UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association, Inc., Complainant,	)	
v.	)	Docket No. EL15-25-000
ISO New England Inc., Respondent.	)	

REQUEST FOR REHEARING OF
THE NEW ENGLAND POWER GENERATORS ASSOCIATION

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] the New England Power Generators Association, Inc. ("NEPGA") hereby requests rehearing of the Commission's January 30, 2015 order in this proceeding (the "January 30 Order").[2] The January 30 Order denied a complaint filed by NEPGA (the "Complaint") asking the Commission (i) to find ISO New England Inc.'s ("ISO-NE") Transmission, Markets, and Services Tariff ("Tariff") provisions governing the Peak Energy Rent ("PER") Adjustment to be unjust and unreasonable,[3] and (ii) to direct ISO-NE, among other things, to adjust the PER Strike Price[4] by $250/MWh for Capacity Commitment Periods 5 through 8.[5] In rejecting the Complaint, the Commission ignored empirical and theoretical evidence presented by NEPGA through its expert witness, Dr. David Hunger, concerning the financial harm that has occurred and that will occur as a result of the

[1] 18 C.F.R. §§ 385.713 (2014).

[2] *New England Power Generators Ass'n, Inc.*, 150 FERC ¶ 61,053 (2015).

[3] Complaint at 11-24.

[4] Capitalized terms not otherwise defined will have the meaning ascribed in the ISO-NE Tariff.

[5] Complaint at 2, 11-21.

Commission's determination pursuant to Section 206 of the Federal Power Act ("FPA")[6] to increase the Reserve Constraint Penalty Factors ("RCPFs") in 2014[7] without a corresponding adjustment to the PER Strike Price.[8] In so doing, the Commission improperly found that NEPGA did not carry its burden under Section 206 of the FPA to show that the existing Tariff is unjust and unreasonable.[9]

NEPGA seeks rehearing of the Commission's denial of the Complaint with respect to Capacity Commitment Periods 5 through 8. Based on the evidence submitted in the record, NEPGA has established that the current PER Strike Price formula is unjust and unreasonable as a result of the change in the RCPFs. At a minimum, the Commission should have found that NEPGA established a *prima facie* case that the current Tariff is unjust and unreasonable, that NEPGA raised substantial questions of material fact, and that the Complaint should be set for hearing and settlement procedures.

In addition, the Commission erred by establishing an unreasonable evidentiary burden for demonstrating that the Tariff is unjust and unreasonable. The Commission established an evidentiary threshold that requires several different and highly complex analyses of ISO-NE's capacity and energy markets in order to prove, among other things, (1) what clearing prices would have been in the forward capacity auctions had the rules for the auctions been different and (2) that energy market price convergence will not occur in the future or will not occur to a sufficient degree to offset the increase in the PER Adjustment. This standard is both

[6] 16 U.S.C. § 824e (2012).

[7] *ISO New England Inc.*, 147 FERC ¶ 61,172 (2014).

[8] Complaint at 14-16; *id.*, Attachment B, at 17; *id.*, Aff. of Dr. David Hunger ¶¶ 20-22; NEPGA Jan. 7, 2015 Answer at 6-7 ("Answer"); *id.*, Supp. Aff. of Dr. David Hunger ¶¶ 7-11 ("Supp. Hunger Aff."). Note that the aggregate estimated PER Adjustment figure for the December 4 Operating Procedure 4 event provided in the Supp. Hunger Aff. was revised in an Errata and Clarification of Supplemental Affidavit of Dr. Hunger filed on January 8, 2015.

[9] January 30 Order at P 35.

unreasonable and arbitrary and capricious. Moreover, while the Commission purports to reject the Complaint without foreclosing consideration of a new complaint concerning Capacity Commitment Periods 5 through 8 in the future, the evidentiary standard set forth by the Commission in the January 30 Order that would be applicable to any future complaint is highly prejudicial to NEPGA and its members. In addition to the burdensome and questionable analyses outlined above, the Commission appears to suggest that NEPGA would have to wait until additional empirical evidence of financial harm is established, i.e., additional PER events occur, and then seek prospective relief.

If the Commission denies rehearing, it should clarify that it will not prejudge what evidence would be required to satisfy NEPGA's burden in any future complaint regarding the PER Strike Price formula for Capacity Commitment Periods 5 through 8. The Commission should also grant rehearing of a misstatement of law in the January 30 Order and clarify that, consistent with recent federal court precedent, NEPGA's Complaint need not demonstrate that its proposed alternative to the existing PER Adjustment Tariff provisions is just and reasonable in order to get relief.

I. BACKGROUND

The PER Adjustment serves as a rebate to load from capacity suppliers for the difference between the PER Strike Price and the real-time energy price on a rolling twelve-month average basis.[10] The magnitude of the PER Adjustment is completely independent of the energy revenues actually earned by a capacity resource, and the PER Adjustment is triggered regardless of whether a capacity supplier's resource is scheduled by ISO-NE or sells energy in the real-time energy market.[11] Moreover, due to the obligation to offer into the day-ahead energy market, the

[10] Tariff, Market Rule 1 § III.13.7.2.7.1.1.

[11] *See id.* §§ III.13.7.2.7.1.1.1, III.13.7.2.7.1.1.2.

majority of capacity resources earn most, if not all, of their energy revenues based on the day-ahead energy market clearing prices, which do not include RCPFs.[12]

In 2014, ISO-NE proposed, and the Commission accepted with modifications, a redesign of the Forward Capacity Market ("FCM").[13] The new capacity market design, called "Pay for Performance," directly links a unit's capacity revenues to its performance during real-time reserve deficiencies.[14] In addition to largely adopting ISO-NE's proposed FCM redesign, the Commission, pursuant to its Section 206 authority, directed ISO-NE in its May 2014 Pay for Performance order to implement increased RCPFs prior to implementation of other Pay for Performance measures.[15] The Commission reasoned that the increased RCPFs would enhance incentives to deliver energy in real-time in advance of Pay for Performance, which would not be implemented until Capacity Commitment Period 9.[16] The Commission declined to address comments in the Pay for Performance proceeding arguing for the elimination of the PER Adjustment, finding such comments to be beyond the scope of the proceeding.[17]

In July 2014, ISO-NE filed, and the Commission subsequently accepted, market rule changes to increase the RCPFs for thirty-minute operating reserves from $500/MWh to $1,000/MWh and for ten-minute non-spinning reserves from $850/MWh to $1,500/MWh, effective December 3, 2014.[18] In its order accepting the July compliance filing reflecting the increases in the RCPFs and other modifications to the Pay for Performance market rules, the

[12] *Id.* § III.2.6(a); *see also* Complaint, Attachment C at 22 ("Close to 100% of real time load now clears in the Day-Ahead Energy Market.").

[13] *ISO New England Inc.*, 147 FERC ¶ 61,172 (2014).

[14] *Id.* P 4.

[15] *Id.* P 25.

[16] *Id.* P 23.

[17] *Id.* P 110.

[18] *ISO New England Inc.*, 149 FERC ¶ 61,009 (2014), *reh'g pending*.

Commission agreed with ISO-NE that reconsideration of the PER Adjustment would be more appropriately considered in a separate proceeding.[19]

Shortly after its July compliance filing, ISO-NE, recognizing that the increase in RCPFs could dramatically increase the amount of the PER Adjustment, initiated a stakeholder process to consider an adjustment to the PER Strike Price for Capacity Commitment Periods 5 through 8. In the context of the stakeholder process, ISO-NE presented as a possible remedy an adjustment to the PER Strike Price designed to maintain the historical level of PER rebates paid by suppliers to load. ISO-NE warned, however, that it would not exercise its FPA Section 205 authority to modify the PER Adjustment Tariff provisions unless the proposal garnered 60% stakeholder approval.[20] The proposal received a 57.74% vote in favor at the Markets Committee and a 47.14% vote in favor at the NEPOOL Participants Committee level, and representatives of ISO-NE subsequently confirmed that ISO-NE likely would not file its proposal with the Commission.[21]

On December 3, 2014, the day the increased RCPFs went into effect, NEPGA filed its Complaint challenging the Tariff provisions governing the PER Adjustment in light of the change in RCPFs. In the Complaint, NEPGA provided an affidavit from its expert witness, Dr. David Hunger, who reviewed, among other things, the "back-cast" analysis of Capacity Commitment Period 4 performed by ISO-NE in the stakeholder process. Dr. Hunger concluded that the higher

[19] *See id.* P 25 n.39 ("[T]he potential inefficiency created by the Peak Energy Rent mechanism exists independent of the increase to the Reserve Constraint Penalty Factors and does not affect competitive suppliers' incremental incentives to produce energy. Accordingly, we agree with ISO-NE that reconsideration of the Peak Energy Rent mechanism would be more appropriately conducted separate from the instant proceeding, and we note that ISO-NE has already commenced a separate stakeholder process for that purpose.") (internal citation omitted).

[20] Complaint, Attachment B at 4.

[21] *See* Draft Minutes of the Sept. 3-4, 2014 Markets Committee Meeting at 11, *available at* http://www.iso-ne.com/static-assets/documents/2014/09/a01_draft_mc_minutes_14090304.doc; Draft Minutes of the Oct. 3, 2014 Participants Committee Meeting at 3352, *available at* http://www.iso-ne.com/static-assets/documents/2014/11/npc_20141107_supplemental.pdf.

RCPFs combined with the current PER Strike Price formula will result in a significant increase in the PER Adjustment going forward, which would not be offset by increased reserve market revenue or real-time peak energy rents.[22] Dr. Hunger also concluded that the $250/MWh adjustment to the PER Strike Price proposed by ISO-NE was likely to maintain the status quo with respect to the PER Adjustment that existed prior to the Commission-directed increase in RCPFs.[23]

Only a day after NEPGA filed the Complaint, ISO-NE experienced an Operating Procedure ("OP") 4 event that drove real-time prices to over $1,100/MWh and triggered an aggregate transfer from capacity suppliers to load via the PER Adjustment of over $29 million.[24] In his Supplemental Affidavit, Dr. Hunger testified that a hypothetical 500 MW generator clearing in the day-ahead market (as the vast majority of capacity resources do) would have had its day-ahead energy payment of $102,184 for hours 17 through 19 offset by a $441,884 PER Adjustment, resulting in a net *loss* of $339,700 (or -$226.47/MWh) during hours in which prices spiked to over $1,100/MWh.[25] Dr. Hunger testified as to the difference in day-ahead and real-time prices for the hours that the RCPFs were in effect and demonstrated that no price convergence had occurred.[26] He also demonstrated that price convergence was not likely to occur in the future given the differences in the rules applicable to the day-ahead and real-time energy markets.[27] Finally, Dr. Hunger explained that if the PER Strike Price were increased by

[22] *See* Complaint, Attachment B at 16; *see also id.*, Aff. of Dr. David Hunger ¶¶ 20-22.

[23] Complaint, Aff. of Dr. David Hunger ¶ 23.

[24] Supp. Hunger Aff. ¶¶ 7, 9; *see also* NEPGA Jan. 8, 2015 Errata and Clarification of Supplemental Affidavit of Dr. Hunger ¶ 3. An "OP4" event is an action taken by ISO-NE during a capacity deficiency. ISO New England Inc., *ISO New England Operating Procedure No. 4 – Action During a Capacity Deficiency* (2014), *available at* http://www.iso-ne.com/rules_proceds/operating/isone/op4/op4_rto_final.pdf.

[25] Supp. Hunger Aff. ¶ 9. Individual five-minute Locational Marginal Price intervals during those hours exceeded $2,700/MWh.

[26] *Id.* ¶¶ 17-19.

[27] *Id.*

$250/MWh, as advocated by NEPGA in its Complaint, the aggregate PER Adjustment rebate to load would have been a significant, but lower, $220,000.[28]

On January 30, 2015, the Commission denied NEPGA's complaint, finding that "the overall result of [the PER/RCPF] interaction is a matter of speculation," despite the analyses conducted by ISO-NE (and appended to the Complaint), which were reviewed and endorsed by Dr. Hunger, and despite the specific evidence of harm resulting from the December 4, 2014 event described in Dr. Hunger's Supplemental Affidavit.[29]

II. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

Pursuant to Rule 713(c) of the Commission's Rules of Practice and Procedure,[30] NEPGA includes the following statement of issues and specification of errors:

1. The Commission erred in denying NEPGA's Complaint rather than granting it or setting it for hearing and settlement, despite the fact that NEPGA carried its burden and established a *prima facie* case, supported by substantial evidence, that the current Strike Price formula, in combination with the new Commission-imposed RCPFs, is unjust and unreasonable. In so doing, the Commission violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and the FPA, 16 U.S.C. § 824e, by ignoring applicable precedent with respect to the use of historic data and by failing to make a reasoned decision based on substantial evidence. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C. Cir. 2005) (holding that FERC may change course only with a rational explanation that "prior policies and standards are being deliberately changed, not casually ignored"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42, 57 (1983); *see also id.* at 43 (requiring federal agencies to "examine the relevant data and articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made").

2. The Commission erred in finding that the overall result of the interaction between the PER Adjustment and the RCPFs was a matter of speculation. In making this determination, the Commission violated the APA by failing to consider evidence provided by NEPGA, *see, e.g., Sw. Power Pool, Inc. v. FERC*, 736 F.3d 994, 999 (D.C. Cir. 2013) (holding that FERC's "failure to consider the evidence proffered renders its orders arbitrary and capricious"); *PPL Wallingford*

[28] *Id.* ¶ 9. If the PER Strike Price were increased by $250/MWh, as advocated by NEPGA in its complaint, the PER Adjustment would be $440/MWh, offsetting 39% of the day's energy revenue.

[29] January 30 Order at PP 35-41.

[30] 18 C.F.R. § 385.713(c).

Energy, LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (holding that the "agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious"), and by ignoring meritorious arguments, *see, e.g.*, *PSEG Energy Resources & Trade LLC*, 665 F.3d 203, 208, 209-10 (D.C. Cir. 2011).

3. To the extent that the Commission's January 30 Order requires NEPGA to experience repeated financial harm, for which there will be no relief, prior to finding ISO-NE's current Strike Price formula to be unjust and unreasonable, the Commission's order was in error. Such a finding would depart, without adequate explanation, from well-established Commission precedent under which the Commission relies upon historical data to determine whether rates will be just and reasonable. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57; *ANR Pipeline Co v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here any agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious").

4. To the extent that the Commission's January 30 Order requires NEPGA to provide all of the analyses discussed in paragraphs 37 – 40 in order to satisfy its burden of demonstrating that the current PER Strike Price is unjust and unreasonable in light of the increased RCPFs, the Commission erred. Such a finding would depart from precedent and would impose an unreasonable burden upon NEPGA to perform several complicated and onerous analyses in support of this Complaint or any future complaint. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57; *ANR Pipeline Co v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here any agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious").

5. To the extent that the Commission held that NEPGA carries the burden to propose a just and reasonable alternative to the existing unjust and unreasonable PER Adjustment Tariff provisions, the January 30 Order was in error. Such a holding would conflict with clearly established precedent. *See FirstEnergy Service Co. v. FERC*, 758 F.3d 346 (D.C. Cir. 2014) (citing *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011)) ("It is 'the Commission's job—not the petitioner's—to find a just and reasonable rate."); *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C. Cir. 2005).

III. REQUEST FOR REHEARING

A Commission order is arbitrary and capricious, and therefore in violation of the Administrative Procedure Act,[31] if the Commission fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the

[31] 5 U.S.C. § 706(2)(A).

facts found and the choice made."[32] Moreover, a decision violates the arbitrary and capricious standard if the Commission departs from past precedent without a satisfactory explanation.[33] As discussed below, the January 30 Order ignores relevant evidence, departs from long-standing precedent without explanation, and establishes an evidentiary standard that is otherwise not in accordance with law. The Commission should therefore grant rehearing of the January 30 Order with respect to the relief sought for Capacity Commitment Periods 5 through 8.

A. NEPGA Has Met its Section 206 Burden to Establish that the Current Tariff is Unjust and Unreasonable, and the Commission's Denial of the Complaint was Not Based on Reasoned Decision-Making.

NEPGA's Complaint established, on both a theoretical and an empirical basis, that the Commission-imposed increase in RPCFs has rendered the existing PER Adjustment unjust and unreasonable. In rejecting this evidence and ultimately denying the Complaint, the Commission departed from past precedent without any explanation and failed to consider compelling evidence of a harm inflicted on NEPGA's members. The Commission's January 30 Order is therefore arbitrary and capricious.

In the Complaint, NEPGA provided a back-cast analysis, performed by ISO-NE, demonstrating that the interaction between the higher RCPFs and the existing PER Adjustment would result in a net increase in the annual payment by suppliers to load of approximately $67 million, even after taking into account increased energy and reserve payments.[34] NEPGA explained that this transfer of revenue is unrelated to economic efficiency and reliability and

[32] *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (internal quotations omitted); *see also id.* (holding that unless an agency "answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned") (internal quotations omitted).

[33] *See Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) ("When an agency shifts course, however, it must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.") (internal quotations omitted).

[34] Complaint at 15.

therefore would result in a windfall to load.[35] The Commission disregarded this evidence based on the notion that a backward-looking analysis cannot demonstrate with any certainty what will occur in the future.[36]

This conclusion contradicts a long-standing Commission practice of using historical data to analyze whether rates will be just and reasonable. For example, the Commission requires sellers to use actual unadjusted historical data to perform the Delivered Price Test that the Commission uses to determine whether to grant market-based rate authority.[37] The Commission justified the use of historical data in the context of market-based rate proceedings thusly:

> [H]istorical data are more objective, readily available, and less subject to manipulation by sellers than future projections. We reiterate our concern that if the Commission were to require sellers to submit studies or change in status filings based on their future projections such as "imminent changes," then sellers would be able to selectively "cherry pick" those changes that benefited the seller in retaining market-based rate authorization while ignoring other equally likely future changes that would undermine the seller's chances for obtaining or retaining market-based rate authorization.[38]

Indeed, many aspects of rate design in wholesale markets rely largely on historical data, such as the establishment of offer caps,[39] the calculation of an Installed Capacity Requirement,[40] and the calculation of Customer Baseline Levels for measuring demand response resource

[35] *Id.* at 14, 18, 22-23; Answer at 4-5.

[36] January 30 Order at P 36.

[37] *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Pub. Utils.*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 116, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

[38] Order No. 697-A at P 127.

[39] *ISO New England Inc.*, 119 FERC ¶ 61,045 (2007).

[40] *See ISO New England Inc.*, 150 FERC ¶ 61,003 (2015) ("While ISO-NE's two-settlement capacity market design aims to incent improved resource performance, we agree with ISO-NE that it would have no basis to use forecasted performance data in the absence of actual historical performance under this nascent two-settlement market design").

performance.[41] In accepting ISO-NE's use of historical data for establishing forward capacity auction offer caps, for example, the Commission expressly disagreed with an argument that historical data does not provide a reasonable basis for predicting future outcomes:

> The Commission disagrees with NRG's assertion that use of historical data for prices, outages, and the cost of replacement capacity will not be representative of future performance and market expectations. Prediction of pricing and outage data is not a perfect science; however, as the Commission has previously found, ***use of historical data is likely to be the most accurate and reliable predictor of future market conditions***.[[42]]

The Commission's wholesale dismissal in this proceeding of a "back-cast" analysis using actual historical data from the 2013-2014 Capacity Commitment Period and an additional Reserves Market analysis of the 2012-2013 and 2013-2014 Capacity Commitment Periods[43] – analyses performed by ISO-NE, which is required to be independent under the rules governing Independent System Operators – departs from this precedent without explanation and is therefore arbitrary and capricious. The Commission does not explain in the January 30 Order why it believes that this data is not predictive of future events. Better data is not available, as the market design change that triggered the Complaint (i.e., the increased RCPFs) has only recently gone into effect.

The Commission's determination that the back-cast analysis is unpersuasive appears, in fact, to suggest that a Section 206 complaint is only ripe for Commission review after an actual harm has been incurred and documented.[44] Establishing such a standard would be particularly unreasonable in light of the filed rate doctrine's rule that rate changes may only occur on a

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[41] *ISO New England Inc.*, 150 FERC ¶ 61,007 (2015).

[42] *ISO-NE*, 119 FERC ¶ 61,045 at P 133 (emphasis added).

[43] *See* Complaint, Attachment B at 16-17.

[44] January 30 Order at PP 36-40.

prospective basis.[45] If the Commission requires NEPGA's membership to incur significant financial harm before it can bring a complaint challenging the reasonableness of the Tariff, NEPGA would be barred from relief from the financial harm that occurred before a complaint was filed. Complaints filed under Section 206 seeking to change unjust and unreasonable market rules are thus quite different from ordinary civil litigation matters, where an actual, concrete injury is required for standing, but where harm can be remedied on a retroactive basis. Such a standard also would conflict with the Commission's regulations governing complaints, which explicitly acknowledge the fact that a complainant may not know the precise extent of the financial injury or harm.[46] In any event, such a position, if valid, still would not justify a finding that NEPGA failed to satisfy its Section 206 burden. In addition to the back-cast analysis, NEPGA submitted into the record a quantification of the *actual* harm incurred by suppliers just one day after the higher RCPFs went into effect.[47]

As explained at length in NEPGA's January 8, 2015 Motion for Leave to Answer and Answer (the "Answer"), the ISO-NE region experienced an OP4 event on December 4, 2014.[48] Unplanned transmission outages in Quebec caused a reserve deficiency in ISO-NE, which triggered the addition of RCPFs to the real-time energy market prices.[49] With support from an affidavit of Dr. David Hunger, NEPGA explained that real-time energy market prices during three hours of the day on December 4 triggered the PER Adjustment mechanism, resulting in a total PER Adjustment of $29 million.[50] NEPGA put this aggregate figure into perspective by

[45] *See Consolidated Edison Co. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

[46] *See* 18 C.F.R. § 385.206(b)(4) ("[A] complainant must: …[m]ake a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction.").

[47] Supp. Hunger Aff. ¶¶ 7, 9, 11.

[48] Answer at 3, 6-7.

[49] *Id.* at 6.

[50] NEPGA Jan. 8, 2015 Errata and Clarification of Supplemental Affidavit of Dr. Hunger ¶ 3.

noting that a 500 MW generator that cleared in the day-ahead market would have earned an energy payment of $102,184 for the three relevant hours, which would have been offset by a PER Adjustment of $441,884 – for a net *loss* of $339,700.[51] In addition to providing evidence of actual, documented financial harm, this real-world example clearly demonstrated that the current Tariff rules have caused the PER Adjustment to morph into something entirely different from its original purpose. Rather than merely shaving the peak energy rents that a resource can earn during scarcity events,[52] the mechanism, in conjunction with the increased RCPFs, now actually causes suppliers that clear day-ahead and that are performing as expected to lose substantial sums during periods of scarcity.

The Commission appears to have ignored this evidence submitted by NEPGA entirely, which renders the January 30 Order arbitrary and capricious.[53] The failure to discuss this evidence of concrete harm in the January 30 Order is particularly troubling considering the Commission's overall message that the harm alleged by NEPGA is "a matter of speculation."[54] The only substantive reference to the December 4, 2014 OP4 event in the January 30 Order comes in paragraph 40, where the Commission makes reference to comments filed by GDF Suez discussing the event.[55] In dismissing the comments of GDF Suez, the Commission asserts that "no party has provided information as to how often such events might occur, or the magnitude of revenue impacts that might result from them."[56]

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[51] Answer at 6.

[52] *See Devon Power LLC*, 115 FERC ¶ 61,340, at P 29 (2006) ("[T]he 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.") (emphasis added).

[53] *See* January 30 Order at P 40.

[54] *Id.*

[55] *Id.*

[56] *Id.*

This statement is wrong on two accounts and further demonstrates a failure to adequately consider the evidence in the record. First, NEPGA did indeed provide evidence of how often such events might occur. On slide 25 of Attachment B of the Complaint, NEPGA provided historical evidence of the frequency of events that trigger the PER Adjustment mechanism.[57] This evidence shows that the PER value was positive in ten hours in calendar year 2013.[58] While NEPGA obviously cannot predict the future, the recent past provides for the best forecast,[59] and this evidence clearly demonstrates the potential for a significant number of PER events going forward, particularly given the tightening of supply that has occurred between Forward Capacity Auctions ("FCAs") 5 through 8. Similarly, NEPGA provided evidence of the revenue impacts that will result from any such events. The experience on December 4, documented by NEPGA, shows that suppliers transferred $29 million to load during the three hours in which real-time prices triggered the PER Adjustment mechanism – or roughly $9.67 million per hour.[60] The Commission's failure to consider this evidence renders its decision arbitrary and capricious.

In summary, by (1) departing from long-standing precedent without providing any explanation for the departure and (2) failing to consider relevant evidence submitted into the record, the Commission's January 30 Order was arbitrary and capricious. The Commission should grant rehearing on this basis.

[57] Complaint, Attachment B at 25.

[58] *Id.* NEPGA notes that a historical look at the frequency of PER events reveals a somewhat erratic pattern (or perhaps no pattern at all), with some years experiencing very little or no PER events, and other years, like 2013, experiencing several events.

[59] *ISO New England Inc.*, 119 FERC ¶ 61,045, at P 133 (2007).

[60] NEPGA Jan. 8, 2015 Errata and Clarification of Supplemental Affidavit of Dr. Hunger ¶ 3.

B. A Complainant Under Section 206 Need Not Provide a Just and Reasonable Remedy to the Unjust and Unreasonable Rate.

NEPGA also seeks rehearing of a statement made in the January 30 Order that is contrary to federal court precedent. The Commission held that it did not need to address whether NEPGA's proposed remedy to the PER Adjustment was just and reasonable, but that, in any event, "NEPGA [has not] adequately supported its proposed alternative to the existing PER Adjustment (i.e., raising the PER Strike price by $250/MWh)."[61] The Commission then goes on to note that "NEPGA does not address the goals of the PER Adjustment – namely, to provide load with a hedge against high energy prices and to discourage market manipulation in the energy market – and set forth how its proposed alternative will continue to accomplish these goals."[62] These assertions represent a clear misstatement of the law. A complainant under Section 206 has no obligation to establish a just and reasonable remedy or replacement for an unjust and unreasonable provision of the tariff.[63] The complainant need only show that the existing tariff is unjust and unreasonable.[64] The Commission should clarify, consistent with recent federal court precedent, that the Commission carries the burden of determining a just and reasonable "replacement" rate.[65]

In addition to misstating the law, this dictum from the Commission also misstates the facts. Contrary to the Commission's statements, NEPGA did address in its Complaint why its proposed remedy – raising the Strike Price by $250/MWh – was a just and reasonable

[61] January 30 Order at P 35 n.48.

[62] *Id.*

[63] *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (rejecting FERC's contention that a Section 206 complainant carries the "dual burden" of showing that the existing rate or practice is unjust and unreasonable *and* demonstrating that its replacement proposal is just and reasonable); *see also Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011) ("It is the Commission's job – not the petitioners' – to find a just and reasonable rate.").

[64] *FirstEnergy Serv. Co.*, 758 F.3d at 353.

[65] *Md. Pub. Serv. Comm'n*, 632 F.3d at 1285 n.1.

replacement rate.[66] NEPGA actually devoted an entire section of the Complaint to establishing this very point.[67] NEPGA explained that, based on an empirical analysis performed by ISO-NE, raising the strike price by $250/MWh would result in a PER Adjustment that is "more consistent with the historic PER Adjustments that were reflected in all of the de-list offers in FCAs 5-8" and that it would "maintain the status quo with respect to the PER Adjustment and would restore the settled expectations of all market participants."[68] By striving to maintain the status quo, NEPGA's proposed solution would address the "goals of the PER Adjustment" to the same extent that those goals were addressed prior to the increase in the RCPFs.

C. The Commission Established an Evidentiary Burden that is Arbitrary and Capricious, an Abuse of Discretion, and Otherwise Not in Accordance with Law.

The Commission reasoned in the January 30 Order that the Complaint failed to consider "the larger context of the overall revenue picture for capacity suppliers" for the relevant capacity commitment periods.[69] The Commission went on to explain that NEPGA failed to consider the revenue effect associated with the administrative pricing rules in effect for FCAs 5 through 7 and that NEPGA similarly failed to consider the potential increase in day-ahead energy market revenue associated with the higher RCPFs.[70] As discussed below, the evidentiary standard established by the Commission is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

[66] *See* Complaint at 18-21, 24-25; Answer at 9-10.

[67] Complaint at 24-25.

[68] Answer at 9-10; *see also* Complaint at 24-25.

[69] January 30 Order at P 36.

[70] *Id.* PP 37-38.

1. The Commission's Analysis of the Effect of Administrative Pricing Rules Establishes an Unjust and Unreasonable Evidentiary Standard.

First, the Commission held that NEPGA failed to demonstrate that the incremental revenue lost to the PER Adjustment is greater than the "above-market" revenue received due to the administrative pricing rules in effect for FCAs 5 through 7.[71] An evidentiary burden of this nature is both infeasible and illogical. To determine the extent to which the auction clearing price was "above market,"[72] NEPGA presumably would have to determine what the clearing price of the auction would have been if there had been no price floor in place for FCAs 5 through 7.[73] Even if NEPGA had access to dynamic de-list bids for all capacity suppliers, NEPGA would have no way of constructing hypothetical dynamic delist bids that would have existed in the absence of a price floor (or with the higher RCPFs that are now in place). NEPGA would have no reliable net risk-adjusted going forward cost information about sellers that remained in the auction *at* the price floor, for example.

More broadly, given that price floors indisputably alter sell offer behavior, NEPGA cannot reliably project how individual sellers would have changed their offers in the absence of a price floor or how game theory would have played into individual sellers' actions during the auctions. Indeed, in the first FCA without an administrative price floor, FCA 8, prices were significantly higher than the previous auctions.[74] One reasonable hypothesis for this increase in price between FCA 7 and FCA 8 is that, with the floor no longer in place, certain struggling units decided to exit the market, which tightened supply and, in this case, triggered the "insufficient

[71] *See id.* P 37.

[72] As discussed later in this section, NEPGA disputes the notion that the FCAs produced revenues that were "above market."

[73] FCAs 5 through 7 cleared at an administratively determined price floor. In FCA 8, insufficient competition triggered a separate administrative pricing rule, placing a cap on the clearing price in that auction.

[74] *See* ISO New England Inc., Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, at 2, 4 (filed Feb. 28, 2014).

competition" administrative pricing rule. While NEPGA can only speculate about seller offer behavior in FCA 8, what is abundantly clear is the fact that an auction clearing at the floor is by no means an indication that the market would clear below that level in the absence of a floor. An analysis of what previous FCAs would have yielded under changed rules therefore would be of limited probative value, as the results of any such analysis would be dependent on the highly uncertain assumptions made regarding how offer behavior would change. Finally, in suggesting that an analysis of hypothetical FCA results would be dispositive, the Commission also fails to consider that not all resources are receiving a capacity clearing price established by a price floor. Some resources obtained capacity commitments in reconfiguration auctions, for example, and these auctions did not contain a price floor.[75] Resources in the Northeastern Massachusetts/Boston area also did not receive a clearing price established by a price floor in FCA 7, as the Commission acknowledges.[76]

The Commission's focus on the effect of administrative pricing rules also appears to ignore the larger objection articulated in the Complaint. One of NEPGA's primary objections all along has been the fact that the higher RCPFs' effect on the PER Adjustment substantially alters suppliers' settled expectations with respect to the overall capacity rate they would receive. Regardless of how the higher RCPFs would (or would not) have affected the clearing prices established in FCAs 5 through 8 due to the administrative pricing rules in effect, suppliers reasonably established certain expectations after those auctions cleared with respect to the PER Adjustment and the resulting capacity revenue that would be received in Capacity Commitment Periods 5 through 8. Just as a retroactive decrease to the FCA 5 through 7 floor prices would significantly alter this expectation, the Commission's decision to dramatically increase the RCPF

[75] *See* ISO-NE Tariff, Market Rule 1 § III.13.4.

[76] January 30 Order at P 37.

values, without a corresponding modification to the PER Adjustment, also significantly alters this expectation without any demonstrated improvement to economic efficiency or reliability. The revenue transfer is thus simply a windfall to load. The Commission's discussion of administrative pricing rules for FCAs 5 through 7 ignores this point entirely.

Perhaps of a more fundamental concern, though, is the implication that administrative pricing floors shield the market against challenges that rates are unreasonably low because of the "above-market" revenue the Commission implies the floor may provide to suppliers. If the Commission approves a price floor as just and reasonable as it did for ISO-NE's capacity auctions,[77] that price floor is necessarily a valid part of the resulting rate that the market produces. Suppliers, therefore, are not receiving "above-market" revenue simply because of the existence of a price floor. Indeed, the Commission presumably only approves a price floor with the intention of correcting for some other kind of market failure that is expected to prevent prices from reaching a just and reasonable level.[78] The flaw in the Commission's logic is further illustrated by examining the converse of the Commission's argument: Would the Commission conclude that an administrative price *cap* provides suppliers with "below-market" revenues? NEPGA submits that the answer to this question is almost certainly "no." For these reasons, the Commission clearly erred by requiring NEPGA to demonstrate whether the "increased PER deduction would be greater than the amount of above-market revenues due to the price floor . . . ."[79]

[77] *See ISO New England Inc.*, 138 FERC ¶ 61,238, at PP 21, 27 (2012); *ISO New England Inc.*, 135 FERC ¶ 61,029, at PP 22, 217 (2011).

[78] *See, e.g., ISO New England Inc.*, 138 FERC ¶ 61,027, at P 50 (2012) ("[T]he Commission found it reasonable to extend the price floor for an additional period of time to address the effect of historical [out of market] capacity on market prices.").

[79] January 30 Order at P 37.

2. The Commission's Analysis of Price Convergence Establishes an Unjust and Unreasonable Evidentiary Standard.

Second, the Commission denied NEPGA's Complaint in part because NEPGA did not provide sufficient evidence regarding the "overall revenue picture" for capacity suppliers in Capacity Commitment Periods 5 through 8[80] and, in particular, because NEPGA did not address the possibility that higher RCPFs will result in higher clearing prices in the day-ahead market.[81] This potential for higher day-ahead prices, the Commission argues, could offset some of the revenue lost as a result of the RCPFs' effect on the PER Adjustment.[82] The Commission therefore appears to establish an evidentiary burden in which NEPGA would have to prove a negative, i.e., NEPGA would have to prove that day-ahead clearing prices for both PER event hours and non-PER event hours will not converge with real-time prices on average over a longer period of time.

This evidentiary burden is arbitrary and capricious and is not the product of reasoned decision-making. NEPGA already has provided evidence concerning the overall revenue picture for capacity suppliers, including the impact on real-time energy, reserves and capacity revenues.[83] With respect to the RCPFs' effect on day-ahead revenues, ISO-NE has concluded that any such effect would be "difficult to predict,"[84] and there is no history in New England of RCPFs of this current magnitude. Dr. Hunger demonstrated in the Answer, however, that there was absolutely no indication of convergence between day-ahead and real-time prices on December 4, nor was there any evidence that convergence would occur in the future due to

[80] *Id.* P 36.

[81] *Id.* PP 38-39.

[82] *Id.*

[83] Complaint at 15-16.

[84] *Id.*, Attachment B at 17.

differences in the rules governing the real-time and day-ahead markets.[85] This conclusion is consistent with ISO-NE's analysis of day-ahead and real-time prices when the hourly PER Adjustment has been positive since December 2010 – an analysis also included as evidence in the Complaint.[86] Furthermore, even assuming NEPGA could somehow perform a historical analysis on price convergence (e.g., by examining the experience thus far in PJM with shortage pricing), the Commission has simultaneously rejected NEPGA's back-cast analysis on the basis that data from past years do not necessarily predict future outcomes.[87]

Even if NEPGA were to concede that the higher RCPFs could result in some offsetting day-ahead market revenues, no one – not ISO-NE, intervenors, or the Commission – has suggested that these revenues would completely offset the significant revenue transfer under the PER Adjustment that NEPGA exhaustively detailed in the Complaint.[88] ISO-NE's analysis indicates that of the $99 million increase in PER Adjustments, only a small amount ($8.4 million) is offset by *real-time* energy price increases, which are the hours that are directly affected by RCPF increases.[89] The idea that convergence between day-ahead and real-time prices in non-PER hours would somehow negate the net effect of the RCPF increases ($67 million in additional payments to load) is simply not plausible.

Rather, the only question on this issue is *to what extent, if any*, this day-ahead energy market revenue may mitigate some of the revenue transfer from suppliers to load. In other words, NEPGA has clearly established that the current Tariff results in an unjust and

[85] Supp. Hunger Aff. ¶¶ 17-19.

[86] *See* Complaint, Attachment B at 25 (showing that, in hours in which the PER Adjustment has been positive since December 2010, the difference between real-time and day-ahead prices has averaged $534/MWh).

[87] January 30 Order at P 36.

[88] The reality is that any offsetting revenue from the day-ahead clearing prices is likely to be modest, if any, as reserve shortages are very difficult to predict. Some resources will receive no offsetting energy revenue at all, as they may be available but not scheduled in day-ahead and unable to respond to real-time price signals.

[89] Complaint, Attachment B at 17.

unreasonable windfall for load, and the only remaining question of fact involves how to calibrate the remedy (i.e., the adjustment to the PER Strike Price). As explained in the previous section, the Commission, not the complainant, carries the burden of establishing a just and reasonable remedy in a Section 206 complaint proceeding.[90] To the extent the Commission believes that this issue presents a substantial question of material fact, which the January 30 Order implies, the proper procedure would have been to grant the Complaint and set the question of the proper remedy for an evidentiary hearing.

NEPGA raises these issues with the January 30 Order for two reasons. First, as just explained, the evidentiary burden established in the order was arbitrary and capricious and did not result in reasoned decision-making. Second, NEPGA wants to ensure that any future proceeding, should the Commission deny rehearing of the Complaint, is not prejudged by the Commission's findings with respect to the required evidentiary burden. In several places in the January 30 Order, the Commission suggests that its order denying the Complaint is without prejudice to NEPGA or some other entity filing a similar complaint in the future. The Commission states that if, "at a future point in time, NEPGA or any other party is 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 [Capacity Commitment Periods] 5 through 8 unjust and unreasonable, the Commission will consider any such complaints at that time."[91] While NEPGA appreciates this openness to considering more evidence on the topic, NEPGA is concerned that the Commission effectively has, advertently or not, prejudged any further consideration of the issue based on the provided rationale for denying

[90] *See FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011).

[91] January 30 Order at P 40; *see also id.* n.51 (noting that NEPOOL has urged the Commission to reject the Complaint without prejudice to refiling); *id* (Comm'rs Moeller and Clark, concurring).

the Complaint. Indeed, the Commission's rationale for denying the Complaint suggests that NEPGA (or any other complainant or the Commission acting *sua sponte*) would have to meet an evidentiary burden that is unreasonable and inconsistent with Commission precedent and applicable law. Had the Commission imposed the same evidentiary burden to its own actions pursuant to FPA Section 206 in the Pay for Performance proceeding, it likely would not have ordered the RCPF increases that precipitated the Complaint.[92] If the Commission denies rehearing of the Complaint, NEPGA seeks, in the alternative, a clarification that the Commission did not intend to establish a new evidentiary burden for any future complaint.

Finally, NEPGA notes that the evidentiary burden imposed by the January 30 Order is particularly unjust in light of the broader context of the Complaint. NEPGA's primary intention in initiating the Complaint was to restore the capacity "rates" established in FCAs 5 through 8, which were equal to the relevant FCA clearing price less the reasonably expected PER Adjustment. The increase in RCPFs directed by the Commission under FPA Section 206, without any corresponding adjustment to the PER Strike Price, substantially altered these rates. Such a substantial change to settled rates undermines one of the primary purposes of a forward capacity market, which is to provide the revenue certainty and stability required to support investment.[93] The notion that NEPGA should be subject to such a heightened evidentiary standard – a standard that would require several analyses that are highly burdensome and of questionable probative value – when NEPGA is simply trying to *restore the approved rates* for FCAs 5 through 8 is unreasonable.

[92] Any demonstration that the Commission made justifying the imposition of increased RCPFs certainly did not rise to the level of the specific evidence discussed in paragraphs 37-40 of the January 30 Order.

[93] The Commission has in fact held, and the D.C. Circuit has affirmed, that FCA rates, as approved by the Commission, are subject to *Mobile-Sierra* protection. *See NEPGA v. FERC*, 707 F.3d 364 (D.C. Cir. 2013).

IV. CONCLUSION

WHEREFORE, the Commission should grant rehearing and reverse its finding in the January 30 Order that NEPGA did not satisfy its Section 206 burden in the Complaint with respect to the relief sought for Capacity Commitment Periods 5 through 8. Based on the evidence in the record, the Commission should conclude that NEPGA has demonstrated that the existing PER Adjustment Tariff provisions are unjust and unreasonable in light of the increased RCPFs ordered by the Commission last year. At the very least, the Commission should set the proceeding for evidentiary hearing and settlement procedures. The Commission should also grant rehearing of a statement in the January 30 Order and clarify that the Commission, not the complainant, carries the burden under Section 206 of establishing a just and reasonable "replacement" rate.

If the Commission denies rehearing, the Commission should clarify that it did not intend to prejudge any future proceeding on the PER Adjustment issue by establishing a required evidentiary standard in the January 30 Order.

Respectfully submitted,

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Dated: March 2, 2015

On behalf of NEPGA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding by either U.S. Mail or electronic service, as appropriate.

Dated this 2nd day of March 2015 at Washington, D.C.

/s/ Carrie Hill Allen

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