

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

ISO New England Inc.

)

Docket No. ER16-551-001

**INITIAL PROTEST AND REQUEST FOR EMERGENCY ACTION OF
THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the New England Power Generators Association, Inc. (“NEPGA”)² submits this initial protest to the February 29, 2016 response³ of ISO New England Inc. (“ISO-NE”) to the Commission’s February 12, 2016 letter⁴ directing ISO-NE to submit additional information regarding its proposed revisions⁵ to the Forward Capacity Market (“FCM”) rules relating to resource retirement. The sole purpose of this initial protest⁶ is to bring to the Commission’s attention ISO-NE’s stated intent to begin enforcing tariff provisions proposed in the December 17 Filing – including, most significantly, a March 18, 2016 deadline for Retirement De-List Bids and Permanent De-List Bids (“Exit Bids”) for the Forward Capacity

¹ 18 C.F.R. § 385.211 (2015).

² NEPGA, a non-profit entity duly organized and existing under the laws of the Commonwealth of Massachusetts, is a trade organization that advocates for the business interests of non-utility electric power generators in New England. NEPGA’s member companies represent approximately 26,000 MW of electrical generating capacity throughout the New England region. The positions set forth in this filing represent the position of NEPGA as an organization, but not necessarily the views of any particular member with respect to any issue.

³ Response to Letter Dated February 12, 2016, Regarding Forward Capacity Market Resource Retirement Reforms, Docket No. ER16-551-001 (filed Feb. 29, 2016) (the “February 29 Filing”).

⁴ See *ISO New England Inc.*, Docket No. ER16-551-000 (Feb. 12, 2016) (unreported) (the “February 12 Letter Order”).

⁵ See Forward Capacity Market Retirement Reforms, Docket No. ER16-551-000 (filed Dec. 17, 2015) (the “December 17 Filing”). Capitalized terms not otherwise defined herein have the meaning set forth in ISO-NE’s Transmission, Markets and Services Tariff (the “Tariff”), or if not set forth therein, the December 17 Filing.

⁶ NEPGA anticipates filing a further protest addressing other aspects of the February 29 Filing by the comment date established by the Secretary with respect to that filing.

Auction for the 2020-2021 Capacity Commitment Period (“FCA 11”)⁷ – before the Commission has allowed those provisions to take effect. In order to prevent serious and irreversible harm that could result if ISO-NE applies provisions and its proposal is ultimately rejected or substantially modified, NEPGA respectfully requests that the Commission take emergency action and issue an order *on or before March 17, 2016* ordering ISO-NE: (1) to refrain from applying or enforcing revised tariff provisions set forth in the December 17 Filing, including (but not limited to) the deadline for Exit Bids, until authorized to do so pursuant to Section 205 of the Federal Power Act (the “FPA”);⁸ and (2) to propose adjusted FCA 11 deadlines that will afford suppliers a reasonable period of time following the issuance of any order accepting the December 17 Filing to comply with the new requirements, as they may be modified by the Commission.

I.

BACKGROUND

The December 17 Filing proposes major changes to the FCM rules relating to resource retirement. Specifically, ISO-NE proposes to eliminate the existing Non-Price Retirement Request (“NPRR”) mechanism and instead to require that any supplier seeking to remove a resource from the FCM submit either (1) a priced Permanent De-List Bid, which, if it clears, would permanently remove the resource from the capacity market; or (2) a priced Retirement De-List Bid, which, if it clears, would permanently remove the resource from all markets.⁹ Such Exit Bids would have to be submitted in March of the year preceding the FCA.¹⁰

⁷ See February 29 Filing, Transmittal Letter at 2-3; *id.*, Attachment B, Memorandum to NEPOOL Markets Committee and Reliability re “Qualification and Data Submission for FCA # 11 (“February 19 Memorandum”).

⁸ 16 U.S.C. § 824d (2012).

⁹ See December 17 Filing, Transmittal Letter at 6.

¹⁰ See *id.* at 9-10.

NEPGA and other parties protested the December 17 Filing, raising serious questions about whether certain of the proposed changes should be rejected altogether or, at a minimum, substantially modified.¹¹ NEPGA, for example, argued that ISO-NE proposal “creates more problems than it solves because it will distort and suppress the price signals resulting from the FCM and result in unlawful discriminatory treatment of resources providing the same service.”¹² Accordingly, NEPGA urged (and continues to urge) the Commission to reject the Exit Bid elements of the December 17 Filing.¹³

In the February 12 Letter Order, Commission Staff stated that the December 17 Filing was “deficient and that additional information is required in order to process this filing.”¹⁴ The February 12 Letter Order specifically directed ISO-NE to respond to a number of substantive questions, some of which speak to the threshold issue of whether the proposed “reforms” are necessary and to fundamental questions about how they would be implemented. For instance, Commission Staff asked ISO-NE to explain how it would determine future capacity and energy prices for purposes of evaluating Exit Bids and why it opted for the Exit Bid approach “in light of protestors’ concerns that ISO-NE’s proposal will result in ‘over-mitigation’ and fails to weigh the need to deter bad behavior by one actor against the potential harm to all participating suppliers.”¹⁵ Recognizing that responding to the letter will delay the issuance of an order on the

¹¹ See Protest of the New England Power Generators Association, Inc., Docket No. ER16-551-000 (filed Jan. 11, 2016) (“NEPGA Protest”); Protest of the Dominion Resources Services, Inc., Docket No. ER16-551-000 (filed Jan. 11, 2016) (“Dominion Protest”); Protest of the GEN Group, Docket No. ER16-551-000 (filed Jan. 11, 2016); Protest of the NRG Companies, Docket No. ER16-551-000 (filed Jan. 11, 2016) (“NRG Protest”); Protest of the PSEG Companies, Docket No. ER16-551-000 (filed Jan. 11, 2016).

¹² NEPGA Protest at 5.

¹³ See *id.* NEPGA did not protest the proposed changes to the FCA timelines, but while those changes may be appropriate, they should not be implemented unilaterally without Commission approval.

¹⁴ February 12 Letter Order at 1, Docket No. ER16-551-000.

¹⁵ *Id.* at 3-4 & n.7 (citing Dominion Protest at 4-5; NRG Protest at 5-6; NEPGA Protest at 10).

December 17 Filing, the February 12 Letter directed ISO-NE to “identify any changes to the proposed effective date, or any waivers that you may need to request, in light of this delay.”¹⁶

The February 29 Filing responds to the February 12 Letter. In that filing, as in pre-filing communications with stakeholders, ISO-NE stated its intent to hold suppliers to the deadlines (with one exception) contemplated by the December 17 Filing with respect to FCA 11, even though many of those deadlines will pass before the Commission acts on the filing and notwithstanding the fact that the Commission could reject or substantially modify the proposal.¹⁷

II.

INITIAL PROTEST

Despite having been invited by the February 12 Letter to adjust the FCA 11 deadlines, ISO-NE has elected instead to apply and enforce deadlines and other tariff provisions that are nowhere to be found in its currently-effective Tariff and that bear little or no resemblance to the provisions of the Tariff that may be in effect when this proceeding is over. It is imperative that the Commission take emergency action to enforce the existing tariff provisions until such time as new ones have been accepted. Specifically, the Commission should issue an order on or before March 17, 2016 ordering ISO-NE (1) to refrain from applying or enforcing the revised tariff provisions proposed in the December 17 Filing until authorized by the Commission to do so pursuant to Section 205 of the FPA;¹⁸ and (2) to propose adjusted FCA 11 deadlines that will afford suppliers a reasonable period of time following the issuance of any order accepting the December 17 Filing to comply with the new requirements.

¹⁶ *Id.* at 4.

¹⁷ *See* February 29 Filing, Transmittal Letter at 2-3; February 19 Memorandum.

¹⁸ 16 U.S.C. § 824d (2012).

As an initial matter, ISO-NE has no legal authority to apply rules that have not been allowed to go into effect pursuant to Section 205 of FPA.¹⁹ Instead, it “must operate in conformance with its approved tariff”²⁰ until such time as the proposed revisions to that Tariff are accepted by the Commission (or allowed to take effect by operation of law). ISO-NE may argue that it will be operating “in conformance with its approved tariff” provided the Commission accepts the December 17 Filing effective as of March 1, 2016. But that argument cuts the opposite direction too. If ISO-NE is going to treat a later order accepting the filing effective as of March 1, 2016 as Commission “ratification” of its prior actions, it must likewise be prepared to acknowledge that a later order rejecting or substantially modifying its filing will be confirmation that ISO-NE violated both the Tariff and the FPA.

ISO-NE’s approach also implicates the filed rate doctrine, which stands for the proposition that “the Commission alone is empowered to make th[e] judgment [of reasonableness], and until it has done so, no rate other than the one on file may be charged.”²¹ The Commission has yet to make any such judgment with respect to the December 17 Filing, and ISO-NE should, therefore, continue to apply the requirements of its currently-effective Tariff. ISO-NE will presumably claim that its filing and its requested effective date have placed the Commission and suppliers on notice, and that it may, therefore, begin applying the rates proposed in the December 17 Filing subject to refund. The problem with that theory is that, where the FCA 11 deadlines are concerned, there will be no way to make refunds or otherwise to un-do the harm that will result from applying and enforcing those deadlines if the Commission rejects or substantially modifies ISO-NE’s proposal (as it should). As a result, even assuming

¹⁹ *Id.*

²⁰ *Williams Power Co. v. California Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,231 at P 18 (2005).

²¹ *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 581 (1981).

arguendo that the notice was sufficient to avoid violating the letter of the filed rate doctrine, ISO-NE's approach would still violate the spirit of the doctrine and frustrate the doctrine's role in "promot[ing] certainty in the market" and "preserv[ing] the regulator's authority to determine at the threshold whether particular rate or practices are unlawful."²²

Contrary to what ISO-NE blithely assumes in its February 29 Filing,²³ applying and enforcing the tariff revisions proposed in the December 17 Filing will, in fact, result in very real and irreparable harm. ISO-NE ignores its own justification for a February 16, 2016 effective date – that approval by this date would have "ensure[d] that there will be some lead time between the issuance of the Commission's order in this proceeding and the opening of the new retirement bid submission window."²⁴ Such lead time is just as important now as it was when ISO-NE submitted the December 17 Filing. Applying and enforcing the proposed March 18, 2016 deadline for Exit Bids, in particular, will place suppliers in the untenable position of having to make what could prove to be premature announcements regarding potential facility retirements or risk missing the opportunity to submit Exit Bids.

Because Exit Bids, unlike NPRRs, allow a supplier to state a price at which it would permanently remove a unit from the market, it is to be expected that suppliers will submit Exit Bids for units in circumstances in which they would not submit NPRRs. Submitting an Exit Bid on March 18, 2016 for a facility that would not otherwise be the subject of an NPRR will not, as ISO-NE falsely assumes,²⁵ be cost-less if the December 17 Filing is later rejected or substantially

²² *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 958 F.2d 429, 432 (D.C. Cir. 1992) (internal citations omitted).

²³ See February 19 Memorandum at 2.

²⁴ December 17 Filing, Transmittal Letter at 2.

²⁵ See *id.*

modified, because of the inherently disruptive effect retirement announcements have on employees, communities and plant operations.²⁶ Brad Kranz, NRG Energy, Inc.'s Vice President for Wholesale Regulatory Strategy Policy, described this effect in his earlier testimony in this proceeding:

Once we have announced plans to retire a facility, it is extremely important that we continue to keep employees focused on operating the plant safely, reliably, and in compliance with all regulations. In addition, once a retirement is announced, workers at the plant understandably begin looking for other opportunities that offer prospects for long-term employment either within the company or externally. As a result, retaining an experienced and skilled workforce can be difficult once a shutdown is announced. The loss of technical expertise, the impact on our employees and the host communities is often of great concern.²⁷

There will be no way to completely reverse the damage after March 18, 2016 if the Commission rejects or substantially modifies the December 17 Filing for the simple reason that employees and other affected stakeholders will only take so much comfort from the fact that the plant economics, while bad enough to justify an Exit Bid, are not bad enough to justify an NPRR.

On the other hand, a supplier that simply lets the proposed March 18, 2016 deadline pass without submitting its Exit Bid will be in the unenviable position of banking on a subsequent Commission order requiring ISO-NE to adjust that deadline and give it another chance. Otherwise, it will be unable to submit an Exit Bid into FCA 11 and will thus be unable to retire its unit prior to the 2021-2022 Capacity Commitment Period.

²⁶ That the initial posting under proposed Tariff Section III.13.1.8(e) will not identify resources by name does not eliminate the harm. Many resources, particularly large generation resources, will be easily recognizable by location. Moreover, the submission of an Exit Bid could be a material development triggering disclosure requirements and may otherwise prove exceedingly difficult to keep under wraps, even assuming that a resource owner did not feel obligated to share this information with its employees and the host community.

²⁷ NEPGA Protest, Attachment C, Affidavit of Brad Kranz at 4.

To be clear, NEPGA is not suggesting that, if the Commission accepts some or even all of the proposals in the December 17 Filing, those proposals should not be implemented. But ISO may not unilaterally implement proposed changes while the Commission is considering whether they should be adopted in the Tariff. It is that action that NEPGA protests here and that requires immediate attention from the Commission.

Weighed against the consequences of moving forward, the impact of a modest delay will be minimal. Even if the Commission takes the full 60 days from the submission of the February 29 Filing to act, the deadline for Exit Bids will need to be deferred by less than 45 days. It should be relatively easy to adjust the schedule in order to absorb that amount of time in the nearly full year remaining before FCA 11 commences.

III.

CONCLUSION

For the reasons set forth herein, NEPGA respectfully requests that the Commission take emergency action and issue an order *on or before March 17, 2016* ordering ISO-NE: (1) to refrain from applying or enforcing revised tariff provisions set forth in the December 17 Filing, including (but not limited to) the deadline for Exit Bids, until authorized to do so pursuant to Section 205 of the FPA;²⁸ and (2) to propose adjusted FCA 11 deadlines that will afford suppliers a reasonable period of time following the issuance of any order accepting the December 17 Filing to comply with the new requirements, as they may be modified by the Commission.

Respectfully submitted,

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On behalf of the **New England Power
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Dated: March 1, 2016

²⁸ 16 U.S.C. § 824d (2012).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington D.C., this 1st day of March, 2016.

/s/ Stephanie Lim _____

Stephanie S. Lim