

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

ISO New England, Inc.	)	
New England Power Pool	)	Docket No. ER21-1637-000
Participants Committee	)	
	)	

**PROTEST 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”),<sup>1</sup> the New England Power Generators Association, Inc. (“NEPGA”)<sup>2</sup> files this Protest of ISO New England Inc.’s (“ISO-NE”) and the New England Power Pool (“NEPOOL”) Participants Committee’s proposed Offer Review Trigger Price (“ORTP” or “Trigger Price”) filing made on April 7, 2021 (“Jump Ball Filing”).<sup>3</sup>

For the sixteenth forward capacity auction (“FCA 16”), ISO-NE required existing resources to submit Permanent and Retirement De-List Bids (collectively, “Exit Bids”) no later than March 12, 2021 (“Retirement Deadline”). Exit Bids represent a pivotal step in the FCA process—before the Exit Bid deadline, suppliers must decide whether to submit a bid that will result in a resource being permanently removed from the capacity market, or from all ISO-NE markets. Bid prices are binding and they are irrevocable once submitted.

---

<sup>1</sup> 18 C.F.R. §§ 385.211, 385.214. This Protest is timely filed according to the Commission’s Combined Notice of Filings #1, Docket No. ER21-1637-000 (Apr. 8, 2021). NEPGA filed a doc-less Motion to Intervene in this docket on April 22, 2021.

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

<sup>3</sup> Joint Filing of ISO New England Inc. and New England Power Pool Regarding Offer Review Trigger Prices, Docket No. ER21-1637-000 (Apr. 7, 2021) (broken up into the “Joint Letter”, the “ISO Transmittal Letter” and the “NEPOOL Transmittal Letter”).

In this proceeding, ISO-NE and NEPOOL have submitted competing proposals to set Trigger Prices for FCA 16 through FCA 18. This is true even though the Retirement Deadline for FCA 16 passed three and a half weeks before the ORTP filing, and Trigger Prices are a key parameter that suppliers consider in evaluating whether future market conditions justify submitting an Exit Bid. Even the competing *proposed* Trigger Prices were not fully known to suppliers prior to the Exit Bid deadline for FCA 16. Suppliers making this critical decision had no reasonable alternative other than to rely on the existing terms of the filed rate—the Trigger Prices approved for FCA 15.<sup>4</sup>

NEPGA respectfully requests that the Commission reject, without prejudice, both proposals on the basis that they would retroactively modify the filed rate for FCA 16 and change the settled expectations of capacity suppliers as to the FCA 16 clearing price and their expected revenues from the auction. In the alternative, NEPGA requests that the Commission reject the filings without prejudice, based on a balancing of the equities. As discussed in the remedies section below, the Commission should direct that FCA 16 go forward based on the Trigger Prices in effect at the time of the Exit Bids, that is, using FCA 15 ORTPs. As another option, the Commission may act, pursuant to its ability to set remedies and approve ISO-NE's proposed ORTPs for effect in FCA 17, while finding that the FCA 15 Trigger Prices shall be used for FCA 16 given the filed rate concerns. Under no circumstances, however, should the Commission approve NEPOOL proposed ORTPs, whether for effect in FCA 16 or FCA 17. For the reasons explained below, the NEPOOL proposal is unjust and unreasonable.

---

<sup>4</sup> As discussed below (at p. 15), the IMM enabled market participants to submit bids assuming a menu of three potential outcomes of the Trigger Price proceeding. However, those potential outcomes (1) were not adjusted based on ISO-NE's and NEPOOL's final proposals and (2) did not benefit market participants who elected to stay on the sidelines rather than submit Exit Bids given the uncertainty.

FCA 16 should, and can, be run on time. NEPGA strongly supports a timely auction in-line with the timelines that are already in process. The compounded issues between the late ORTP filing in this proceeding and ISO-NE's delay in proposing yet another new Net Cost of New Entry ("Net CONE") 89 days after its initial proposal for FCA 16,<sup>5</sup> create a real and serious risk to erosion of confidence in the investment environment in New England's wholesale electricity markets. It is for those reasons that NEPGA encourages the Commission to preserve the FCA 16 timeline and allow ISO-NE to make any needed recalculation of the ORTP values – like NEPGA's request regarding Net CONE – for effect in FCA 17, so as to provide necessary and appropriate notice to market participants. It is NEPGA's hope that conduct of the FCA 16 auction using existing ORTPs and Net CONE (those used in FCA 15), will provide room for collaborative efforts to address foundational challenges in the New England market and allow the current deliberative process the Commission began in 2021 to resolve minimum offer pricing mitigation issues like the ORTP mechanism.<sup>6</sup>

The Commission should not under any circumstance, however, approve NEPOOL's proposed ORTP value for off-shore wind. The unprecedented scope of off-shore wind projects and their capital-intensive nature relative to other renewable resource projects, renders NEPOOL's approach wholly inappropriate for calculation of a just and reasonable ORTP for off-shore wind. NEPOOL's ORTP suffers from at least three fundamental flaws that artificially lower the ORTP for off-shore wind: (1) capital costs were calculated using an improper and flawed "inferred" cost model; (2) it is calculated using a commercially implausible financing structure that overstates the

---

<sup>5</sup> *ISO New England Inc.*, Docket No. ER21-787-000, Response to Commission Deficiency Notice and Revised CONE, Net CONE, and Capacity Performance Payment Rate Value (Mar. 30, 2021).

<sup>6</sup> *See Modernizing Electricity Market Design*, Docket No. AD21-10, Post-Technical Conference Comment of New England Power Generators Association, Inc. (Apr. 26, 2021).

amount and timing of tax benefits; and (3) it applies a new, unjustified extended-horizon proposal to spread capital costs out over 25 years rather than the 20-year period provided in the Tariff.

## **I. BACKGROUND**

### **A. Permanent De-List Bids and Retirement De-List Bids Irrevocably Bind Existing Generators.**

Every March, as part of the annual Forward Capacity Auction qualification process, existing generators in ISO-NE have the option of submitting an Exit Bid for the future Capacity Commitment Period.<sup>7</sup> The function of Exit Bids is to allow an existing generator to offer above the market price where the market price is insufficient to allow the resource to be viable. Suppliers who decide to submit an Exit Bid must “specify a price” that would be sufficient to keep the resource from retiring were it to receive that price from the FCA.<sup>8</sup> Exit Bids are due by the Retirement Deadline, which was March 12, 2021 for FCA 16.<sup>9</sup>

The consequences of *not* being selected in the FCA after submitting an Exit Bid are stark. If the resource is not retained for reliability,<sup>10</sup> it will “be permanently de-listed” from the ISO-NE capacity market (for Permanent De-List Bids) or “will be retired” from all ISO-NE markets (for

---

<sup>7</sup> ISO-NE Market Rule 1 (“Tariff”) at III.13.1.2.3.1. (“All Permanent De-List Bids and Retirement De-List Bids in the Forward Capacity Auction must be detailed in an Existing Capacity Retirement Package submitted to the ISO no later than the Existing Capacity Retirement Deadline.”); *id.* at III.13.1.10 (providing that “the Existing Capacity Retirement Deadline will be in March, approximately four years and three months before the beginning of the Capacity Commitment Period”).

<sup>8</sup> See Tariff at III.13.1.2.3.1.5(a) (offering opportunity to “submit a Permanent De-List Bid”), *id.* at III.13.1.2.3.1.5(b) (same regarding “Retirement De-List Bid”). The IMM must review Exit Bids greater than 20 MW that are at or above the Dynamic De-List Bid Threshold to determine, among other things, whether the bid is consistent with “the net present value of the resource’s expected cash flows.” *Id.* at III.13.1.2.3.2.1.

<sup>9</sup> ISO-NE, *Forward Capacity Auction 16 Schedule – Capacity Commitment Period: 2025-2026* (revised Mar. 5, 2021) (reporting Retirement and Permanent De-List Bids Window as “3/5/2021 - 3/12/2021”), <https://www.iso-ne.com/static-assets/documents/2019/02/fca-16-market-timeline-2-13-2019.pdf>.

<sup>10</sup> See Tariff at III.13.1.2.3.1.5.1(c) (“If the capacity associated with a Permanent De-List Bid or Retirement De-List Bid is needed for reliability reasons ..., the de-list bid shall be rejected and the resource shall be entered into the Forward Capacity Auction.”).

Retirement De-List Bids).<sup>11</sup> The submission of an Exit Bid is thus not a decision that suppliers make lightly.

Key to the Retirement Deadline is that once submitted, suppliers are not permitted to make unilateral changes to their bid price specification.<sup>12</sup> This specification is one of the earlier deadlines in the year-long FCA process, and the steps that follow are shaped by the level of participation in the Exit Bid process. It is not tenable for the ISO to reopen the Exit Bid process later, or for the FCA deadlines to be shifted back—the schedule recurs annually and must be completed on time. Exit Bids therefore represent binding commitments regarding future conduct.

With this structure, suppliers who opt to not submit an Exit Bid make an important financial choice by doing so. If a supplier does not submit an Exit Bid and decides to participate in the FCA process, as a matter of economic reality, its logical choice is to participate and secure payment in exchange for a Capacity Supply Obligation.<sup>13</sup> That is because while a supplier can submit a static or dynamic delist bid later in the process, if it does so, it will still incur fixed costs but may receive no capacity payment. Thus, when Trigger Prices are lowered *after* the supplier makes its retirement choice and, as a result, the capacity prices plummet, the supplier is forced to remain in the energy

---

<sup>11</sup> See Tariff at III.13.2.5.2.5.3 at (a)(i), (b)(i).

<sup>12</sup> See, e.g., *id.* at III.13.2.5.2.5.3(c) (“Once submitted, no Permanent De-List Bid or Retirement DeList Bid may be withdrawn, except as provided in Section III.13.1.2.4.1.”); *id.* at III.13.1.2.1.1 (explaining that “a Market Participant may not change any Existing Generating Capacity Resource attribute” between “the Existing Capacity Retirement Deadline” and “the conclusion of the Forward Capacity Auction.”).

Section III.13.1.2.4.1 of the Tariff allows for a Lead Market Participant to choose to retire a resource or seek conditional treatment of its bid after receiving a retirement determination notification, and section III.13.1.2.4 allows for some adjustments to the price specified in the bid in light of the retirement determination notification, but both provisions deal with changes to the bid in light of the Independent Market Monitor’s review of the bid itself (the review that leads to the retirement determination notification described in section III.13.1.2.4). After the Existing Capacity Retirement Deadline, no unilateral changes can be made by the market participant merely because it later wishes it had submitted a different number.

<sup>13</sup> See Tariff at III.13.2.3.2(d).

market, but potentially without capacity revenue or with lower revenue than expected. Therefore, existing generators contemplating retirement must be able to rely on the filed rate. Here, that was the ORTPs in the Tariff as of March 12, 2021.

**B. ISO-NE did not Recalculate Trigger Prices for FCA 16 prior to the Retirement Deadline.**

Under the Tariff, ORTPs are the benchmark prices<sup>14</sup> below which a new resource cannot offer unless it justifies that lower offer to the IMM. ORTPs represent estimates of the cost of entry for the resource types that may participate in the Forward Capacity Market (“FCM”).<sup>15</sup> Trigger prices are determined by resource technology, and currently range in the approved Tariff from \$0.00/kW-month for certain energy efficiency resources, to \$11.025/kW-month for on-shore wind resources, to the auction starting price for many other resource types, like off-shore wind resources.<sup>16</sup> Importantly, as of March 12, the default ORTP listed in the Tariff for several resource types, including off-shore wind and solar, was the starting price of the auction. The starting price for FCA 16 is uncertain because ISO-NE, late in the process, filed to update Net CONE, but it may be \$11.978/kW-month.<sup>17</sup>

---

<sup>14</sup> *ISO New England Inc.*, 146 FERC ¶ 61,084 at P 3 (2014) (“Prior to the FCA, ISO-NE compares capacity supply offers from new resources to benchmark prices in order to protect against the exercise of buyer-side market power that could inappropriately suppress capacity prices. ISO-NE calculates a benchmark price, known as an ORTP, for each resource technology type (e.g. combustion turbine) based on certain revenue and cost assumptions.”), *rehearing denied*, 147 FERC ¶ 61,110 (2014).

<sup>15</sup> Tariff Appx. A at III.A.21.

<sup>16</sup> *See id.* at III.A.21.1.1.

<sup>17</sup> *Id.* (listing “[a]ll other technology types” as “Forward Capacity Auction Starting Price”); *see* ISO Transmittal Letter at 30. ISO-NE states that this value is contingent upon the Commission’s accepting ISO-NE’s revised FCA 16 CONE Values Filing. *Id.* at 30 n. 87.

Trigger Prices are recalculated periodically by the IMM and submitted to the Commission for approval and inclusion in the Tariff.<sup>18</sup> In November 2018, ISO-NE and NEPOOL submitted a request to amend the Tariff “to provide for [several] parameters [including ORTP] to be reviewed and updated at the same time” in advance of FCA 16.<sup>19</sup> The Commission accepted the revision by delegated order.<sup>20</sup> The Tariff now reads:

The Offer Review Trigger Price for each of the technology types listed above shall be recalculated using updated data for the Capacity Commitment Period beginning on June 1, 2025 and no less often than once every three years thereafter. Where any Offer Review Trigger Price is recalculated, the Internal Market Monitor will review the results of the recalculation with stakeholders and the new Offer Review Trigger Price shall be filed with the Commission prior to the Forward Capacity Auction in which the Offer Review Trigger Price is to apply.<sup>21</sup>

Important here, in justifying the revision, ISO-NE and NEPOOL explained that “[t]he consolidated schedule would result in all of the parameters being updated *for use in the FCA 16 auction process*, which generally *begins in early 2021* and culminates in the Forward Capacity Auction to be held in February 2022.”<sup>22</sup> They further noted that “[i]n order for the updated parameters to be ready for use in FCA 16, the ISO expects that stakeholder review and filing of the updated parameters *would occur in 2020*.”<sup>23</sup>

---

<sup>18</sup> In years where the IMM does not complete a full recalculation, the Trigger Prices are adjusted using set parameters. *See* Tariff Appx. A at III.A.21.1.2(e).

<sup>19</sup> *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER19-335, Accession No. 20181114-5036, at 1 (Nov. 14, 2018) (“Tariff Amendment Letter”).

<sup>20</sup> *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER19-335, Accession No. 20181219-3053 (Dec. 19, 2018).

<sup>21</sup> Tariff Appx. A at III.A.21.1.2.

<sup>22</sup> Tariff Amendment Letter at 4 (emphasis added).

<sup>23</sup> *Id.* (emphasis added).

ISO-NE and NEPOOL did not submit updated calculations prior to the beginning of the FCA 16 process in early 2021 or the Retirement Deadline of March 12, 2021.<sup>24</sup> Instead, they submitted competing “jump ball” proposals on April 7, 2021, three and a half weeks after the Retirement Deadline. As explained below, the Tariff does not allow for revised Trigger Prices to be applied retroactively during an FCA process. Nor were the specifics of the competing proposals known to suppliers prior to the March 12 deadline.

## II. PROTEST

### A. **Accepting the ORTP Proposal as Effective for FCA 16 Would Violate the Filed Rate Doctrine and Result in Retroactive Ratemaking.**

ISO-NE’s and NEPOOL’s proposed Trigger Prices for FCA 16 violate the filed rate doctrine and constitute impermissible retroactive ratemaking. The FCA 16 process began in February 2021 and, on March 12, 2021, market participants were required to decide whether to submit binding and irrevocable Exit Bids.<sup>25</sup> ISO-NE and NEPOOL filed the competing proposals almost a month after the Exit Bid deadline with off-shore wind Trigger Prices on the extreme end of the spectrum, with ISO-NE proposing the off-shore wind Trigger Price to be the starting price of the auction, and NEPOOL proposing an off-shore wind Trigger Price of zero dollars. This,

---

<sup>24</sup> See *ISO New England Inc.*, 174 FERC ¶ 61,162 at P 7 (2021) (Filing Parties requested that the Commission “accept the proposed Tariff revisions effective March 2, 2021, to ensure that [a new calculation methodology] is in place for the start of the relevant qualification activities for FCA 16, which begin in March of 2021”).

<sup>25</sup> Tariff at III.13.1.2.3.1. (“All Permanent De-List Bids and Retirement De-List Bids in the Forward Capacity Auction must be detailed in an Existing Capacity Retirement Package submitted to the ISO no later than the Existing Capacity Retirement Deadline.”); *id.* at III.13.1.10(b) (providing that “the Existing Capacity Retirement Deadline will be in March, approximately four years and three months before the beginning of the Capacity Commitment Period”); ISO-NE, *Forward Capacity Auction 16 Schedule – Capacity Commitment Period: 2025-2026*, (revised Mar. 5, 2021) (reporting Retirement and Permanent De-List Bids Window as “3/5/2021 - 3/12/2021”), <https://www.iso-ne.com/static-assets/documents/2019/02/fca-16-market-timeline-2-13-2019.pdf>.



despite their commitment to file updated ORTPs in 2020.<sup>26</sup> Suppliers cannot reasonably use these ORTPs to navigate the irrevocable decision of whether or not to exit the market.

The joint transmittal letter argues that “[a]bsent a Commission order accepting new ORTP values for each technology that is participating in the Forward Capacity Market, the ISO cannot move forward with the administration of FCA 16,” including “mov[ing] forward with FCA 16 qualification.”<sup>27</sup> But importantly, as ISO-NE acknowledges, the administration of FCA 16 *has already begun*.<sup>28</sup> The filed rate doctrine and rule against retroactive ratemaking serve to prevent changes to the rules in the middle of the game,<sup>29</sup> and those restraints ensure that all market participants are treated fairly, have the same transparency into the conduct of the auction, and have certainty regarding the rate to be observed.<sup>30</sup> ISO-NE’s and NEPOOL’s filings should be rejected.

### **1. These Requirements Are “Undeniably Strict” and Apply to RTO Market Rules.**

The filed rate doctrine holds that no “regulated entity” may “charge rates for its services other than those properly filed with the appropriate federal regulatory authority.”<sup>31</sup> A rate “filed by the wholesale seller of electricity or fixed by FERC is the only lawful charge and deviation

---

<sup>26</sup> See Tariff Amendment Letter at 4.

<sup>27</sup> Joint Letter at 2.

<sup>28</sup> ISO Transmittal Letter at 9, (“As the ISO has explained to the Commission in the Revised FCA 16 CONE Values Filing, the FCA 16 qualification process is already underway. The Existing Capacity Retirement window closed on March 12, 2021, and the ‘show of interest’ window for Market Participants seeking to qualify new capacity resources for FCA 16 will close on April 23, 2021.”).

<sup>29</sup> *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230-31 (D.C. Cir. 2018) (FERC has “no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations.”).

<sup>30</sup> Since NEPOOL’s filing is “treated on the same legal footing as the ISO’s proposal,” see NEPOOL Transmittal Letter at 3-4, both proposals are similarly situated for purposes of the filed rate doctrine and rule against retroactive ratemaking.

<sup>31</sup> *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981).

from it is not permitted upon any pretext”<sup>32</sup>—the parties subject to the rate “are bound to the terms of the filed rate.”<sup>33</sup> The filed rate doctrine is “undeniably strict”: “[i]gnorance or misquotation of rates” by the public utility is not “an excuse for paying or charging either less or more than the rate filed.”<sup>34</sup> An important corollary is that changes to filed rates cannot be made retroactively;<sup>35</sup> market participants are entitled to “rate predictability” in making economic decisions.<sup>36</sup> Indeed, “the Commission itself has no power to alter a rate retroactively,” even where the rate is later found to be unjust and unreasonable.<sup>37</sup>

Market rule tariff provisions dealing with bids and auctions may not be “typical rates,” like stated charges or power purchase and sale contracts, but they are nevertheless filed rates subject to both the filed rate doctrine and the rule against retroactive ratemaking.<sup>38</sup> Sellers and buyers in a deregulated market rely not on a single published rate, but rather on a filed tariff that provides for bidding and auction processes that establish prices for products.<sup>39</sup>

---

<sup>32</sup> *La. Pub. Serv. Comm’n v. FERC*, 771 F.3d 903, 910 (5th Cir. 2014) (quoting *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004)).

<sup>33</sup> *N.E. Rural Elec. Membership Corp. v. Wabash Valley Power Ass’n*, 707 F.3d 883, 887 (7th Cir. 2013).

<sup>34</sup> *Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 222 (1998) (quotations omitted).

<sup>35</sup> *La. Pub. Serv. Comm’n*, 771 F.3d at 912.

<sup>36</sup> *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

<sup>37</sup> *Hall*, 453 U.S. at 578.

<sup>38</sup> See *N.Y. Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,178 at P 17 & n.13 (2011) (contrasting RTO filing of updated Installed Capacity (ICAP) demand curves with the electric rate increase filings in *West Texas Utilities Co.*, 18 FERC ¶ 61,189 at 61,375 (1982) but applying the same policy); *Conn. Mun. Energy Coop. v. ISO New England, Inc.*, 128 FERC ¶ 61,270 at P 25 (2009) (explaining that complaints regarding “the FCM rules” must show those provisions “as currently filed” are unjust and unreasonable); see also *ISO New England Inc. and New England Power Pool*, 130 FERC ¶ 61,105 at PP 51-55 (2010) (finding that changes to market inputs “involve[] a change to a Market Rule” and are thus subject to the Participants Agreement “jump ball provision”).

<sup>39</sup> See *Consol. Edison*, 347 F.3d at 969.

Indeed, the Commission has denied requests for retroactive relief from market rules even where the market operator has misapplied rules, explaining that market participants who relied on those provisions “cannot effectively revisit their economic decisions” or “retroactively alter their conduct.”<sup>40</sup> Put another way, the Commission rejects changes to rules that are “historical” in nature after the conduct to be informed by the rule already happened.<sup>41</sup> If market participants did not have notice that tariff provisions would be applied in a particular way, the filed rate doctrine and the rule against retroactive ratemaking prevent retroactive changes.<sup>42</sup> An RTO’s “change in policy” with retroactive effect is not permitted.<sup>43</sup>

In the FCM, capacity prices are set more than three years prior to when service is provided. These capacity prices serve as a signal for economically efficient resource development, retention, and retirement.<sup>44</sup> To accomplish that goal, the capacity prices must be a product of the process detailed in the filed rate, and all market participants must be certain of that filed rate prior to taking (or not taking) any significant actions that affect their revenue prospects and, thereby, the efficiency of the market.

---

<sup>40</sup> *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000), *rehearing denied*, 97 FERC ¶ 61,154 at 61,673 (2001); *see also Cal. Indep. Sys. Operator Corp.*, 151 FERC ¶ 61,247 at P 20 & n.46 (2015) (directing prospective-only filing and denying resettlement of market for prior period); *DC Energy, LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 at P 101 (2012) (avoiding problems that would “create substantial uncertainty and undermine faith in the markets”), *rehearing denied*, 144 FERC ¶ 61,024 (2013).

<sup>41</sup> *Midcontinent Independent System Operator, Inc.*, 157 FERC ¶ 61,250 at P 27 (2016) (rejecting proposal that would apply true-up provisions to a rate year “that is historical” by the time of Commission action), *rehearing denied*, 161 FERC ¶ 61,020 (2017).

<sup>42</sup> *See DC Energy, LLC*, 138 FERC ¶ 61,165 at P 85, *rehearing denied*, 144 FERC ¶ 61,024 at PP 49, 57.

<sup>43</sup> *DC Energy, LLC*, 144 FERC ¶ 61,024 at P 57 (distinguishing between an RTO’s “change in policy” and a mere “correction of prior errors” that had been “passively accepted” rather than “actively evaluat[ed]”).

<sup>44</sup> *See N.Y. State Pub. Serv. Comm’n*, 173 FERC ¶ 61,060 at P 41 (2020) (capacity prices should “send appropriate market signals supporting efficient market entry and exit of resources”) (quotations omitted).

## **2. Trigger Prices constitute rates subject to the rule against retroactive ratemaking.**

Trigger Prices constitute part of ISO-NE's rate and are entitled to the protections of the filed rate doctrine and the rule against retroactive ratemaking. The Commission itself has called ORTPs a "benchmark price."<sup>45</sup> To avoid this conclusion, ISO-NE has attempted to recast Trigger Prices as an "administrative threshold," that does not itself amount to "a rate paid to" a supplier.<sup>46</sup> This new characterization of Trigger Prices ignores that market participants make key decisions based on those benchmark prices, because they have a substantial effect on the market participants, and on the auction clearing price. Indeed, as the IMM explains, the ORTP is targeted to ensure "proper price formation in the primary auction."<sup>47</sup> It is reasonable for existing capacity resources to rely on this benchmark price for the resources covered by the ORTP in determining whether to submit an exit bid. This is a touchstone issue for promoting stability and rate predictability in organized markets.<sup>48</sup> As such, it is part of the rate. Market design issues, by their nature, can often be described as administrative. Were the Commission to accept ISO-NE's distinction, RTOs could change rules with impunity.

The Commission's distinction between "rates" and "inputs" for formula rates illustrates the issue. "When the Commission accepts a formula rate as a filed rate, it grants waiver of the filing and notice requirements of § 205, and the utility's rates, then, can change repeatedly, without notice to the Commission, *provided* those changes are consistent with the formula."<sup>49</sup> Because of

---

<sup>45</sup> *ISO New England Inc.*, 146 FERC ¶ 61,084 at P 3.

<sup>46</sup> See ISO Transmittal Letter at 5-6.

<sup>47</sup> ISO-NE, 2019 Annual Markets Report, at 2 (May 26, 2020), [https://www.iso-ne.com/static-assets/documents/2020/06/a6\\_2019\\_annual\\_markets\\_report.pdf](https://www.iso-ne.com/static-assets/documents/2020/06/a6_2019_annual_markets_report.pdf).

<sup>48</sup> See *Cent. Off. Tel., Inc.*, 524 U.S. at 222-23; *Consolidated Edison*, 347 F.3d at 969.

<sup>49</sup> *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F. 3d 250, 254 (D.C. Cir. 2001) (quotations and alterations omitted) (emphasis in original).

this, “changes in inputs to a formula rate do not constitute retroactive ratemaking because the formula itself, as opposed to the inputs, is the filed rate, and the formula has not changed.”<sup>50</sup>

Unlike inputs in a formula rate, Trigger Prices are not raw inputs to the market design that have been agreed upon in advance and are knowable at a particular time to market participants. Rather, as the gulf between ISO-NE’s and NEPOOL’s filings aptly demonstrates, Trigger Prices are the products of complicated analyses that can yield vastly different outcomes based on the inputs and models used, as aptly shown in the Jump Ball Filing. Because of this, while annual ORTP adjustments occur automatically using predictable inputs,<sup>51</sup> recalculations must be filed with the Commission for inclusion in the Tariff. It cannot be said here that anything other than the language of the Tariff itself could provide stability and predictability to market participants. Changing those terms now would lead to a different application of pricing rules to entire categories of resources.<sup>52</sup>

Also relevant is the distinction between administrative matters that can be changed internally by an ISO and those that must be resolved in a Section 205 filing by the Commission under its rule of reason. “Section 205 ... requires all practices that significantly affect rates, terms, and conditions of service to be on file with the Commission.”<sup>53</sup> As discussed above, ORTPs are

---

<sup>50</sup> *La. Pub. Serv. Comm’n v. Sys. Energy Res., Inc.*, 171 FERC ¶ 63,003 at P 254 (2020) (“[C]hanges in inputs to a formula rate do not constitute retroactive ratemaking because the formula itself, as opposed to the inputs, is the filed rate, and the formula has not changed.”) (quotations omitted); *Entergy Servs., Inc.*, 153 FERC ¶ 61,303 at P 151 (2015) (“The rule against retroactive ratemaking does not apply to the annual inputs that populate the formula.”).

<sup>51</sup> See Tariff Appx. A at III.A.21.1.2(e).

<sup>52</sup> See ISO Transmittal Letter at 4-6 (explaining that ORTP specifications dictate application of further IMM review under minimum offer price rules); NEPOOL Transmittal Letter at 7 (describing “the method the IMM uses to evaluate an offer price below the relevant ORTP”).

<sup>53</sup> *Fla. Mun. Power Agency v. Duke Energy Fla., LLC*, 167 FERC ¶ 61,138 at P 43 & n.98 (2019); see also *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 811 (D.C. Cir. 2007) (“[U]tilities must file ‘only those practices that affect rates and service *significantly*, that are realistically *susceptible* of specification, and that

benchmark prices that significantly affect market behavior by incumbent and new resources. To confirm that Trigger Prices are rates that must be filed with and approved by the Commission, and not merely a routine “administrative threshold,” the Commission need look no further than the Jump Ball Filing. Surely, if Trigger Prices could be adjusted in-house in a manual, ISO-NE would not undertake the time and expense of this lengthy proceeding.

For these reasons, the Commission should treat Trigger Prices as rates and reject ISO-NE’s characterization of them as administrative thresholds.

### **3. ISO-NE’s and NEPOOL’s Proposed Revisions Come Too Late.**

The Jump Ball Filing proposing competing Trigger Prices for FCA 16 comes too late and, if approved, would impermissibly change the filed rate after the fact. At the Retirement Deadline, suppliers had no viable choice but to rely on the approved Tariff, that is the Trigger Prices and other parts of the rate specified in the Tariff. Applying either competing ORTP proposal to FCA 16 would shatter participants’ settled expectations, and upset the efficiency of the market and fairness of the capacity construct.

Under the unique circumstances here, no proper change was made to recalculate Trigger Prices before binding deadlines in FCA 16 passed, and market participants were left to rely on the filed rates that existed in the Tariff as of March 12. By the Retirement Deadline, market participants not only lacked a firm proposal for the updated Trigger Prices from ISO-NE, but they also suspected that the parameters would be the subject of a “jump ball” submission by NEPOOL, further exacerbating confusion about what would come of the section III.A.21.1.2.(a) process.

---

are not so generally understood in any contractual arrangement as to render recitation superfluous.”) (quoting *Cty. of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)).

This timeline problem did not go unnoticed. The IMM acknowledged that the “‘jump ball’ alternate proposal of [Trigger Prices] from NEPOOL” would deepen the “uncertainty,” and that there was “insufficient time” to allow “participants to update their bids” within the FCA 16 schedule.<sup>54</sup> Because there existed “three potential outcomes to the jump ball ORTP filing”—whatever those filings ultimately became—each with “disparate risks,” the IMM offered existing resources two options. First, resources could submit up to three prices reflecting each of the three “potential outcomes” the IMM envisioned (which were not necessarily exhaustive of all possibilities). Second, resources could “submit one bid” that would “reflect the risks of the multiple possible outcomes.”<sup>55</sup> The IMM’s “preferred approach” was for “[p]ricing ... this risk into one bid price,” but the options it offered reflect the fact that uncertainty and regulatory risk at the March 12 deadline were unusually high given the “multiple possible outcomes.”<sup>56</sup>

The IMM’s efforts before March 12, though well-intentioned, are inadequate to cure the timing problem with ISO-NE’s and NEPOOL’s April 7 submissions. Not only had the Commission process not begun by the key Exit Bid deadline, the actual proposals themselves were not known by then. The Commission cannot reasonably expect that suppliers could read the tea leaves through the stakeholder process to make accurate judgments as to what the proposed Trigger Prices would be, and which if any of those values the Commission would subsequently accept. It is true that the IMM hypothesized options, but each—other than the rate used for FCA 15—was still a guess. Along similar lines, existing suppliers did not have notice, like that required under

---

<sup>54</sup> Memorandum from Internal Market Monitor to NEPOOL Markets Committee, *Impact of Offer Review Trigger Price Jump Ball Filing on FCA 16 Retirement Bids* (Feb. 22, 2021) (“IMM Memo”), [https://www.iso-ne.com/static-assets/documents/2021/02/a02\\_mc\\_2021\\_02\\_24\\_impact\\_ortp\\_filings\\_retirement\\_bids.pdf](https://www.iso-ne.com/static-assets/documents/2021/02/a02_mc_2021_02_24_impact_ortp_filings_retirement_bids.pdf).

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 1-2 & n.2.

the FPA Section 205, that NEPOOL was going to propose to amend the Tariff to include a new extended-horizon method for calculating ORTPs to replace the existing 20-year default.

Moreover, the IMM's menu of options was only available to market participants who decided to submit an Exit Bid; other suppliers likely decided not to submit a bid at all in light of the Trigger Prices in ISO-NE's rate on file, or may have declined to submit a bid simply because of the great uncertainty about what could happen with an ORTP filing. When faced with great uncertainty, suppliers may reasonably elect to incur significant losses over time prior to making the irrevocable decision to retire.<sup>57</sup>

Perhaps even more important, uncertainty as to what the rules will be in the first place is not a risk that suppliers are expected to manage. Here, the current Tariff indicates that, at most, an interim adjustment will be made to the Trigger Prices on file. Yet, the ISO-NE and NEPOOL filings from April 7 present an extreme range of potential future outcomes, with the market hanging in the balance. For example, under the existing rates and ISO-NE's proposal, off-shore wind Trigger Prices are the FCA starting price. By contrast, NEPOOL proposes—too late—an ORTP of \$0.00/kW-month for off-shore wind. But for reliance on the filed rate doctrine, suppliers would face a situation in which this difference would have a pivotal effect on the expected FCA 16 price because hundreds of megawatts of qualified capacity that is expected to enter the market will either be price takers or their bids will be too high to be considered in the auction.<sup>58</sup>

---

<sup>57</sup> For example, the supplier that decided to retire the Pilgrim Nuclear Power Station did so only after losses increased to \$40 million per year. *See* Entergy Corp., *Entergy to Close Pilgrim Nuclear Power Station in Massachusetts No Later than June 1, 2019* (Oct. 12, 2015), <https://www.entergynewsroom.com/news/entergy-close-pilgrim-nuclear-power-station-massachusetts-no-later-than-june2019/> (noting that it considers whether to “operat[e] over the long-term if it is not economically viable to do so”).

<sup>58</sup> *See* Vineyard Wind 1, Benefits, <https://www.vineyardwind.com/vineyard-wind-1> (noting that construction of the 800 MW off-shore wind project will begin in 2021); Park City Wind, Project



The lateness of ISO-NE's and NEPOOL's filings is highlighted by their submission in support of the 2018 Tariff revisions, which set the current schedule for recalculating Trigger Prices. As noted above, ISO-NE and NEPOOL said that the revised schedule "would result in all of the parameters being updated for use *in the FCA 16 auction process*, which generally begins in early 2021," and they committed to "filing [] the updated parameters [] *in 2020*."<sup>59</sup> ISO-NE and NEPOOL did not meet this timeline. They did not update and file the ORTP calculation in 2020, nor did they complete the calculations in time "for use in the FCA 16 auction process."<sup>60</sup>

#### **4. The Commission Should Apply the FCA 15 Trigger Prices for FCA 16.**

To be sure, the preferred procedure for FCA 16 would have been for ISO-NE and NEPOOL to follow their own schedule and have filed their proposal(s) far enough in advance of the process for revised Trigger Prices (and other key figures, like Net CONE) to be timely set by the Commission. But now that the FCA 16 process has begun, and participants have passed a crucial point, the only way for the process to be conducted fairly and in line with Commission precedent is to use the existing parameters in the Tariff to conduct FCA 16, without delaying the process. The Commission should dismiss the filing without prejudice to enable ISO-NE and NEPOOL to file their proposals again for use in FCA 17.

The Commission need not make any special waiver to apply the FCA 15 Trigger Prices for FCA 16, as the plain language of the Tariff indicates that the Trigger Prices currently specified at

---

Overview, <https://www.parkcitywind.com/project-overview> (discussing plan for 804 MW off-shore wind project near Connecticut); Orsted, Our Offshore Wind Projects in the U.S., <https://us.orsted.com/wind-projects> (highlighting development plans for off-shore wind project near Massachusetts of up to 2 GW).

<sup>59</sup> Tariff Amendment Letter at 4 (emphasis added).

<sup>60</sup> ISO-NE states that the delay was caused by last-minute changes to the Investment Tax Credit in December 2020. *See* ISO Transmittal Letter at 13. Regardless of the reason for the delay, the fact remains that ISO-NE did not secure a new filed rate prior to the beginning of the FCA 16 process.

section III.A.21.1.1 will remain in force as the rate until a Commission order. The Tariff indicates that “Offer Review Trigger Prices for the twelfth Forward Capacity Auction (for the Capacity Commitment Period beginning on June 1, 2021) shall be as follows,” and then lists values by technology type, with “[a]ll other technology types” subject to a value of the “Forward Capacity Auction Starting Price.”<sup>61</sup> Subject to annual indexing, these values have been observed and applied not just in FCA 12, but also in each subsequent auction process through FCA 15.<sup>62</sup> The Trigger Prices first used in FCA 12 continue to apply, subject to indexing, in each subsequent “year[] in which no full recalculation is performed” and “filed with the Commission.”<sup>63</sup>

Unlike other provisions of the ISO-NE Tariff, the Trigger Prices are not subject to an explicit sunset provision. The Tariff does *not* say here—as it does, for example, regarding fuel security reliability review—that the Trigger Prices “will remain in effect for the 2022/23, 2023/24 and 2024/25 Capacity Commitment Period, after which this Section III.13.2.5.2.5A will sunset.”<sup>64</sup> Nor does it have language, such as that used for Peak Energy Rents, specifying that the section only applies “[f]or Capacity Commitment Periods beginning prior to June 1, 2019.”<sup>65</sup> Instead, the Trigger Prices specified in the Tariff continue in force until “recalculated” and “filed with the Commission” for its approval.<sup>66</sup>

---

<sup>61</sup> Tariff Appx. A at III.A.21.1.1.

<sup>62</sup> See ISO Transmittal Letter at 49 (referring to the “indexing rules” in Section III.A.21.1.2(e)); *id.* at 55 (explaining that “the interim update process” is “used during years when a full ORTP update is not performed”); Tariff Appx. A at III.A.21.1.2(e) (Trigger Prices “will be adjusted” as provided in that subsection “[f]or years in which no full recalculation is performed pursuant to subsection (a) above”); see also *id.* at III.A.21.1.2(a) (indicating that the “results of the recalculation ... shall be filed with the Commission”).

<sup>63</sup> See *id.* at III.A.21.1.2(a), (e).

<sup>64</sup> See Tariff at III.13.2.5.2.5A (Fuel Security Reliability Review).

<sup>65</sup> *Id.* at III.13.7.1.2.

<sup>66</sup> See Tariff Appx. A at III.A.21.1.2(a), (e).

The Tariff does provide a process for recalculating Trigger Prices “for the Capacity Commitment Period beginning on June 1, 2025”—i.e. FCA 16—“and no less often than once every three years thereafter.” But, that process is not self-executing. Instead its “results” must be “filed with the Commission prior to the Forward Capacity Auction in which the Offer Review Trigger Price is to apply.”<sup>67</sup> The point of that section and the filing deadline it imposes is to ensure that the ISO and its Internal Market Monitor timely file any recalculations consistent with the FCA process, not explicitly to sunset the preceding provision, which contains no such term. Indeed, as discussed above, ISO-NE and NEPOOL committed in their cover letter supporting the Tariff amendment that the recalculation would occur in 2020.<sup>68</sup>

And of course, the Tariff cannot guarantee that any particular recalculation “file[d] with the Commission” will actually be accepted, as Commission acceptance or rejection of any particular FPA Section 205 filing can only be determined on the specifics of each “particular filing.”<sup>69</sup> In light of that reality, and the potential that, as here, the ISO misses key deadlines in filing a recalculation, the Tariff defaults to the use of an index adjustment.

In sum, accepting new Trigger Prices now would impermissibly change the rules in the middle of the game. By March 12, every supplier made a decision whether to submit an Exit Bid that could bind its resource or resources to permanent retirement. They made their decisions based on the Trigger Prices that are part of the current filed rate because the updated ORTP calculations

---

<sup>67</sup> See *id.* at III.A.21.1.2(a).

<sup>68</sup> Tariff Amendment Letter at 4. Even if the Commission disagreed about the nature of the recalculation provision, the Commission could use its remedial authority and simply delay the effectiveness the proposed ORTP values until FCA 17.

<sup>69</sup> See *PP&L, Inc.*, 95 FERC ¶ 61,160 at 61,519 (2001) (applying 18 C.F.R. § 35.5 and *Municipal Light Boards of Reading and Wakefield v. Federal Power Commission*, 450 F.2d 1341, 1346 (D.C. Cir. 1971)).

were not filed prior to the Retirement Deadline. Resource owners used this information to make judgments about FCA 16 clearing prices to determine whether their resources would be economic. “[C]hanging the rules midway through FCA” qualification destabilizes “FCM rules during the ongoing FCM processes.”<sup>70</sup> Stability and rate predictability are bedrock reasons for the filed rate doctrine and rule against retroactive ratemaking,<sup>71</sup> and waiving the filed rate doctrine by accepting these Trigger Prices would offend both of those guarantees.<sup>72</sup>

**B. In the Alternative, the Commission Should Reject the ORTP Proposals as Unsettling the Reasonable Expectations of Market Participants.**

To reiterate, the Commission should find that the ORTP proposals violate the rule against retroactive ratemaking. Should the Commission find otherwise, it should reject the change based on a balancing of interests as fundamentally unfair, as it has in prior proceedings. Market participants—and the market itself—are jeopardized when fundamental rules change after the FCA process has already begun.

There is ample precedent for such a conclusion. Just last year, the Commission determined that “ISO-NE disrupted settled expectations” in FCA 13 when it “sought to put into effect ... Economic Life Revisions after market participants had relied on the existing FCM rules to determine whether to submit a [Retirement or Permanent] De-List Bid for FCA 13.”<sup>73</sup> The Commission correctly noted that “a market participant who chose not to submit a Retirement De-List Bid in FCA 13 based on its reliance on the then-existing economic life calculation might have,

---

<sup>70</sup> *ISO New England Inc. and New England Power Pool Participants Committee*, 170 FERC ¶ 61,187 at P 17 (2020) (“Economic Life Rehearing Order”).

<sup>71</sup> *See Cent. Off. Tel., Inc.*, 524 U.S. at 222-23; *Consol. Edison*, 347 F.3d at 969.

<sup>72</sup> *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (“In sum, we have found no support for the Commission’s contention that on a finding of sufficient cause, it has the authority . . . to waive the filed rate doctrine”).

<sup>73</sup> Economic Life Rehearing Order, 170 FERC ¶ 61,187 at P 17.

under the Economic Life Revisions, submitted such a bid based on expectations of future FCA clearing prices.”<sup>74</sup> The Commission summarized, “ISO-NE’s action therefore creates uncertainty about the stability of FCM rules during the ongoing FCM processes, which in turn significantly decreases market participants’ confidence in the market.”<sup>75</sup>

This analysis applies squarely here. Trigger prices are a critical rate parameter that suppliers use to decide whether to submit an Exit Bid, and, to a limited extent, the level of that bid. Using the best available data, including the Trigger Prices that are part of the filed rate, suppliers must forecast the capacity price and their revenues based on that price. Because the decision to submit an Exit Bid is permanent and irrevocable, suppliers are functionally forced to make an up-or-down decision based on the best available information: retire or seek capacity revenues at the predicted capacity clearing price. Because of this, changing the rules mid-course would substantially harm individual capacity suppliers and undermine confidence in the market as a whole.

Applying Trigger Prices not revealed prior to the Retirement Deadline would mean that some resources have missed the opportunity to retire, and thus must continue operating for another year. Imposing the new ORTP would upend market participants’ settled expectations, upsetting irrevocable commercial decisions that are made using precise analyses, and some with permanent effect. More broadly, ISO-NE’s and NEPOOL’s filing of revised Trigger Prices after the Retirement Deadline means that the market will retain resources that are inefficient now given those new ORTP price signals—because those participants relied on the existing tariff and

---

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

corresponding market signals—thereby keeping capacity interconnection rights from new, more efficient resources, and potentially leaving resources in the market that may have preferred to exit.<sup>76</sup>

ISO-NE's and NEPOOL's proposals would also fundamentally undermine market participant confidence in the stability of the FCM because it will set an untenable precedent that the FCA rules can be freely changed any time before an auction is conducted. Accepting these ORTP changes for FCA 16 would send a signal to market participants that the Forward Capacity Market rules are fluid, not fixed, a result that would undoubtedly decrease participant and investor confidence in the process.<sup>77</sup> This would be the case despite the fact that a methodical, year-long process of binding deadlines had been observed in the run up to the auction.

Market signals drive market efficiency, including uneconomic resources surrendering their capacity interconnection rights to more efficient resources. With at least three different sets of ORTP under consideration prior to the Retirement Deadline, there was no clear signal and potentially uneconomic resources did not seek retirement and surrender of their interconnections. The Commission here can provide certainty to future auction processes by affirming that the filed rate is the ORTP in the tariff at the time of the Retirement Deadline.

---

<sup>76</sup> See Economic Life Rehearing Order, 170 FERC ¶ 61,187 at P 17. Just last year, in granting ISO-NE's waiver to extend the Retirement Deadline for FCA 15 based on a proposal pending in the stakeholder process, the Commission noted that the extension would "prevent unfair and inefficient market outcomes that could occur if market participants are not allowed to adjust or withdraw their Retirement Bid if ISO-NE makes a non-clerical change." *ISO New England, Inc.*, 170 FERC ¶ 61,188 at P 14.

<sup>77</sup> See Economic Life Rehearing Order, 170 FERC ¶ 61,187 at P 17 (destabilizing "FCM rules during the ongoing FCM processes" would "in turn significantly decrease[] market participants' confidence in the market").

In contrast to the severe harms to individual resources and to the market caused by accepting the new parameters, there would be little hardship in rejecting, without prejudice, the filings for FCA 16. By keeping the existing Tariff language, there would be no need reopen the qualifications process or resettle market outcomes.<sup>78</sup> The Commission can apply recalculated Trigger Prices in FCA 17 or suggest that ISO-NE and NEPOOL resubmit their proposals for consideration in FCA 17 and beyond.<sup>79</sup> The bottom line here is that if the market rules are allowed to change mid-stream without regard for the binding deadlines that have already passed, there is no way to ensure fairness to those who relied on the predecessor rules.

**C. NEPOOL's Proposed Trigger Price for Off-Shore Wind is Unjust, Unreasonable, and Unsupported by the Record.**

In the Jump Ball Filing, NEPOOL has proposed off-shore wind values that deviate significantly from those proposed by ISO-NE and from any reasonable measure of the costs of off-shore wind resources. ISO-NE calculates the off-shore wind ORTP at above the starting price of the auction (expected to be \$11.978/kW-month), meaning that any resource can provide justification of costs lower than the benchmark price and participate in FCA 16. By contrast, NEPOOL has proposed an off-shore wind ORTP of \$0.00/kW-month, which will allow all off-shore wind resources to submit zero price offers in FCA 16 based on a fiction that off-shore wind is cost competitive with other resource technology types.

This fiction arises from NEPOOL's ORTP calculation that has at least three significant deficiencies. *First*, the NEPOOL approach uses an unrealistic capital cost assumption that is based on an inferred-cost model rather than a bottom-up engineering study. As the IMM has found,

---

<sup>78</sup> See *id.* at PP 20-21.

<sup>79</sup> See *id.* (Glick, Comm'r, dissenting at P 3).

NEPOOL's approach, and the ORTP in general, are highly sensitive to the model inputs and introduces significant uncertainty into NEPOOL's capital cost estimate.<sup>80</sup> *Second*, the NEPOOL model is utterly unsuitable for evaluating the realization of tax benefits by a project of the size and scale of the offshore wind representative project. Even using more reasonable assumptions applied to that flawed model shows that the anticipated tax benefits are grossly overstated by NEPOOL. *Third*, NEPOOL proposes to change the tariff to apply a novel extended-horizon timeline, that artificially reduces its proposed ORTP by \$4.242/kW-month. Without the extended-horizon timeline NEPOOL's proposed ORTP is negative \$3.625/kW-month.<sup>81</sup> Our experts' analysis shows that applying a commercially feasible model takes the NEPOOL ORTP from negative \$3.625/kW-month to between \$2.15/kW-month to \$7.92/kW-month.

It is particularly apt to focus on offshore wind projects when analyzing the effects of tax benefits on the ORTP. Not only is the nameplate capacity of the representative project unprecedented for the U.S. renewable energy industry, but the first-of-a-kind nature of off-shore wind creates significant project development risks for these projects. Projects of that size would require a multi-billion dollar investment and would yield a proportionally significant tax benefit. Any rational sponsor of a renewable project of that immense scale and complexity would seek to timely realize the tax benefit and manage its risks by entering into a financing structure fundamentally different than the equity and a first mortgage proposed by NEPOOL.<sup>82</sup> The only structure — and the only one regularly used in the renewable industry — that would permit

---

<sup>80</sup> IMM memo to NEPOOL Markets Committee (Nov. 9, 2020) ("IMM Nov. 9 Memo"), [https://www.isone.com/static-assets/documents/2020/11/a4\\_imm\\_memo\\_re\\_ucs\\_renew\\_offshore\\_wind\\_amendment.pdf](https://www.isone.com/static-assets/documents/2020/11/a4_imm_memo_re_ucs_renew_offshore_wind_amendment.pdf) ("The discounted cash flow model is sensitive to the inputs and, therefore, the inferred capital cost value will be too.").

<sup>81</sup> Joint Letter Attachment N-1b ("Krich Aff.") at 18:9-18; *see also* Krich Aff. at 9:12-14 (explaining that the extended-horizon timeline reduces ISO-NE's proposed off-shore wind ORTP by \$6.84/kW-month).

<sup>82</sup> Joint Affidavit at P 10.



sufficient risk diversification and allow for timely realization of the tax benefits is the partnership flip structure, explained below. While it is demonstrated in the expert affidavit that many, if not all, commercial renewable resources, including smaller scale projects, employ this financing structure, it is most important to evaluate the offshore wind ORTP under a commercially plausible financing structure because its scale and unprecedented nature heightens these risks.

For these reasons and as explained further below, the Commission should reject NEPOOL's proposal as unjust and unreasonable.

### **1. NEPOOL's Inferred Capital Cost Value for Off-Shore Wind is Unreasonably Low.**

The estimate of capital costs is the single most impactful input into the Discounted Cash Flow model for determining the ORTPs. NEPOOL has used a total capital cost estimate for off-shore wind that is just over one-third that of ISO-NE's assumption—\$3,326/kW for NEPOOL compared to \$5,328/kW for ISO-NE. NEPOOL had Daymark conduct a cash-flow analysis to develop its estimate and then attempted to benchmark that inferred capital cost value against other, publicly-available offshore wind capital cost estimates. The Commission must reject these costs estimates as unreasonably low and unrepresentative of the actual costs of a representative off-shore wind facility built in New England.

Unlike ISO-NE, which used a bottom-up engineering-based estimation of the capital costs for off-shore wind, NEPOOL "inferred" the capital costs based on an analysis of recent large-scale wind PPAs in New England and other publicly available information about off-shore wind. A key problem with NEPOOL's inferred capital cost approach is that minor changes in inputs can yield dramatic swings in the resulting capital costs. During the stakeholder process, the IMM noted that a preliminary analysis of the model showed that minor adjustments to inputs could yield dramatic impacts on the output—perhaps "by as much as 45% by making small adjustments in a number of

the input variables to that equation.”<sup>83</sup> These input variables are known only to the project sponsor, yet NEPOOL applies the same assumptions to all the projects that it analyzed. Unlike the IMM, NEPOOL did not perform any sensitivity analysis to characterize the uncertainty in its estimate. Additionally, NEPOOL uses the very same commercially infeasible DCF model to infer capital cost.<sup>84</sup> While on its face NEPOOL’s approach has all the trappings of a legitimate method, under closer scrutiny it is susceptible to the fundamental flaws inherent in the DCF model, and its approach yields an unacceptably wide range of estimated uncertainty that rejection because NEPOOL’s has not meet its burden to show the its offshore wind ORTP is just and reasonable.

Moreover, Mr. Richard D. Homich and Mr. Dennis Moritz examined the sensitivity of the ORTP using a range of assumed costs (i.e., ISO-NE’s capital costs, NEPOOL’s capital costs, and a number in between) and their model using the partnership flip structure, as explained below.<sup>85</sup> They concluded that for each \$69.35 million increase (2.53%) in capital costs the ORTP increases by \$1.00/kW-month.<sup>86</sup> That is, the off-shore wind ORTP is highly sensitive to the capital cost assumption. The great sensitivity of the ORTP to that capital cost estimate makes it all the more so an unreasonable basis for calculating the off-shore wind ORTP.

With regard to NEPOOL’s off-shore wind revenue assumptions, ISO-NE conducted an exhaustive review of the underlying NEPOOL benchmarking analysis—that we need not

---

<sup>83</sup> IMM Nov. 9 Memo at 2.

<sup>84</sup> See NEPOOL Filing, Gilbert Testimony at 5:11-14 (“The underlying structure of my model is the same as the ISO’s model. It solves for a different variable. Specifically, the financial model was developed to calculate the implied capital costs of New England offshore wind projects given a fixed set of assumptions regarding a project’s capacity revenue.”)

<sup>85</sup> Attachment A, Joint Affidavit of Richard D. Homich and Dennis Moritz on Behalf of New England Power Generators Association at P 18 (“Joint Affidavit”).

duplicate—and concludes that NEPOOL relies “greatly, and in some cases exclusively, on global cost data that does not account for the regional differences that determine the development costs for an offshore wind project in New England.”<sup>87</sup> Rather than reflect global data, capital costs for off-shore wind should reflect the characteristics of the location in which the reference project is likely to be sited, consistent with how ISO-NE has formulated its capital cost estimate and, generally, with how Net CONE is calculated. Off-shore wind project costs are driven by individual project considerations, including the water depth, distance to the shore, and the distance to the point of interconnection with the grid.<sup>88</sup> Importantly, NEPOOL’s estimate understates costs by using inferred project costs for facilities that are located near the point of interconnection, within about 30 miles, as is common in Europe and other locations in the U.S.<sup>89</sup> In fact, the Massachusetts lease areas are far from shore—60 miles from the point of interconnection—to meet the requirement that that turbines not be visible from land.<sup>90</sup>

Putting turbines farther out to sea, with greater distances to the point of interconnection and ocean depths, naturally causes costs to increase.<sup>91</sup> This is especially true because undersea cables cannot simply be laid on the seafloor; they must be buried to protect it from storms, marine life, and shipping.<sup>92</sup> The effect of the beyond-visible-range requirement could be to *double* certain costs, like undersea cables, from European analogues.<sup>93</sup>

---

<sup>87</sup> ISO Transmittal Letter at 42; *see id.* at 42-44 (summarizing the disparities in each study put forward by NEPOOL as compared with information specific to New England off-shore wind resources); Powers Aff. at 37-47 (detailing same).

<sup>88</sup> *See, e.g.*, Joint Letter Attachment I-1f (Mott MacDonald Rep’t) at 3, 10

<sup>89</sup> *Id.* at 19.

<sup>90</sup> *Id.* at 10.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 19.

Furthermore, costs have decreased in Europe based on specific expertise and technical support that is only available there.<sup>94</sup> For example, specialized vessels and other construction infrastructure are readily available that can reduce the costs of projects.<sup>95</sup> This is not the case in the U.S., where off-shore wind is still in its infancy. Moreover, the scope of work in some European countries is dramatically narrower than here, as the costs of off-shore substations, submarine export cabling, the landfall transition, and the electrical interconnection are paid by the utility rather than the developer.<sup>96</sup> For these reasons, it is not reasonable to use as the basis for estimates, costs of projects for which there are little or no interconnection costs, such as those in Europe.

## **2. NEPOOL Far Overstates Tax Benefits for Off-Shore Wind.**

In addition to drastically underestimating capital costs of offshore wind, NEPOOL also employs a commercially implausible model that uses a manifestly unreasonable premise to exaggerate the effect of investment tax credits (“ITC”) and other tax benefits. As explained by renewable energy project financing experts, Homich and Moritz, no utility scale renewable projects with similar nameplate capacity are able to benefit from ITC that have used an equity and first mortgage financing structure.<sup>97</sup> The Concentric Energy Advisors, Inc. (“CEA”) Discounted Cash Flow (“DCF”) model used by NEPOOL is premised on the incorrect assumption that the owners of the representative resource will have sufficient ability to use the tax benefits in a timely manner.<sup>98</sup> The NEPOOL model also presumes that the development risks of a project of unprecedented scale and scope are concentrated in a small number of Project Sponsors. This is

---

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 18.

<sup>97</sup> Joint Affidavit at P 10.

<sup>98</sup> While ISO-NE sponsored the CEA DCF model, for ease of reference and because NEPOOL depends upon that model, we refer to the CEA model as NEPOOL’s model and analysis.

wrong. To manage single-project development investment risk (for projects much smaller in practice than the offshore wind project described in the NEPOOL model), the industry practice would be to form a club or syndicate of tax equity investors that pool capital in order to diversify their risk.

The need to diversify the risk and monetize the tax benefits necessitates a partnership flip structure that then invokes the Internal Revenue Code (“IRC”) rules for partnerships not addressed in the NEPOOL model. For the above reasons, the U.S. renewable energy industry relies on third-party sources of institutional capital and partnership flip financing structures as it is otherwise unable to realize the ITC and tax depreciation benefits as soon as the benefits are available and to manage project development risk. These considerations would be especially acute for a multi-billion dollar, first-of-a-kind project such as the representative off-shore wind farm.

Indeed, our expert, Mr. Moritz played a key role in developing the partnership flip structure which is widely adopted in the market today.<sup>99</sup> Under partnership flip financing structures, tax equity investors have collectively contributed approximately \$15 billion of capital annually to finance approximately \$50 billion of renewable energy projects.<sup>100</sup> In its most basic form, this structure allows a Project Sponsor to partner with an investment entity (“Tax Equity Partner”) who has the capacity to use the tax benefits and contribute a significant portion of the capital needed to finance a project. The “flip” refers to the fact that the tax equity ownership share steps down to a minority interest (e.g., 5%) after reaching some specified target of return (e.g., flip yield).<sup>101</sup>

---

<sup>99</sup> *Id.* at P 3.

<sup>100</sup> *Id.* at P 14.

<sup>101</sup> *Id.* at P 12.

The NEPOOL model ignores any partnership structure and the IRC rules, and diversification needs of investors, resulting in a non-viable representation of how tax benefits would be realized by the sponsor of an offshore wind asset. For this reason the Commission should discard any analysis that uses NEPOOL's utterly flawed model.

To estimate a reasonable ORTP for off-shore wind, Homich and Moritz used a commercially plausible model, the partnership flip structure, to determine what the ORTP would be with more reasonable assumptions. First, they corrected for NEPOOL's improper inflation of depreciable basis in NEPOOL's model to determine a baseline comparison – this showed that the ORTP would increase by an additional \$1.58/kW-month. Then, using NEPOOL's assumed capital cost applied in the partnership flip model, the off-shore wind ORTP increases by between \$4.19/kW-month and \$9.95/kW-month.<sup>102</sup> In total, the NEPOOL model underestimates the off-shore wind ORTP by between \$5.77/kW-month to \$11.53/kW-month.<sup>103</sup> The NEPOOL off-shore wind ORTP of negative \$3.625/kW-month, as adjusted, is in the range of \$2.15/kW-month to \$7.92/kW-month.

As an initial matter, NEPOOL's inflation adjustment of the cost of capital overstates the tax benefits and understates the ORTP. NEPOOL uses an inflation adjustment of the weighted average cost of capital that inflates all items of revenue and expense equally. But capital asset tax depreciation should not be inflated as it depends solely on the project cost assumption at commercial operation. Homich and Moritz corrected this error by removing the weighted average cost of capital inflation adjustment from NEPOOL's model and explicitly inflating revenue and

---

<sup>102</sup> *Id.* at PP 15, 31-32.

<sup>103</sup> The ORTP assumes a 20-year rather than a 25-year model and an ORTP of negative \$3.625. Krich Aff. at 18:16.

expenses other than tax depreciation. This results in an increase to the offshore wind ORTP of \$1.58/kW-month.<sup>104</sup>

Second, Homich and Moritz employ their partnership flip model to evaluate the effect of using a proper financing structure, including compliance with IRC rules, for the offshore wind representative project. Where possible, they adopt assumptions that are consistent with NEPOOL's model.<sup>105</sup> By evaluating two scenarios based on different back leverage assumptions,<sup>106</sup> the analysis provides the range of possible *increases* in the offshore wind ORTP from use of a commercially plausible financing structure. Relying on NEPOOL's unfounded capital cost, the results show an increase in the off-shore wind ORTP of between \$4.19/kW-month and \$9.95/kW-month.<sup>107</sup>

As shown in the Joint Affidavit, correction of these flaws results in material changes to the NEPOOL offshore wind ORTP and would be higher yet with a higher assumed capital cost, thus the Commission must reject NEPOOL's proposed offshore wind ORTP as unjust and unreasonable.<sup>108</sup>

### **3. NEPOOL's Extended-Horizon Proposal Should Be Rejected.**

A key input for Trigger Prices is the technology-specific time horizon used for calculating discounted cash flow. The time horizon is assessed by considering (1) the assumed debt

---

<sup>104</sup> *Id.* at PP 19-20.

<sup>105</sup> *Id.* at P 28 (explaining assumptions).

<sup>106</sup> Back-leverage is sponsor-only debt financing based solely on the anticipated cash distributions of the partnership to the sponsor partner (i.e., with no direct claim on project assets).

<sup>107</sup> *Id.* at P 17.

<sup>108</sup> *See NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 110 (D.C. Cir. 2017) ("Section 205 does not allow FERC to make modifications to a proposal that transform the proposal into an entirely new rate of FERC's own making.").

amortization horizon—the debt term; (2) the facility’s expected physical life; and (3) the facility’s expected operating life—the time during which it will remain profitable.<sup>109</sup> ISO-NE’s Tariff sets each of these horizons at 20 years, and used a 20-year horizon for its own ORTP calculations.<sup>110</sup> The 20-year horizon has also been ratified by the Commission in other minimum offer price proceedings,<sup>111</sup> and the Commission should do the same here.

Rather than use the standard 20-year horizon, NEPOOL proposes to amend the Tariff to add a definition for “New Capacity Resource Economic Life.” That is, NEPOOL seeks to replace the 20-year horizon in the current Tariff with the number of years that is:

the lesser of (a) the period of time that a New Capacity Resource of a given technology type or types would reasonably be expected to operate before the resource becomes unprofitable for at least two consecutive years, (b) the expected physical operating life of the resource, or (c) 35 years.<sup>112</sup>

NEPOOL proposes to change the horizon from 20 to 25 years for the offshore wind technology, decreasing ISO-NE’s proposed ORTP by \$6.840/kW-month, from \$17.948/kW-month to \$11.108/kW-month.<sup>113</sup>

As noted above, NEPOOL proposes to apply this Tariff change to FCA 16, even though suppliers made their Exit Bid decisions that depend on ORTPs almost a month ago, without notice that the Tariff specifying the time-horizon for this benchmark price could change. As shown below, NEPOOL’s extended-horizon proposal suffers from significant design flaws, its choice of a 25-year horizon for off-shore wind is unjustified and its proposed Tariff modification—which is

---

<sup>109</sup> Power Aff., 9:16-10:5, 10:11-13, 14:7-11, 15:17-16:1.

<sup>110</sup> *Id.* at 9:11-15, 10:1-5., 10:14-11:1; 14:12-13; 16:2-6.

<sup>111</sup> See *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 at P 290 (2020) (*Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019)).

<sup>112</sup> NEPOOL Transmittal Letter at 12 (citing NEPOOL proposed Marked Tariff § I.2.2.)

<sup>113</sup> Krich Testimony at 17:1-5.



not objectively administrable—uses arbitrary and discretionary measures of a resource type’s economic life.

There are four significant conceptual flaws with NEPOOL’s suggestion for an extended-horizon evaluation. *First*, administering the NEPOOL definition of New Capacity Resource Economic Life would be unduly burdensome and subject to unlimited discretion. To implement NEPOOL’s proposal, ISO-NE must establish by objective measure: (1) the expected physical operating life of each resource type; and (2) the expected period of profitability (i.e., useful life) of each resource type. Without determining each of those periods and comparing those numbers with 35 years, ISO-NE cannot determine which is the lowest number. NEPOOL has failed to follow its own proposed definition here. Its proposed New Capacity Resource Economic Life for the off-shore wind resource type is missing analysis of the expected physical operating life, which its expert admits could be a “potentially shorter period” than the useful life.<sup>114</sup> Moreover, its data on useful life does not purport to examine the period of time the off-shore wind resource type would “reasonably be expected to operate before the resource becomes unprofitable for at least two consecutive years.”<sup>115</sup> In addition, NEPOOL’s expert exercises complete discretion to select 25 years over 30 years as the reasonable measure of the time horizon for off-shore wind.<sup>116</sup> ISO-NE should not be required to attempt to administer a tariff mechanism that NEPOOL itself does not employ in proposing the time-horizons for FCA 16; nor is it acceptable to give ISO-NE the discretion to select whatever number suits it, as NEPOOL’s expert has done here.<sup>117</sup>

---

<sup>114</sup> Krich Aff. at 9:12-14.

<sup>115</sup> See NEPOOL Transmittal Letter at 12

<sup>116</sup> Krich Aff. at 12:2-4.

<sup>117</sup> See *id.* at 10.

*Second*, there is *no* commercial data available showing the physical operating life of off-shore wind resources, and estimating one would be inappropriate for use in developing ORTPs.<sup>118</sup> Indeed, there are only two small off-shore wind facilities operating in U.S. waters.<sup>119</sup> If anything, new technologies, like off-shore wind, are especially ill-suited for a horizon beyond the 20-year default because there are few-to-no examples of resources in the domestic market that have actually reached the end of their physical operating lives. Without adequate data, setting the physical operating life of these resources will be highly speculative and fraught with disagreement. By contrast, a 20-year horizon provides a reasonable outer limit for off-shore wind facilities to operate over without needing significant additional capital investments.

*Third*, NEPOOL's extended-horizon proposal fails to line up with the term of a 20-year PPA.<sup>120</sup> NEPOOL offers no explanation for why it ignores this particularly relevant information in setting the time horizon.

*Fourth*, NEPOOL provides inadequate justification for its choice of a 35-year maximum horizon. Putting aside that 35 years is arbitrary and wholly unsupported, it ignores that capital investment may be necessary to restore the performance levels assumed in the NEPOOL model, particularly past the 20-year horizon. After that point, resources see both declining efficiency and output, and increasing capital, operating, and maintenance expenses. NEPOOL's proposal ignores

---

<sup>118</sup> ISO Transmittal Letter at 24.

<sup>119</sup> Powers Aff. at 14:12-15:2.

<sup>120</sup> Powers Aff. at 10:14-11:14.

this, and treats a unit approaching the end of its physical life as if it is operating the same as it did on day one.

NEPOOL's choice of a 25-year modeling horizon for off-shore wind is also fatally flawed. NEPOOL based its 25-year horizon on a "brief survey of U.S. wind project developers, sponsors, financiers, and consultants," which concluded that 18 of 21 surveyed professionals use between 25 and 30 years as the useful life for *onshore* wind facilities.<sup>121</sup> The differences between the conditions that *onshore* wind facilities and *off-shore* wind facilities operate in are obvious. Despite this, it does not appear that NEPOOL undertook any effort to compare the expected useful life of these technologies, or to show that they are in any way comparable.<sup>122</sup> The Commission also cannot ignore, as noted above, that extending the horizon by five years from the standard 20 years serves to reduce the annual costs that resources must recover through the capacity market, and therefore, the ORTP.<sup>123</sup>

Finally, extending the DCF model to 25 years would exacerbate the harm of the static methodology applied in forecasting energy and ancillary service revenues ("E&AS Revenues") for the off-shore wind ORTP. In support of NEPGA's complaint challenging ISO-NE's application of the Tariff definition of Net CONE, specifically as it applied to ISO-NE's forecast of E&AS

---

<sup>121</sup> Asset Lifetimes for the ORTP Calculation: A Proposed Amendment, slide 6, presented to the NEPOOL Markets Committee on September 8-10, 2020, [https://www.iso-ne.com/static-assets/documents/2020/09/a6\\_a\\_v\\_renew\\_amendment\\_asset\\_lifetime\\_for\\_orpt\\_calculation.pdf](https://www.iso-ne.com/static-assets/documents/2020/09/a6_a_v_renew_amendment_asset_lifetime_for_orpt_calculation.pdf). Benchmarking Anticipated Wind Project Lifetimes: Results from a Survey of U.S. Wind Industry Professionals, Ryan Wiser and Mark Bolinger, Lawrence Berkeley National Laboratory, at (Sept. 2019) ("Berkeley Wind Survey"), [https://eta-publications.lbl.gov/sites/default/files/wind\\_useful\\_life\\_report.pdf](https://eta-publications.lbl.gov/sites/default/files/wind_useful_life_report.pdf).

<sup>122</sup> See Krich Aff. at 10:3-13:2.

<sup>123</sup> Powers Aff. at 13:2-7. NEPOOL also failed to account for declining efficiency and increasing costs that typically occur after 20 years, as discussed above.

Revenues, NEPGA submitted the affidavit of Mr. Robert B. Stoddard.<sup>124</sup> Mr. Stoddard explained that ISO-NE’s current process to calculate energy and ancillary services revenues implicitly assumes that the “resource mix from 2025 to 2044 is unchanged from the average resource mix from 2017 to 2019, minus the resources selected by ISO to withdraw to bring the system into capacity balance.”<sup>125</sup> Mr. Stoddard concluded that these assumptions are unsound in part because New England is at the “beginning of a major transition—led by state policy—away from fossil fuels” for which “the impact on future earnings . . . from this transition to zero-bid intermittent resources will be profound,” and, in part, because the constant-earnings assumption employed by ISO-NE is “fictitious” in “[i]gnoring future LMP declines.”<sup>126</sup> Thus, according to Mr. Stoddard, the Net CONE revenue forecast has “substantial biases.”<sup>127</sup> Mr. Stoddard’s warning applies equally to ORTPs – in that the NEPOOL revenue forecast for off-shore wind resources suffers from the same flaws – and provides an additional basis for the implausibility of a move to a 25-year extended horizon as suggested by NEPOOL here. E&AS revenues that are grossly overstated over a 20-year DCF period are even more so over the 25 years of NEPOOL’s proposal.

For the above reasons, the Commission should reject NEPOOL’s offshore wind ORTP, as well as the NEPOOL’s proposed New Capacity Resource Economic Life definition and any tariff provisions proposed by NEPOOL that rely on that definition.<sup>128</sup>

---

<sup>124</sup> Complaint and Request for Fast-Track Processing of New England Power Generators, Inc., Affidavit of Robert B. Stoddard, Docket No. EL21-26 (Dec. 11, 2020).

<sup>125</sup> Stoddard Aff. at P 53.

<sup>126</sup> *Id.* at PP 8, 58.

<sup>127</sup> *Id.* at P 8.

<sup>128</sup> This includes all of NEPOOL’s modifications proposed to Tariff section III.A.21.2(b) that would require the IMM and project sponsors of new resources to determine both the useful life and the physical operating life of their new resources when NEPOOL has not met that burden here. In addition, these changes to section III.A.21.2(b) are unnecessary as the IMM has discretion to make these decisions per

#### IV. REQUEST FOR REMEDIES

NEPGA supports the current timeline for conducting FCA 16. Our protest here need not delay that auction. We, however, respectfully request that the Commission conduct the auction using the Trigger Prices used in FCA 15 as those were the benchmark prices and the filed rate by which suppliers made their decisions regarding Exit Bids. Doing so will provide regulatory certainty to the entire marketplace in addition to existing suppliers who face substantially changed expectations with regard to the ultimate market clearing price should one of the competing updated Trigger Prices apply. If the Commission finds—contrary to a plain reading of the tariff—that new Trigger Prices are mandatory for FCA 16, the Commission should grant waiver of that requirement to allow the values for FCA 15 to remain.<sup>129</sup>

To implement this request, the Commission, with its power at its zenith to craft remedies, could approve ISO-NE's proposal to become effective for the FCA 17 process, ensuring that the new ORTPs (and other parameters) are known and part of the filed rate prior to the deadlines for Exit Bids and prior to the qualification process. The Commission has the power to suspend the effective date of a filing for up to five months and may do so here. And, there may be other remedies, such as waiver of the effective date, that would allow the ORTPs to take effect for FCA 17.

Another alternative would be for the Commission to reject, without prejudice, ISO-NE's and NEPOOL's proposals and suggest that a new filing be made to apply updated Trigger Prices

---

the current tariff provisions and has the ability to clarify the sources of data that would assist in such decision-making.

<sup>129</sup> See *Indep. Mkt. Monitor for PJM v. PJM Interconnection, LLC*, 174 FERC ¶ 61,212 at P 73 (2021) (noting that “the Commission’s discretion is at its zenith when fashioning remedies” and permitting PJM’s capacity auction to proceed under the current rules in order “not to further delay the upcoming auction while the Commission determines the just and reasonable replacement rate”).

in FCA 17. Given more time and current stakeholder-wide efforts to reform the New England market,<sup>130</sup> it is possible that any filing submitted for effect in FCA 17 would not contain competing proposals. Rather, a new filing may represent a timely new solution to the difficult issues in the New England market. NEPGA is striving to work toward forward-looking market solutions to address the changing resource mix and better align the wholesale markets with state policies. NEPGA would welcome the opportunity to work with all other stakeholders and states to craft a consensus solution to these and other issues that are foundational to the continuation of a reliable, resource adequate, and efficient market.

## **V. CONCLUSION**

NEPGA respectfully requests that the Commission reject, without prejudice, ISO-NE and NEPOOL's proposed ORTPs as having impermissible retroactive effect. If the Commission does not apply the retroactive ratemaking doctrine here, it should nevertheless find that the equitable solution—that is consistent with settled expectations of suppliers—is to hold the sixteenth Forward Capacity Auction with the ORTPs that are in place now, i.e., the ORTPs for FCA 15. Should the Commission decline to do so, it should reject NEPOOL's proposed ORTP for off-shore wind resources and NEPOOL's proposed changes to the Tariff as unjust and unreasonable.

---

<sup>130</sup> See ISO-NE, *New England's Future Grid Initiative Key Project*, <https://www.iso-ne.com/committees/key-projects/new-englands-future-grid-initiative-key-project>.

Dated: April 28, 2021

Respectfully submitted,

Bruce Anderson  
Vice President, Market and Regulatory  
Affairs  
New England Power Generators  
Association, Inc.  
33 Broad Street, 7th Floor  
Boston, MA 02109  
Telephone: 617-902-2347  
banderson@nepga.org

/s/Jennifer Amerkhail  
Jennifer Amerkhail  
Zachary B. Cohen  
Jenner & Block LLP  
1099 New York Ave., NW, Suite 900  
Washington, DC 20002  
Telephone: 202 639-6000  
jamerkhail@jenner.com  
zcohen@jenner.com

**CERTIFICATE OF SERVICE**

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

Dated at Washington, DC, this April 28, 2021.

/s/ Zachary B. Cohen  
Zachary B. Cohen