$25.36 fuel price when divided by the heat rate of 22,000 BTUs per kWh. Increasing the strike price by \$250, as NEPGA suggests, would have raised the

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<sup>55</sup> See Motion to Intervene and Protest of NESCOE, *New England Power Generators Ass'n v. ISO New England Inc.*, Docket No. EL15-25 (Dec. 23, 2014), at 10-11 ("NESCOE December 2014 Protest").

<sup>56</sup> Tariff, § III.13.7.2.7.1.1.1(b)(iii); see FCM Settlement Agreement at 37.

<sup>57</sup> Tariff, § III.13.7.2.7.1.1.1(b)(iii) (emphasis added).

<sup>58</sup> Catherine McDonough, Ph.D., ISO-NE, Presentation at NEPOOL Markets Committee: Peak Energy Rent ('PER') Adjustment Mechanism: Summary of Participant Comments and ISO Proposal, at Slide 17 (Aug. 5-6, 2014), available at [http://www.iso-ne.com/static-assets/documents/committees/comm\\_wkgrps/mrktls\\_comm/mrktls/2014/aug562014/a03\\_iso\\_presentation\\_08\\_05\\_14.pptx](http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrktls_comm/mrktls/2014/aug562014/a03_iso_presentation_08_05_14.pptx).



strike price to \$808, which translates to an equivalent heat rate of 31,861 BTUs per kWh (\$808/25.36). This represents a 44% increase in the heat rate, substantially more than the marginal generating unit and impermissible under the Tariff.<sup>59</sup>

Moreover, under the plain language of the Tariff, changes to the heat rate can only be made pursuant to a FPA section 205 filing by ISO-NE. In the third quarter of 2014, ISO-NE presented for consideration a proposal to raise the strike price to \$250/MWh.<sup>60</sup> The proposal failed to garner support of 60% of stakeholders in the Markets Committee and received only 47.14% support at the October 3, 2014 Participants Committee meeting.<sup>61</sup> ISO-NE declined to file changes to the PER provisions under FPA section 205 given the lack of stakeholder support, because ISO-NE recognized that its proposal “addresses revenue allocation issues that raise equity issues and does not address reliability or economic efficiency concerns . . . .”<sup>62</sup> This proposed remedy would thus fail to comport both with the Tariff and the position of states and a majority of stakeholders. The fact that PER rebates may have been nearly \$100 million less using an increased strike price does not demonstrate that the PER Adjustment mechanism is unjust and unreasonable.

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<sup>59</sup> See NESCOE December 2014 Protest at 10-11.

<sup>60</sup> See Catherine McDonough, Ph.D., ISO-NE, Presentation to NEPOOL Markets Comm.: Peak Energy Rent (PER) Adjustment Mechanism: Summary of ISO Proposal & Response to GDF Suez Proposals (Sept. 3-4, 2014) (“September 2014 Presentation”), available at [http://www.iso-ne.com/static-assets/documents/2014/08/a09\\_iso\\_presentation\\_per.pptx](http://www.iso-ne.com/static-assets/documents/2014/08/a09_iso_presentation_per.pptx); see also Memorandum from Catherine McDonough, Ph.D, ISO-NE to NEPOOL Markets Committee, PER Modifications for CCP5-CCP8 (Aug. 27, 2014) (“August 2014 Memo”), available at [http://www.iso-ne.com/static-assets/documents/2014/08/a09\\_memo\\_per.docx](http://www.iso-ne.com/static-assets/documents/2014/08/a09_memo_per.docx).

<sup>61</sup> See December 2014 Complaint at 10.

<sup>62</sup> September 2014 Presentation at Slide 4.

**C. The New England Stakeholder Process Produced the Increased Reserve Constraint Penalty Factors That the Commission Ultimately Adopted in the Pay for Performance Order—But Contingent on Retaining the PER Rebate.**

NEPGA’s description of the increase in the Reserve Constraint Penalty Factors—“the Commission directed an unprecedented increase in RCPFs”<sup>63</sup> —ignores the background of how the increased in Reserve Constraint Penalty Factors came before the Commission in the first instance.

There was an extensive stakeholder process leading up to the PFP proposal. ISO-NE had proposed significant changes to the FCM design, 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.<sup>64</sup> The NEPOOL proposal, on the other hand, which was sponsored by one of NEPGA’s members, NRG Energy, Inc. (“NRG”),<sup>65</sup> involved incremental changes to the energy market rules and the FCM rules.<sup>66</sup>

NRG proposed an increase to the Reserve Constraint Penalty Factors in November 2012, as an alternative to ISO-NE’s PFP design.<sup>67</sup> NRG included the elimination of the PER Adjustment as part of a NEPOOL alternative to PFP that was initially considered in a presentation to the Markets Committee on March 12, 2013.<sup>68</sup> The package of changes presented

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<sup>63</sup> Complaint at 9.

<sup>64</sup> PFP Order at PP 1, 4.

<sup>65</sup> See PFP Filing, Att. N-1a, NEPOOL Transmittal Letter at 5-6, Filings of Performance Incentives Market Rule Changes; *ISO New England Inc. and New England Power Pool*, Docket No. ER14-1050 (Jan. 17, 2014).

<sup>66</sup> PFP Order at P 1.

<sup>67</sup> See NRG, *FCM Performance Incentives—An Alternative Proposal* (Nov. 16, 2012), available at [http://www.iso-ne.com/static-assets/documents/committees/comm\\_wkgrps/mrks\\_comm/mrks/mtrls/2013/jan292013\\_joint\\_mtng/a02b2\\_nrg\\_alternative\\_proposal\\_11\\_16\\_12.pdf](http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2013/jan292013_joint_mtng/a02b2_nrg_alternative_proposal_11_16_12.pdf).

<sup>68</sup> See Peter Fuller, NRG, Presentation to NEPOOL Markets Comm.: Market Reform Proposal, Slide 13, (Mar. 12, 2013), available at [http://www.iso-ne.com/static-assets/documents/committees/comm\\_wkgrps/mrks\\_comm/mrks/mtrls/2013/mar11122013/a14\\_nrg\\_presentation\\_03\\_12\\_13.ppt](http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2013/mar11122013/a14_nrg_presentation_03_12_13.ppt).

by NRG included the increase to the Reserve Constraint Penalty Factors and elimination of the PER Adjustment continued to be discussed through the NEPOOL technical committee process over the ensuing year, concluding with a vote at the November 13 and 14, 2013 NEPOOL Markets Committee that failed with only 31.65% in favor.<sup>69</sup> Having not received the required support for the combined package of rule changes, NRG separated the Reserve Constraint Penalty Factors and elimination of the PER Adjustment proposal into separate amendments at the December 6, 2013 Participants Committee meeting in an attempt to gain more support for the Reserve Constraint Penalty Factors proposal. At that meeting, NRG sponsored a stand-alone amendment to eliminate the PER mechanism. Only 44% of stakeholders supported the proposal, and it was not incorporated into the NEPOOL alternative proposal.<sup>70</sup> GDF Suez also offered an amendment regarding the PER provisions, which failed by a show of hands.<sup>71</sup> Importantly, no party offered an amendment asking for a delayed effective date for the Reserve Constraint Penalty Factor increases, reflecting the understanding after more than a year of discussion regarding any interplay between the Reserve Constraint Penalty Factor and PER Adjustment.

The NEPOOL proposal included with the PFP Filing was to increase the Reserve Constraint Penalty Factors: For 30-Minute Operating Reserves, from \$500/MWh to \$1,000/MWh, and for 10-Minute Non-Spinning Reserves from \$850/MWh to \$1,500/MWh.<sup>72</sup>

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<sup>69</sup> See Alex W. Kuznecow, Secretary of NEPOOL Markets Comm., Minutes of the Markets Committee Meeting held on Wednesday and Thursday, November 13 and 14, 2013 in Westborough, Mass., at 32 (Dec. 11, 2013), available at [https://iso-ne.com/static-assets/documents/committees/comm\\_wkgrps/mrkt comm/mrkt/mins/2013/mc\\_minutes\\_13111314.doc](https://iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrkt comm/mrkt/mins/2013/mc_minutes_13111314.doc).

<sup>70</sup> See PFP Filing, Attachment N-1g: Summary of NEPOOL Participant Processes Regarding the ISO-NE and NEPOOL Proposals, at 8-9.

<sup>71</sup> *Id.*

<sup>72</sup> PFP Order at P 12.

While NEPOOL proposed certain changes to the FCM rules,<sup>73</sup> it did not propose any changes to the PER Adjustment.<sup>74</sup>

NESCOE believes that, as indicated in the development of the NEPOOL proposal and in the lack of support for changes to the PER Adjustment, consumer interests would not have supported the substantial increase in the Reserve Constraint Penalty Factors without retaining the protection of the PER rebate. NESCOE recognizes that ultimately the Commission established its own FPA section 206 investigation into the ISO-NE Tariff and adopted a solution; nonetheless, had PER been eliminated earlier, the NEPOOL proposal may never have been presented to FERC due to a lack of support.

If granted, the changes sought in the Complaint would distort the carefully balanced compromise package of FCM changes, developed several years ago, which garnered the support of over 80% of NEPOOL Participants Committee members.<sup>75</sup> The interplay between the Reserve Constraint Penalty Factors and the PER Adjustment, which is central to NEPGA's claim, was entirely foreseeable by the complainant, as its members were among those who actively negotiated this package of rule changes. Modifications to the PER Adjustment were considered by NEPOOL, and after deliberations, were not ultimately included in the NEPOOL filing of FCM changes.<sup>76</sup>

Through the Complaint, NEPGA attempts to force through revisions that could have been, but were not, included in the NEPOOL proposal. Granting the Complaint would have a detrimental effect on the willingness and ability of states and stakeholders to coalesce around

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<sup>73</sup> *Id.* at P 13.

<sup>74</sup> PFP Filing, Att. N-1a, NEPOOL Transmittal Letter at 11 (the "deduction for Peak Energy Rents" is "not at issue here").

<sup>75</sup> *See* December 2014 Complaint at 18.

<sup>76</sup> PFP Filing, Att. N-1a, NEPOOL Transmittal Letter at 11.

future proposals (which inevitably include compromises on all sides), by sending the message that such proposals, once accepted by the Commission, could be as easily unwound or revised through litigation even much later in time.

**D. To the Extent the Commission Agrees That the PER Adjustment Is Unjust and Unreasonable, the Commission Should Not Grant the Relief Requested, But Rather, Should Direct ISO-NE To Convene a Stakeholder Process To Determine a Remedy That Is Equitable to All Market Participants.**

NEPGA asks that the Commission issue an order granting the Complaint by November 29, 2016.<sup>77</sup> NEPGA does not style the Complaint as one requesting fast-track processing. However, NEPGA's request for an order granting the Complaint within 60 days after the Complaint was filed, in effect, amounts to such a request. NEPGA has not complied with Rule 206(b)(11) that requires the complainant to explain why the Commission's standard processes will not be adequate for expeditiously resolving the complaint. If the Commission grants NEPGA's request to establish September 30, 2016 as the refund effective date for the Complaint, there is no reason to rush through the process and risk a result that is one-sided and more likely subject to ongoing disputes.

Accordingly, to the extent that the Commission agrees with NEPGA that the PER Adjustment mechanism has been proved to be unjust and unreasonable, NESCOE urges the Commission not to direct ISO-NE to simply eliminate the PER Adjustment mechanism or to implement a prescriptive remedy, but rather to convene a stakeholder process with the purpose of determining a remedy that would be equitable to consumers and market participants. Similarly, NEPGA's request that the Commission issue an order directing ISO-NE to file revisions to its Tariff within 30 days that "return the Rebate to a just and reasonable level that more closely

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<sup>77</sup> Complaint at 1.

resembles the original intent of the PER Adjustment and the expectations of both load and suppliers”<sup>78</sup> should be rejected. To the extent that the Commission determines a change to ISO-NE’s Tariff is required, the Commission should direct ISO-NE to initiate a stakeholder process to determine what revisions are appropriate.

#### IV. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission deny the Complaint and take other necessary and appropriate actions consistent with the foregoing protest.

Respectfully Submitted,

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*Attorneys for the New England States Committee  
on Electricity*

Date: October 20, 2016

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<sup>78</sup> *Id.* at 34.

## CERTIFICATE OF SERVICE

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

Dated at Washington, DC this 20th day of October, 2016.

*/s/ Phyllis G. Kimmel* \_\_\_\_\_

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