

that it is willing to accept for purposes of this filing only. The IMM is seeking to create a controversy before the Commission where none exists, and the Commission should decline to address it in this proceeding.

In essence, the IMM is seeking a declaratory order on the proper interpretation of the Tariff provisions governing Reference Levels in a proceeding in which other generators and market participants had no notice that the interpretation of these provisions was at issue. The relief the IMM seeks – a declaratory order that the IMM’s interpretation of Reference Level is “correct” and the IMM has authority to set aside a market participant’s actual fuel costs for purposes of establishing a Reference Level – could have far-ranging consequences for all market participants. Due process demands that these participants be given adequate notice that an issue that may directly affect their Reference Levels is being decided. Indeed, one of the very reasons the Commission has a specific procedure for a request for a declaratory order is that it provides notice to interested parties and affords a fair opportunity to consider the request and to respond if necessary. The IMM should not be permitted to bypass the Commission’s procedure, especially when the question it poses need not be answered for the Commission to make a decision on Ex Gen’s request for cost recovery.

For these reasons, NEPGA respectfully requests that the Commission deny the IMM’s request that it declare that the IMM’s interpretation of the Reference Level definition is “correct.”

I. Motion to Intervene Out-of-Time

The issue of whether the ISO Tariff requires the IMM to calculate Reference Levels using “market-based prices,” rather than permitting the recovery of actual costs incurred by generators, was not raised in the Cost Recovery Filing, and was only raised in the IMM Protest. As explained

below, the Commission should reject the IMM's request to expand the scope of this proceeding to address this new issue. Nonetheless, because any Commission determination on the IMM's request will directly affect NEPGA's members and because no other party can adequately represent NEPGA's interests, NEPGA respectfully requests leave to intervene out-of-time in this proceeding.

NEPGA is the trade association representing competitive power generators in New England. NEPGA's member companies represent approximately 26,000 megawatts, or roughly 80% of the installed capacity in New England. NEPGA's mission is to support competitive wholesale electricity markets in New England. NEPGA believes that open markets guided by stable public policies are the best means to provide reliable and competitively-priced electricity for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region. As active participants in the ISO-NE capacity and wholesale electricity markets, NEPGA's member companies have substantial and direct interests in the outcome of these proceedings, and those interests cannot be adequately represented by any other party in the proceeding.

NEPGA agrees to accept the record as it exists, such that its intervention will not result in prejudice or additional burden to any other party, or otherwise disrupt this proceeding. All correspondence and communications related to this proceeding should be addressed to the following individual:

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II. Motion for Leave to Answer

The IMM's arguments regarding the Reference Level calculation are set forth in a portion of its pleading styled as "comments," and NEPGA should, therefore, be entitled to answer those arguments as a matter of right.⁵ To the extent that these "comments" are treated as a "protest," NEPGA requests leave to answer. Although the Commission's rules generally do not permit answers to protests, the Commission permits such answers for good cause shown, such as when the response aids in the explanation of issues or facilitates the development of the record.⁶ NEPGA's Answer provides important information that will assist the Commission in its decision-making process. The IMM makes raises new arguments and assertions in its Limited Protest not present in ExGen's original filing, and NEPGA's responses to those issues newly raised in the IMM's Limited Protest will assist the Commission in its decision-making.

III. Answer

The IMM seeks relief on an issue that is well outside of the scope of this proceeding, asking the Commission to make decision that has no bearing on whether ExGen is entitled to cost recovery. In its February 3, 2017, filing in this proceeding ("Cost Recovery Filing"), ExGen asked the Commission to authorize the recovery of approximately \$1.5 million of unrecovered fuel costs incurred by Units 8 and 9 at the Mystic Generating Station during various days in October and November 2016.⁷ ExGen's February 3 filing limited the requested additional cost

⁵ See 18 C.F.R. § 385.213(a)(2), (3) (2016) (stating that an answer "may be made to any pleading" other than "a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority").

⁶ See, e.g., *Morgan Stanley Capital Grp., Inc. v. New York Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000).

⁷ *Request for Additional Cost Recovery and Request for Limited Tariff Waiver*, at p. 1. Docket No. ER17-933-000 (filed Feb. 3, 2017).

recovery to a market-based proxy that the IMM supported for its fuel costs, as opposed to the full costs incurred under a contract between Constellation Mystic Power, LLC and Engie Gas & LNG, LLC (“Engie”). The IMM does not oppose Exelon’s request for recovery of approximately \$1.2 million, but disagrees only with Exelon’s request for the remaining \$300,000, which corresponds to fuel costs incurred on October 1, 2, and 4, 2016.⁸ The IMM disputes that amount, asserting that Exelon’s request for cost recovery for those days was not timely. ExGen therefore explained that, “apart from the question of whether ExGen may seek additional cost recovery for the October 1, 2 and 4 Operating Days, ExGen has accepted, for purposes of this filing, the IMM’s adjustments.”⁹ This is the only issue in controversy in this proceeding.

In the course of seeking cost recovery under Section 205, ExGen was required by the ISO-NE Tariff to submit to the IMM information about its unrecovered costs, and the IMM was then required to provide a written explanation of the events that resulted in the request for cost recovery, which Exelon was then required to include in its Section 205 filing. According to Exelon’s calculations, it failed to recover approximately \$3.4 million of fuel costs due to mitigation in October and November 2016 (its “Contract Costs”), and submitted its findings to the IMM in its pre-Section 205 filing submission.¹⁰ Though ExGen maintains that its calculations were correct, for purposes of this proceeding ExGen does not ask the Commission to make a finding on that matter. ExGen stated that, “[a]lthough ExGen continues to believe that the correct calculation would use actual, rather than estimated, fuel costs . . . , ExGen has elected to limit this request for additional cost recovery to additional fuel costs calculated using IMM-

⁸ IMM Protest at p. 8.

⁹ Cost Recovery Filing at 18.

¹⁰ *Id.* at p. 16.

approved Reference Levels” *Id.* at 17. ExGen asks for recovery in an amount consistent with the IMM’s calculations (except with respect to the October costs, as noted above), and therefore does not challenge the IMM’s conclusions in its Cost Recovery Filing.

The IMM, however takes issue with ExGen’s reservation of rights to argue in a future proceeding that its costs incurred under its LNG contract are properly recoverable under the Tariff.¹¹ The IMM takes this as ExGen “implicitly argu[ing] that its contract with Engie should determine the Reference Level.”¹² For this reason, the IMM asks the Commission to “find that the IMM has properly applied the ISO Tariff in establishing the Reference Levels for the Mystic 8 and 9 units . . . and reject ExGen’s assertion that its LNG contract price be used in place of a market-based price[.]” *Id.* at 3-4. In point of fact, ExGen neither implicitly nor explicitly asked the Commission to make any finding with respect to the Reference Levels for Mystic 8 and 9. Indeed, ExGen did not even base its requested additional cost recovery on costs incurred under the contract with Engie but instead limited that request to the IMM-approved values, while reserving its right to assert in future proceedings that the contract costs are recoverable. There is nothing extraordinary about a party so reserving its rights, and certainly nothing out of the ordinary that would justify granting declaratory relief on an issue that is beyond the scope in two respects, first as it relates to actual cost recovery not requested by ExGen and second as it relates to the Reference Level calculation. Even if ExGen and the IMM have differing interpretations of the ISO Tariff (as they may on this and a variety of other issues), there is no need for the

¹¹ IMM Protest at pp. 1-3.

¹² *Id.* at p. 3.

Commission to decide the Tariff issue raised by ISO-NE when it has no bearing on the relatively *de minimis* issue before the Commission in this proceeding.¹³

ISO-NE's improper request for a declaratory order is also fundamentally unfair to other parties, including other market participants that may be bound by any ruling on these issues, or for which a Commission decision on the issue may have some precedential effect. Market participants had no notice, nor any reasonable expectation that the definition of Reference Level as it relates to contracted fuel costs, would be substantively decided in this proceeding. NEPGA, for one, did not previously seek to intervene in this proceeding because it was obvious from the February 3 filing that this proceeding involved only a dispute over a narrow, ExGen-specific issue, not the potentially far broader and market-wide impact of a declaratory order defining the extent to which contracted fuel costs are allowable in an energy resource's Reference Level, the question the IMM asks the Commission to decide. It is precisely out of this concern, that interested parties will not be placed on notice and have a meaningful opportunity to participate in proceedings, that the Commission does not permit intervenors to expand the scope of proceedings in this fashion.¹⁴

¹³ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,055 at P 30 (2012) (denying request for interpretation of agreement because the underlying petition in that proceeding “did not seek guidance as to how such provision would be implemented nor whether compensation is necessary”); *Northern States Power Co.*, 136 FERC ¶ 61,093 at P 22 (2011) (rejecting concerns as “speculative” and “beyond the scope of this proceeding,” and directing parties to “detail those concerns in a separate complaint filed under section 206 of the Federal Power Act”) (footnote omitted); *Florida Gas Transmission Co., LLC*, 119 FERC ¶ 61,091 at P 7 (2007) (denying a protest that “involves consideration of policy issues and tariff interpretation beyond the scope of this filing” and directing the protestor to file “a complaint if a concrete situation arises”).

¹⁴ See, e.g., *330 Fund I, L.P. v. New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,151 at P 56 (rejecting request for “an alternative form of relief on rehearing because such a submission does not allow interested parties sufficient notice of the new relief requested, nor permit an opportunity to respond”) (footnote omitted); *Entergy Servs., Inc.*, 116 FERC ¶ 61,132 at P 16 (2006) (rejecting request that was “beyond the scope of this proceeding” and directing the party to file a separate complaint in order to “provide[] all interested parties notice that a complaint or

The same is true here, and the Commission should reject the IMM's request for relief as outside the scope of this proceeding. With relatively little in controversy in this case, the IMM asks the Commission to unnecessarily make a potentially significant decision. NEPGA respectfully requests that the Commission decline to do so. Alternatively, should it decide that this issue needs to be resolved at this time, it should direct the IMM to make a separate filing that will be noticed if the IMM wishes to pursue its requested relief.

IV. Conclusion

Wherefore, NEPGA respectfully asks that the Commission deny the ISO New England Inc. Internal Market Monitor's request that the Commission decide whether ExGen's Contract Costs are properly included in the Reference Level for Units 8 and 9 at the Mystic Generating Station.

Respectfully Submitted,

/s/ Bruce Anderson

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request for waiver has been filed, and provide[] them an opportunity to respond") (footnote omitted); *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040 at 61,062-63 (1990) ("a complaint cannot be submitted as an integral part of a protest and motion to intervene in an ongoing proceeding; it does not allow interested parties sufficient notice of the complaint because it is not formally docketed and noticed") (footnote omitted).

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments by via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts, March 13, 2017.

/s/ Bruce Anderson _____

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