

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

ISO-New England Inc.

Docket No. ER18-1509-001

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**REQUEST FOR CLARIFICATION OR IN THE ALTERNATIVE REHEARING OF
THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

The New England Power Generators Association, Inc. (“NEPGA”)¹ hereby requests clarification of the Commission’s Order denying ISO New England Inc.’s (“ISO-NE”) request for waivers of several provisions of its Transmission, Markets, and Services Tariff (“Tariff”) and instituting a proceeding under Section 206 of the Federal Power Act.² The Commission directs ISO-NE to, *inter alia*, file “interim” Tariff changes that allow for a cost-of-service agreement to address demonstrated fuel security concerns within 60 days (“60-Day Filing”), or to show cause why the Tariff is just and reasonable without those changes.³ As part of the 60-Day Filing, ISO-NE must include a “mechanism that addresses how resources retained for fuel security (e.g., under cost-of-service agreements) would be treated in the [Forward Capacity Market].”⁴

¹ The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

² *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018). NEPGA requests clarification of the Order pursuant to Section 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.212 (2016).

³ *Id.* at P 2. ISO-NE is also required to make a Section 205 filing by July 1, 2019, with “permanent” improvements to the wholesale market design to better address the identified fuel security needs.

⁴ *Id.* at P 57.

Just yesterday, on July 26, 2018, ISO-NE announced that it proposes to comply with that part of the 60-Day Filing requirement, in part, by administratively offering resources retained for fuel security “as price takers in FCA 13.”⁵ ISO-NE’s proposal completely contradicts the clear direction the Commission gave in its Order, in which it describes two acceptable mechanisms that require that a resource retained for fuel security (“Fuel Security Resources”) be offered in the Forward Capacity Auction (“FCA”) at its competitive offer price or not at all and, if it does not clear the auction competitively, have its revenues and obligations dictated solely by a cost-of-service agreement.

Further, the Order contemplates an “interim” period during which: (1) ISO-NE may retain a resource it deems necessary to meet a fuel security requirement out-of-market; and (2) a Fuel Security Resource may be made whole through a cost-of-service agreement; while (3) competitive pricing in the Forward Capacity Market (“FCM”) is maintained.⁶ ISO-NE looks to accept the first two prongs of this concerted effort but disregard the third, to the detriment of competitive markets and to the harm of capacity suppliers and the FCM at large. The treatment of a Fuel Security Resource in the FCA was a highly litigated issue in this and a parallel proceeding initiated by NEPGA’s Complaint,⁷ and the Commission’s clear preference is for ISO-NE to treat Fuel Security Resources in a way that avoids offering them into the FCA at uncompetitive offer prices. NEPGA takes the Commission’s direction on this matter as intentional and material to the 60-Day Filing requirement.

⁵ ISO-NE Presentation to the July 31, 2018, Joint Meeting of the NEPOOL Markets and Reliability Committees, at p. 12, available at: https://www.iso-ne.com/committees/markets/markets-committee/?eventId=136491&sort=normalized_document_title_s.asc (titled “2018-07-31 Joint MC and RC A02.3 Reliability Reviews for Fuel-Security: Integration into FCM Tariff Provisions”).

⁶ See Order at PP 55-57.

⁷ *Complaint and Request for Expedited Consideration of the New England Power Generators Association Inc.*, Docket No. EL18-154-000 (filed May 23, 2018) (“NEPGA Complaint”); see also *Motion for Leave and Answer of the New England Power Generators Association, Inc.*, Docket No. EL18-154-000 (filed July 2, 2018) (“NEPGA Answer”).

NEPGA therefore asks that the Commission clarify that it is directing ISO-NE to adopt one or both of the mechanisms it describes in its Order,⁸ or some other mechanism that likewise prohibits offering a Fuel Security Resource in the FCA as a price-taker or at some other uncompetitive offer price. If the Commission does not grant NEPGA's clarification requested herein, NEPGA respectfully requests rehearing of the Order.⁹ NEPGA asks for rehearing on the basis that the Commission has erred by failing to make a rational connection between its findings, the acceptable remedies it describes, and its directive. The Commission further failed to include a mandate that ISO-NE not merely include a "mechanism" in its 60-Day Filing but expressly prohibiting ISO-NE from offering Fuel Security Resources at \$0/kW-month in FCA 13. The Commission may complete a rational connection by granting rehearing and giving ISO-NE an even more obvious, explicit instruction consistent with the clarification request NEPGA describes above.

NEPGA further requests that the Commission grant the request for clarification or rehearing prior to August 31, 2018, the date by which ISO-NE must make its 60-Day Filing. Not only will the ISO-NE proposal cause considerable harm to capacity suppliers and frustrate the FCM design, it will also cause needless litigation and further delay the development of a just and reasonable market design for FCA 13 if filed without clarification or further direction from the Commission.

⁸ Order at PP 56, 57.

⁹ NEPGA seeks rehearing in the alternative, pursuant to Section 313(a) of the Federal Power Act ("FPA") and Rule 713 of the Commission's Rules of Practice of Procedure. This request has been filed within 30 days of the issuance of the Order and is therefore timely under the Commission's Rules.

I. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

NEPGA seeks clarification regarding the intent of the Commission's Order, pursuant to which the Commission provides ISO-NE with certain principles that it should follow in developing a mechanism to address the treatment of Fuel Security Resources. The Commission does not affirmatively state that ISO-NE must adopt a specific mechanism but is clear that ISO-NE should not adopt a mechanism that re-prices Fuel Security Resources at \$0/kW-month or at some other uncompetitive offer price. ISO-NE's proposal to do just that compels clarification from the Commission that ISO-NE's proposal is at odds with the Commission's directives, and that ISO-NE should instead file a proposal that offers Fuel Security Resources at their competitive offer price or procures the Fuel Security Resource outside of the FCM, with its obligations and compensation for the fuel security service dictated solely by a cost-of-service agreement.

If the Commission does not grant the clarification requested herein, NEPGA requests rehearing and includes the following statement of issues pursuant to Rule 713(c) of the Commission's rules of practice and procedure:

The Order is arbitrary and capricious and not the product of reasoned decision-making because it does not explicitly instruct ISO-NE to adopt Tariff changes consistent with the Commission's findings. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and it is error for an agency to "entirely fail[] to consider an important aspect of the problem") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

II. BACKGROUND

On May 1, 2018, ISO-NE filed a petition for waivers from several provisions of its Tariff (“Waiver Request”)¹⁰ in order to make two generating resources, the Mystic Units 8 and 9 (“Mystic Units”), eligible for a cost-of-service agreement “for fuel security purposes.”¹¹ On July 2, 2018, the Commission denied the request, finding Tariff waivers “an inappropriate vehicle” to make the Mystic Units eligible for a cost-of-service agreement.¹² The Commission, however, accepted ISO-NE’s conclusion that the retirement of the Mystic Units could cause reliability standard violations as soon as 2022 and that there is a “compelling need for out-of-market action.”¹³ The Commission therefore directed ISO-NE to either explain why the Tariff at present is just and reasonable in this respect, or to make two filings: (1) within 60 days of the order, “interim” Tariff changes that allow for a resource to be eligible for a cost-of-service agreement¹⁴ to meet a “demonstrated fuel security need”; and (2) by July 1, 2019, “permanent” Tariff revisions “reflecting improvements to its market design to better address regional fuel security concerns.”¹⁵

As part of its Waiver Request, ISO-NE proposed to re-price the Mystic Units as price-takers in FCA 13 and FCA 14.¹⁶ In response, NEPGA filed a Conditional Protest in this

¹⁰ *Petition of ISO New England Inc. For Waiver of Tariff Provisions*, Docket No. ER18-1509-000 (filed May 1, 2018).

¹¹ Order at P 1.

¹² *Id.* at P 14.

¹³ *Id.* at P 49.

¹⁴ The Commission recently set for hearing and settlement procedures several issues related to the cost-of-service agreement filed by Exelon for the Mystic Units, which by its terms would be in effect from June 1, 2022 – May 31, 2024. *See ISO New England Inc.*, 164 FERC ¶ 61,003 (2018). The Commission acted *sua sponte* to provide Exelon with an extension until January 4, 2019, to decide whether to retire the units unconditionally or to offer the units as supply in FCA 13, to accommodate the procedural schedule in the cost-of-service proceeding. Order at P 59.

¹⁵ Order at P 55.

¹⁶ Waiver Request at 26.

proceeding¹⁷ and a complaint under Section 206 of the Federal Power Act (“Complaint”),¹⁸ asking the Commission to find that re-pricing the Mystic Units, or any other resources retained for fuel security, as price-takers in the FCA is unjust and unreasonable. NEPGA incorporated its Complaint by reference into this proceeding, providing evidence that re-pricing the Mystic Units, *i.e.*, offering them at uncompetitive offer prices, will cause significant harm to capacity suppliers by suppressing capacity prices below competitive levels in at least the next two Forward Capacity Auctions (“FCAs”), FCA 13 and FCA 14.¹⁹ NEPGA asked that if the Commission approved the Waiver Request, that it do so with the condition that ISO-NE adopt Tariff revisions consistent with the relief NEPGA sought in its Complaint or other relief the Commission deemed appropriate to ensure that the Waiver Request did not render the Forward Capacity Market unjust and unreasonable.

NEPGA’s Complaint was contingent on the Commission accepting the Waiver Request. NEPGA therefore withdrew its Complaint following the rejection of the Waiver Request.²⁰ Prior to then, several parties including ISO-NE and the Connecticut Public Utilities Regulatory Authority, *et al.*, answered NEPGA’s Complaint, asking the Commission to require ISO-NE to re-price the Mystic Units as price-takers.²¹ Though the Commission was not compelled to address that question in NEPGA’s Complaint proceeding due to its rejection of the Waiver

¹⁷ *Motion to Intervene and Conditional Protest of the New England Power Generators Association, Inc.*, Docket No. ER18-1509-000 (filed May 23, 2018).

¹⁸ *Complaint and Request for Expedited Consideration of the New England Power Generators Association Inc.*, Docket No. EL18-154-000 (filed May 23, 2018) (“NEPGA Complaint”).

¹⁹ NEPGA Complaint at 8-14 (showing that re-pricing the Mystic Units as price-takers in FCA 13 would significantly harm capacity suppliers by suppressing capacity prices by \$214 to \$652 million and displacing 1,050 to 1,285 MW of otherwise economic resources in FCA 13 alone, with the potential for even greater price suppression and displacement in FCA 14, which in turn would distort the price signals necessary for the efficient exit and entry of capacity in the Forward Capacity Market).

²⁰ *Notice of Withdrawal*, Docket No. EL18-154-000 (filed July 3, 2018).

²¹ *See Answer to Complaint of ISO New England Inc.*, Docket No. EL18-154-000 (filed June 6, 2018); *Answer and Protest of the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel*, Docket No. EL18-154-000 (filed June 6, 2018).

Request, it offered several findings in its Order here related to the treatment of Fuel Security Resources in the FCA, effectively responding to arguments raised in this proceeding and in NEPGA's Complaint proceeding. The Commission: (1) suggested two potential mechanisms to address the treatment of Fuel Security Resources; (2) explained that there "appear to be material differences" between the retention of Fuel Security Resources and resources retained to meet a local transmission reliability need; (3) explained the role Pay for Performance is intended to play in meeting fuel security requirements, and the need to not interfere with that design; and (4) discussed the contribution of New England state policies and permitting decisions to ISO's identified need to procure out-of-market fuel security resources.

III. REQUEST FOR CLARIFICATION

NEPGA, ISO-NE and several other parties raised the question of whether and how Fuel Security Resources should be treated in the FCA, in both this proceeding and in NEPGA's Complaint proceeding. Throughout its Order, the Commission recognizes the resolution of that question in a way that prohibits re-pricing Fuel Security Resources at an uncompetitive offer price of \$0/kW-month. Unfortunately, ISO-NE appears to be taking the Commission's thorough discussion of this issue as *dicta* in proposing treatment of Fuel Security Resources in the FCA completely at odds with the Order, specifically its proposal to offer the Mystic Units (and presumably any other eligible Fuel Security Resources) as price-takers in FCA 13, a repeat of the treatment it proposed as part of the Waiver Request rejected by the Commission.²² In so doing, ISO-NE has side-stepped its responsibility to develop and administer competitive markets while

²² Without clarification or rehearing on this issue, the Commission may receive the same proposal on the treatment of Fuel Security Resource on August 31, the deadline for the 60-Day Filing, as it did in March when ISO-NE filed the Waiver Request, with NEPOOL stakeholders and ISO-NE no further along in developing a just and reasonable treatment.

it ignores the clear direction given by the Commission that whatever the remedy, it should prevent a Fuel Security Resource from suppressing FCA auction prices by its administrative re-pricing in the FCA at \$0/kW-month. The Commission sets out this direction in several respects.

First, the Commission suggests two potential remedies – either offering the Fuel Security Resource at its competitive offer price or simply allowing the resource to exit the FCA and contract for fuel security compensation and obligations solely through the cost-of-service agreement.²³ These remedies share two characteristics central to the arguments raised in this and NEPGA’s Complaint proceeding. Each requires competitive offer prices in the FCA and allows for, or requires, that a cost-of-service agreement is the sole basis for the Fuel Security Resource’s obligations and compensation should it not competitively acquire a Capacity Supply Obligation in the FCA.

These characteristics mirror the positions NEPGA took in its Complaint and in its Limited Protest, and unmistakably signal the Commission’s intent that the Mystic Units in FCA 13, or any other Fuel Security Resource, should not be priced at an uncompetitive level in the FCA. They also recognize, as NEPGA argued in its Complaint, that Fuel Security Resources will be procured out-of-market not to satisfy the 12-month system-wide (or local) resource adequacy requirement (the product procured by the FCM), but to meet a newly defined (though as of yet not fully defined) three-month fuel security requirement.²⁴ The Commission confirms

²³ Order at PP 56-57.

²⁴ NEPGA Complaint at 37. In this case, however, the Mystic Units are not being retained to maintain resource adequacy, but to address a “fuel security” need that has not yet been defined and that was never intended to be reflected in the capacity requirement or demand curves in the ISO-NE Forward Capacity Market.

this belief by concluding that the now-expired ISO-NE Winter Reliability Program “addressed a similar need” to that addressed by a Fuel Security Resource.²⁵

Second, the Commission finds that “[i]n addressing a possible solution ... there appear to be material differences between” a Fuel Security Resource and retaining a resource to meet a local transmission reliability need.²⁶ These findings are relevant to whether Commission precedent, specifically its decision in *IPPNY*²⁷ dictates or supports re-pricing Fuel Security Resources as price-takers. Several Protesters and NEPGA argued this point, with NEPGA explaining that there are a number of material differences between Fuel Security Resources and the resources held for reliability in *IPPNY*. As a result, the basis for the Commission’s finding that price-taker treatment was just and reasonable in *IPPNY* do not apply in the case of Fuel Security Resources.²⁸ Conversely, ISO-NE argued that *IPPNY* controls here and that Fuel Security Resources therefore must be re-priced at \$0/kW-month.²⁹ The Commission clearly speaks to this question in finding that there “appear to be material differences” and, as a result, “it may be reasonable” for Fuel Security Resources to be offered into the FCA at a price above \$0/kW-month.³⁰

²⁵ Order at p 50, note 143 (“ISO-NE’s deterministic approach is specifically tailored to consider resource unavailability caused by fuel shortages, whereas a traditional probabilistic resource adequacy analysis would be unlikely to address such events due to the unpredictability of fuel shortages and the likelihood that outages resulting from fuel shortages will simultaneously affect multiple resources”).

²⁶ *Id.* at P 57.

²⁷ *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.* 150 FERC ¶ 61,214 (2015) (“*IPPNY*”).

²⁸ *See Motion for Leave and Answer of the New England Power Generators Association, Inc.*, at 5-8, Docket No. EL18-154-000 (filed June 19, 2018); *see also* NEPGA Complaint at 31-35 (noting several material differences and maintaining that NEPGA disputes the notion that there was insufficient evidence to support *IPPNY*’s request for relief in that case).

²⁹ *See Answer to Complaint of ISO New England Inc.*, at 3, Docket No. EL18-154-000 (filed June 6, 2018) (“The Commission’s decision in [*IPPNY*], which addressed essentially the same question raised here, and which NEPGA fails to distinguish, is controlling here and warrants rejection of the NEPGA Complaint.”).

³⁰ *Id.* at P 57.

Third, the Commission notes that “fuel security was one of the major drivers of the adoption of ISO-NE’s pay-for-performance revisions” and recognizes concerns raised by several parties that “allowing out-of-market compensation to reduce capacity market revenues will undermine pay-for-performance’s ability to drive other investments necessary to meet fuel security needs.”³¹ The Commission agrees with ISO-NE that due to a “timing problem” it is uncertain whether the Pay for Performance design will timely address the fuel security concerns to be addressed in the 60-Day Filing, and thus refers to the 60-Day Filing as an “interim” solution until “permanent Tariff revisions reflecting improvements to its market design to address regional fuel security concerns” are in effect.³² Presumably, the Commission means that these permanent “improvements” to the market design must be in concert with, recognize, and not interfere with the role ISO-NE designed Pay for Performance to play in addressing any fuel security requirements. Given its recognition of concerns raised about impacts on the Pay for Performance design, it would contradict the Commission’s direction on permanent wholesale market improvements to treat Fuel Security Resources in a way that undermines the Pay for Performance design on an “interim” basis.

Fourth, the Commission explains that New England state policies and permitting decisions have largely contributed to the need to procure resources out-of-market to meet fuel security needs. The Commission notes the “important role” the New England states play in “maintaining the region’s fuel security” through their policy and permitting authority.³³ The Commission, again in agreement with ISO-NE, cites to several state policy and permitting

³¹ Order at P 57, note 154.

³² Order at P 55.

³³ Order at P 54.

decisions “as collectively leading to the current regional fuel security concerns.”³⁴ The Commission concludes that if a state policy or permitting decision “prevents investors from adequately responding to the price signals sent by the market, there may be instances where the market alone does not fully address the problem,” which in turn may require a cost-of-service agreement to meet a short-term need.³⁵ Together with its findings that a Fuel Security Resource addresses a three-month winter fuel security requirement and may be procured outside of the FCA, the Commission’s discussion on the contribution of state policy and permitting decisions to the need to procure resources outside of the wholesale markets logically points to the conclusion that any costs associated with procuring a Fuel Security Resource may be properly borne outside of the FCA, and should not be subsidized by capacity suppliers through the re-pricing of Fuel Security Resources and the associated price suppression in the FCA for an entire twelve-month period.

Throughout its Order, the Commission makes findings and describes acceptable treatment of Fuel Security Resources that are inconsistent with re-pricing them at \$0/kW-month in the FCA. NEPGA respectfully requests that the Commission grant clarification that it directed ISO-NE to adopt a mechanism that prohibits the re-pricing of Fuel Security Resources in the FCA at \$0/kW-month or at any other uncompetitive offer price.

IV. REQUEST FOR REHEARING

Should the Commission deny NEPGA’s request for clarification, NEPGA requests in the alternative that the Commission grant rehearing. If the Order does not in fact direct ISO-NE to adopt a mechanism that prohibits re-pricing Fuel Security Resource as price-takers in the FCA, it

³⁴ *Id.*

³⁵ *Id.*

would be arbitrary and capricious for it not to do so. The Commission's Order would be in error because it would fail to articulate a rational connection between its several findings and suggested mechanisms, as described above, and its directive for the treatment of Fuel Security Resources. The Commission makes several findings throughout its Order consistent with the relief NEPGA sought in its Complaint, and contrary to the FCA treatment ISO-NE and Protesters asked for in this proceeding and in answering NEPGA's Complaint. It is evident from these Commission findings that re-pricing the Mystic Units, or any other Fuel Security Resources, at \$0/kW-month or otherwise below their competitive cost-based offer price would contradict the entirety of the Commission's Order on this issue.

The scope of review under the "arbitrary and capricious" standard requires that an agency must "articulate a satisfactory explanation for its action [,] including a rational connection between the facts found and the choice made."³⁶ If the Commission has given ISO-NE leave to file a mechanism that re-prices Fuel Security Resources at \$0/kW-month, it bears no rational connection to the remainder of the Commission's Order. As discussed above, the Commission discusses issues relevant to Fuel Security Resource FCA treatment at great length, and in each instance makes findings and describes acceptable remedies that point to a resolution in favor of competitive offer prices in the FCA. Nothing in the Order suggests that re-pricing Fuel Security Resources at \$0/kW-month is just and reasonable.

In order to provide a rational connection between the remainder of the Order and the Commission's directive to file a mechanism to address the treatment of Fuel Security Resources, NEPGA respectfully requests that the Commission grant rehearing and order ISO-NE to adopt a

³⁶ *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016), citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

mechanism that prevents Fuel Security Resources from being offered into the FCA at \$0/kW-month or at any other uncompetitively low offer price.

V. CONCLUSION

WHEREFORE, for the reasons stated herein, NEPGA respectfully requests that the Commission grant NEPGA's request for clarification or, in the alternative, rehearing of the Order as set out more fully in the body of this request, and direct ISO-NE to file Tariff changes that address the treatment of Fuel Security Resources in the FCA by requiring that they are not offered into the FCA at \$0/kW-month or otherwise at a price below their competitive offer price.

Respectfully Submitted,

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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, July 27, 2018.

/s/ Bruce Anderson

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