

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

Vineyard Wind LLC

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Docket No. ER19-570-000

**MOTION TO INTERVENE AND COMMENTS
OF THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ the New England Power Generators Association, Inc. (“NEPGA”)² hereby submits this Motion to Intervene and Comments on Vineyard Wind LLC’s (“Vineyard Wind”) petition for a waiver of sections of the Tariff related to the qualification, notification, and possible pro-rationing of resources seeking to participate in the Forward Capacity Auction (“FCA”) as Renewable Technology Resources (“RTRs”).³

I. MOTION TO INTERVENE

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

¹ 18 C.F.R. § 385.213 (2018).

² The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

³ *Petition of Vineyard Wind LLC for Waiver of Tariff Provisions and Expedited Commission Action*, Docket No. ER19-570 (filed December 14, 2018) (“Waiver Request”).

for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region. NEPGA’s member companies are responsible for generating and supplying electric power for sale within the New England bulk power system. As active participants in the ISO-NE 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.

All correspondence and communications related to this proceeding should be addressed to the following individual:

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II. BACKGROUND

On November 30, 2018, ISO-NE filed a series of proposed “enhancements and conforming changes to support the implementation” of the Competitive Auctions with Sponsored Policy Resource (“CASPR”) rules.⁴ A Commission decision on the CASPR Filing is pending. ISO-NE included in the CASPR Filing an “ancillary clarification” to the RTR definition, to include off-shore wind resources located in federal waters as those that may qualify for the RTR exemption from the Minimum Offer Price Rule.⁵ On December 14, 2018, Vineyard Wind filed its Waiver Request, asking for waiver of the pro-rationing rule and “other affected provisions.”⁶

⁴ *Joint Filing of ISO New England Inc. and New England Power Pool regarding Conforming Change to ISO Tariff for CASPR*, Transmittal Letter at p. 1, Docket No. ER19-444-000 (filed Nov. 30, 2018) (“CASPR Filing”).

⁵ *Id.* at p. 3.

⁶ Waiver Request at p. 1.

III. INTRODUCTION

NEPGA does not take lightly filing comments on any supplier's waiver request. After all, NEPGA Member companies have filed waiver requests when, for example, they miss a deadline under the Forward Capacity Market ("FCM") Tariff⁷ rules. NEPGA and its members have also noted numerous instances when Tariff rules, as drafted, did not work as intended. For example, the Peak Energy Rent ("PER") mechanism, which was drafted as part of the FCM settlement package, based the PER Strike Price on the *lower* of ultra low-sulfur No. 2 oil measured at New York Harbor plus a seven percent markup for transportation or day-ahead gas measured at the Algonquin City Gate. When this provision was drafted, it was unforeseen that those index prices would one day diverge significantly from one another. But, when they did, ISO-NE agreed to file an amendment that *prospectively* based the PER Strike Price on the *higher* of natural gas or oil index prices,⁸ thus ending an outcome that the Commission agreed was "not functioning as intended."⁹

Like the PER mechanism, at the time the RTR definition was drafted, it was unforeseen that state-sponsored offshore wind resources located in *federal* waters would participate in the capacity auction, and thus the RTR definition as filed was limited to renewable or alternative energy resources "geographically located" in any particular New England state.¹⁰ The Tariff definition as a result excluded resources located in federal waters, such as Vineyard Wind. But, after this omission was discovered, ISO-NE filed a Tariff amendment to revise the RTR definition in a manner that would allow offshore wind to participate under the RTR exemption.

⁷ ISO-NE Transmission, Markets and Services Tariff, Market Rule 1.

⁸ *ISO New England Inc.*, 134 FERC ¶ 61,128 (2011), *order denying reh'g*, 136 FERC ¶ 61,221 (2011) (As of October 2010, the price separation between gas and oil resulted in gas being on average \$5/MMBtu and oil being \$15/MMBtu (134 FERC ¶ 61,128 at P 25), resulting in an approximate \$220/MWh difference in the PER Strike Price).

⁹ *Id.* at P 24.

¹⁰ *See* Tariff Section III.13.1.1.1.7.

This amendment is currently pending in the ISO's CASPR Filing, with a requested effective date of January 29, 2019,¹¹ approximately one week before the scheduled FCA 13 auction.

NEPGA provides this context due to the unique issues raised in Vineyard Wind's waiver request filing. The Waiver Request, as currently styled, raises new issues that must be considered by the Commission that may not be immediately apparent. It is for these reasons that NEPGA offers these comments.

IV. COMMENTS

Historically, the Commission "has granted one-time waivers of tariffs where an emergency situation or an unintentional error was involved."¹² Vineyard Wind's petition differs significantly from past requests, as it neither concerns a matter of *force majeure* or an unintentional error by the requesting party. Rather, Vineyard Wind asks that concurrent with the Commission's acceptance of the change to the RTR definition in the CASPR Filing that the Commission waive certain qualification and notification deadlines. Additionally, Vineyard Wind requests a waiver of the rules that ISO-NE uses to allocate RTR awards to eligible resources. Vineyard Wind asserts that this additional rule waiver is necessary to avoid harm to other resources already qualified under the RTR election, and to avoid harm to ISO-NE's conduct of FCA 13. Vineyard Wind's Waiver Request raises important questions and, if approved by the Commission, would set key precedent.

¹¹ See Joint Filing of ISO New England Inc. and New England Power Pool, Docket No. ER19-444-000 (filed Nov. 30, 2018) ("ER19-444 Transmittal Letter").

¹² *Cal. Indep. Sys. Operator Corp.*, 132 FERC ¶ 61,004 at P 10 (2010). See, e.g., *ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (using reasoning typically applied to waivers to allow limited and temporary change to tariff to correct an error); *Great Lakes Transmission L.P.*, 102 FERC ¶ 61,331, at P 16 (2003) (granting emergency waiver involving *force majeure* event granted for good cause shown); *Massachusetts Municipal Wholesale Elec. Co.*, 148 FERC ¶ 61,227 (2014) (seeking waiver of the FCA New Capacity show of Interest and New Capacity Qualification Package deadlines for 2 MW Wind facility); *Northeast Energy Associates, LP*, 152 FERC ¶ 61,175 (2015) (seeking waiver of the FCA New Capacity Show of Interest deadline for an increase of 25 MW to an existing facility).

With regard to the waivers of general Tariff deadlines, Vineyard Wind asks the Commission for waivers to allow it to be qualified under the RTR exemption for FCA 13 *after* ISO-NE's currently pending amendment revising the RTR definition becomes effective on January 29, 2019. These Tariff deadlines would include the October 2018 election deadline and the requirement in Section III.13.1.1.2.10 that ISO-NE notify a Project Sponsor of the qualified capacity value of its resource under the RTR exemption no more than five business days after the October deadline for submitting the RTR election.

To our knowledge and belief, the request to waive rules that have not yet taken effect is a novel legal request. The Tariff amendments being sought by ISO-NE in its CASPR Filing to allow RTR participation by resources in federal waters will not become effective, if at all, until after 60 days from the date of the filing, in compliance with section 205(d) of the Federal Power Act ("FPA"). Moreover, ISO-NE did not have the authority to include offshore wind under the existing RTR definition because both FPA section 205(c) and the Commission's rules require every public utility to file rates and charges in connection with the transmission or sale of electric energy with the Commission.¹³

The result is that Vineyard Wind is effectively requesting that the Commission allow portions of ISO-NE's Tariff to become effective retroactively. The retroactive change would effectively result in allowing the yet-unaccepted RTR definition to treat Vineyard Wind's October 2018 RTR election as if it had been accepted rather than rejected by ISO-NE. The Filed Rate Doctrine and rule against retroactive ratemaking simply would not permit such a change to be made. Vineyard Wind's petition, however, asks the Commission under Rule 207 to do

¹³ See 18 C.F.R. § 385.205(a) ("A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge or term or condition of service, or any classification, contract, practice or any related regulation established by and for the applicant.").

exactly what ISO-NE could not do under FPA section 205: retroactively waive deadlines based on the prospective Tariff change in its CASPR Filing. NEPGA is unaware of any supportive precedent. If the Commission is inclined to approve the Waiver Request, NEPGA urges the Commission to address the application of the Filed Rate Doctrine and rule against retroactive ratemaking, as such an order would appear to represent an important policy shift.

With regard to Vineyard Wind's second and more specific Waiver Request, Vineyard Wind seeks waiver from the pro-rata proration provision in Section III.13.1.1.2.10, which it explains is necessary to "ensure[] that other RTRs that have already entered into composite bids remain unaffected,"¹⁴ *i.e.*, to protect certain third parties from undesirable consequences. Vineyard Wind made this request in response to the suggestion laid out by ISO-NE in its CASPR Filing, in which it explained that: "'given that the ISO and participants have already taken actions based on the existing RTR cap, and because [certain] deadlines have passed' it is necessary to the conduct of an orderly and timely auction 'to apply the proration requirement only to new offshore wind resources located in federal waters' if the cap is exceeded."¹⁵

This proposal, however, goes well beyond the proper scope of a waiver request necessary to avoid, for example, an unjust application of an existing Tariff rule to a party that made an administrative error. Section III.13.1.1.2.10(a) states, in relevant part, that "[i]f the total FCA Qualified Capacity of Renewable Technology Resources exceeds the cap specified in subsections (b), (c), (d) and (e) the qualified capacity value of each resource shall be prorated by the ratio of the cap divided by the total FCA Qualified Capacity." Rather than adding Vineyard Wind's Qualified Capacity to those of other RTR resources and then conducting a *pro rata* proration because the total Qualified Capacity seeking an RTR exemption is greater than the 481

¹⁴ Waiver Filing at p. 6.

¹⁵ *Id.* at p. 4 (quoting ER19-444 Transmittal Letter at p. 40).

MW RTR cap, as conceived in Section III.13.1.1.2.10(a), Vineyard Wind asks that it be qualified to receive only the difference between the existing RTR qualified capacity value for FCA 13 and the RTR cap.

This request is outside the scope of the existing Tariff rules, which request should be limited to the minimum amount necessary to correct the alleged administrative error that Vineyard complains about. Changing the clearing engine and application of the RTR award rules is far more significant and looks more akin to a Tariff modification. The Commission's reasoning in its July 2018 rejection of ISO-NE's waiver requests to effectuate the fuel security changes is just as applicable here:

Although ISO-NE attempts to frame its filing as a request for waiver of existing ISO-NE Tariff provisions, its request effectively creates an entire process that is not in the ISO-NE Tariff in order to allow for a cost-of-service agreement to meet regional fuel security concerns. Such new processes may not be effectuated by a waiver of the ISO-NE Tariff; they must be filed as proposed tariff provisions under FPA section 205(d).¹⁶

While Vineyard Wind does not have any rights here under FPA section 205, in this case Vineyard Wind could have filed a complaint under FPA section 206 to modify the Tariff; but it cannot modify the terms of the filed rate in Section III.13.1.1.2.10(a) through a Rule 207 petition.

If the Commission rejects this portion of the Waiver Request, NEPGA notes that Vineyard Wind may not meet one of the Commission's four prongs for granting a waiver: that the waiver does not have undesirable consequences. As Vineyard Wind explains, waiver of the Section III.13.1.1.2.10 proration requirement allows it to demonstrate that there will not be "harm to third parties or a disruption of the FCA 13 process,"¹⁷ as other resources would

¹⁶ *ISO New England Inc.*, 164 FERC ¶ 61,003 at P 47 (2018), *reh'g pending*.

¹⁷ Waiver Filing at p. 6.

otherwise become subject to the proration requirement. In addition, as Vineyard Wind highlighted, ISO-NE in the CASPR Filing explained that without waiver from proration, ISO-NE's "conduct of an orderly and timely auction"¹⁸ would be affected. NEPGA urges the Commission to consider and address the potential unintended policy consequences brought forward in these aspects of the Waiver Request.

V. CONCLUSION

For the reasons explained above, NEPGA respectfully requests that the Commission grant this Motion to Intervene and consider these concerns in making a decision on Vineyard Wind's petition. The issues raised in the Waiver Request, however, go beyond just such a limited change and raise important precedential issues that NEPGA wishes to draw the Commission's attention to in these comments.

Respectfully Submitted,

/s/ Bruce Anderson

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¹⁸ *Id.* at 4.

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, January 4, 2019.

/s/ Bruce Anderson

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