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	**)**	

MOTION FOR LEAVE TO ANSWER, AND ANSWER OF THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

Pursuant to Section 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, the New England Power Generators Association, Inc. ("NEPGA") submits its Motion for Leave to File, and Answer, to the Answer of the New England Power Pool ("NEPOOL") Participants Committee.[1] On April 7, 2021, ISO New England Inc. ("ISO-NE") and NEPOOL (collectively, the "Joint Filers") proposed competing Offer Review Trigger Price ("ORTP" or "Trigger Price") figures in a single filing ("Jump Ball Filing").

In its Answer, NEPOOL argues that the Commission should reject NEPGA's assertions of the Joint Filers' violation of the filed rate doctrine because they are simply "legal arguments" and the Commission is not "constrained by such principles."[2] Compliance with the filed rate doctrine and the corollary requirement that rates cannot be retroactively changed are foundational requirements under the Federal Power Act that the Commission cannot ignore. 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"). Suppliers lacked legally required notice as to the changed rate as of the Retirement Deadline. Indeed, they still don't know what the final Trigger Prices will be. Neither the ISO-NE

[1] *ISO New England Inc.*, Docket No. ER21-1637-000, Motion for Leave to Answer and Answer of the New England Power Pool Participants Committee (May 13, 2021) ("NEPOOL Answer").

[2] *Id.* at 5-6.

stakeholder process nor the IMM memorandum permitting conditional retirement bids afforded reassurance or certainty about Trigger Prices to suppliers contemplating irrevocable Exit Bids.

If the Commission resolves the many difficult issues raised in the Jump Ball Filing and retroactively alters Trigger Prices, instead of simply using the FCA 15 rates that are currently on file, it will cause irreparable harm to suppliers who did not submit Exit Bids on account of reliance on the filed rate. As explained below, even if those suppliers take all available actions to exit the market to avoid the retroactive Trigger Prices, they will be subject to ongoing costs and risks, and unable to pursue the most cost-efficient unwinding activities for at least a year.

Regarding NEPOOL's off-shore wind Trigger Price proposal and its criticism of NEPGA's expert affidavit, this Answer explains that NEPOOL fails to meet its goal of aligning its off-shore wind Trigger Prices with prevailing market conditions. This is because NEPOOL fails to account for tax consequences consistent with how the renewable industry finances projects for sufficient ability to use the tax benefits in a timely manner. Moreover, NEPOOL's Answer, in attempting to support its extended-horizon framework, only adds fuel to the fire. NEPOOL's reliance on design criteria to show the useful life of a project is unreasonable and speculative and does not support its extended horizon proposal.

NEPGA renews its request that the Commission reject, without prejudice, the ORTP proposals on the grounds that they would retroactively modify the filed rate, and direct ISO-NE to employ in FCA 16 the Trigger Prices in effect at the time of the Exit Bids—namely, the FCA 15 Trigger Prices. In the alternative, the Commission should approve ISO-NE's proposed Trigger Prices for effect in FCA 17. Under no circumstances, however, should the Commission approve NEPOOL's unjust and unreasonable ORTPs.

I. MOTION TO ANSWER

NEPGA respectfully requests that the Commission grant its Motion for Leave and accept this Answer because it provides information that will assist the Commission in evaluating the issues raised by NEPOOL. NEPGA acknowledges that the Commission's regulations generally do not permit responsive pleadings unless otherwise ordered by the decisional authority.[3] The Commission, however, may waive its procedural rules for good cause shown[4] and has done so to allow an otherwise prohibited responsive pleading when it provides the Commission with information that assists in the understanding of the issues or aids in the decision-making process.[5]

In particular, this Answer responds to NEPOOL's assertion that existing capacity suppliers will not be harmed by having to wait a year to retire if the Commission's order here approves either ISO-NE's or NEPOOL's filing. As such, it provides additional information to assist the Commission in acting justly, reasonably, and lawfully to reject, without prejudice, the Joint Filing as an impermissible retroactive rate application.

[3] 18 C.F.R. § 385.213(a)(2).

[4] 18 C.F.R. § 385.101(e).

[5] *See, e.g.*, *Calpine Corp. v. PJM Interconnection, LLC*, 173 FERC ¶ 61,061 at P 9 (2020) (accepting answers to answers that "have provided information that assisted [FERC] in [its] decision-making process"), *order set aside in part by* 174 FERC ¶ 61,109 (2021); *PJM Interconnection, LLC*, 173 FERC ¶ 61,028 at P 29 (2020) (explaining "Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority," and accepting answers to protest and answers "because they have provided information that assisted [the Commission] in [its] decision-making process").

II. ANSWER

A. The filed rate doctrine and rule against retroactive ratemaking forbid applying new Trigger Prices to FCA 16.

1. Market participants were not on notice of the proposed Trigger Prices.

To allow the replacement Trigger Prices to have retroactive effect and to avoid the strictures of the filed rate doctrine, NEPOOL claims that market participants received adequate notice of the revised trigger prices. They did not. With two exceptions irrelevant here, Commission precedent requires notice to come in the form of a rate filing with the Commission.[6] Moreover, a filing like the one here lacks the specificity of notice required by Commission and D.C. Circuit precedent. Sufficient notice was not provided prior to the beginning of the FCA 16 process and the Retirement Deadline; nor can lack of notice be remedied by other later bidding options.

NEPOOL argues, after dedicating more than a page to a timeline of events, that "Market Participants knew or should have known well in advance of the March 12 Deadline that competing ORTP proposals would be filed in a jump ball proceeding."[7] But that is not the standard. General intent to change tariff provisions is insufficient to provide notice under FPA Section 205. "[N]otice of a potential rate adjustment must be provided through the rate filed with the Commission."[8]

There was no action here prior to the Retirement Deadline that would "provide the legally required notice."[9] Like ISO-NE's consideration of replacement Trigger Prices in the stakeholder

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[6] *ISO New England Inc.*, 171 FERC ¶ 61,160, *order on reh'g*, 172 FERC ¶ 61,251 at P 17 (2020), *appeal pending sub nom. Cogentrix Energy Power Mgmt., LLC v. FERC*, D.C. Cir. No. 20-1389 (Oct. 14, 2020).

[7] NEPOOL Answer at 9.

[8] *ISO New England Inc.*, 172 FERC ¶ 61,251 at P 17 ("[S]tatements that are not filed with the Commission do not provide the legally required notice.").

[9] *Id*.

process, the "fact that a public utility is considering Tariff revisions does not, in itself, render the Tariff provisions currently on file and accepted by the Commission 'tentative' or subject to later adjustment."[10] The information and memorandum given to market participants prior to the Retirement Deadline of intent to change Trigger Prices is inadequate, even had that informal notice specifically stated the replacement Trigger Prices (which it did not).[11] The Commission has rejected expressions of intent to file a rate change, such as those made in a stakeholder process, as sufficient notice of the rate change,[12] and should do so here.

Commission precedent provides two exceptions that allow a filing to have retroactive effect, neither of which apply here. A rate adjustment may take effect prior to a section 205 filing when: (1) "parties have notice that a rate is tentative and may be later adjusted with retroactive effect;" or (2) when parties "have agreed to make a rate effective retroactively."[13] It is undisputed the second scenario does not apply; suppliers did not agree to make either set of the proposed Trigger Prices effective retroactively.[14]

Nor was adequate notice given that the existing Trigger Prices were tentative and would be adjusted with retroactive effect. There is no Tariff provision allowing a retroactive filing,[15] no

[10] *Midcontinent Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,020 at P 11 (2017).

[11] *Old Dominion Elec. Coop. v. FERC* ("*ODEC*"), 892 F.3d 1223, 1231-32 (D.C. Cir. 2018) (rejecting website statement as notice of rate change and concluding ratepayers lacked notice where no tariff provision or statement filed with Commission indicated variability).

[12] *Midcontinent Indep. Sys. 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).

[13] *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969-70 (D.C. Cir. 2003).

[14] *See Cal. Indep. Sys. Operator Corp.*, 155 FERC ¶ 61,009 at P 12 (2016) (granting retroactive effect given that the only entity that is responsible for refunds supported the retroactive effect of the rates).

[15] NEPGA Protest at 18-19.

Commission order directing the submission of replacement Trigger Prices,[16] and importantly, no refund obligation set by the Commission to ensure that parties are kept whole once the just and reasonable replacement rate is set.[17] Moreover, ISO-NE's statement in another proceeding did not provide certainty that it would file updated ORTPs at all, much less in time for consideration prior to the Retirement Deadline.[18] At best, ISO-NE's transmittal letter in the Net CONE proceeding "provided notice only of a potential change to be proposed in potential future filings."[19] As the Commission explained recently, that is insufficient for a rate change to be applied retroactively, especially where the costs that suppliers will seek to recover is unknown.[20]

Formula rates fall under the notice exception for tentative rates that can be retroactively implemented. Formula rates allow for the rate to be determined prospectively, but such rates must be predictable.[21] Here, there is no predictability. Some Trigger Prices span the full price spectrum, from allowing any of the resource type as a price-taker to excluding all of the resource type from the auction except those that can demonstrate costs below the auction starting price. Even if Trigger Prices are viewed as inputs to ISO-NE's rate, they are the type of inputs for which FERC

[16] *See Tex. E. Transmission Corp. v. FERC*, 102 F.3d 174, 186 (5th Cir. 1996) (FERC may look for adequate notice from sources, including Commission orders).

[17] *Pepco Energy Servs., Inc. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,051 at P 27 (2009) ("PJM, as well as all other parties, were on notice from the date of the complaint of the possibility that refunds would be owed for 2008-2009 pursuant to the statute.").

[18] *See* NEPOOL Answer at 8 (referencing ISO-NE's December 31, 2020 FPA § 205 filing of FCA 16 parameters); *see also W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 23 (D.C. Cir. 2014) ("[C]harging customers with notice of every statement in every pleading submitted in proceedings to which they are not even parties is a far logical leap from the discrete categories to which the notice exception has generally been limited.").

[19] *ISO New England Inc.*, 172 FERC ¶ 61,251 at P 18 (rejecting, as an impermissible filed rate violation, suppliers' argument that rates should go into effect on the date of ISO-NE's filing).

[20] *Id.* (rejecting argument that Commission's acceptance of an ISO-NE rate schedule that allows for recovery of reliability costs sets the effective date for recovery of those costs).

[21] *Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("The Commission's acceptance of formula rates is premised on the rate design's 'fixed, predictable nature.'").

would not allow retroactive effect. For example, return on common equity ("ROE") is an important input into most formula rates.[22] If ISO-NE and New England Transmission Owners were to file competing ROEs akin to the competing ORTPs in this Jump Ball Filing, the Commission would not allow that input to take effect retroactively, as with other formula rate inputs. Indeed, with competing ROEs, as with competing ORTPs, parties are disadvantaged by uncertainty about the exact rate until the Commission decides between the two (or rejects the filing altogether).

Even if the form of notice here were adequate to support a retroactive rate (which it is not), the content of the notice was patently deficient. Mere knowledge that the Joint Filers would come forward with new Trigger Price proposals wasn't enough, as the method for calculating Trigger Prices is not precise and is subject to varying interpretations—which the Jump Ball Filings aptly show. Allegedly, NEPOOL has applied the same Tariff provisions that ISO-NE applied.[23] Yet NEPOOL's proposed off-shore wind Trigger Price is $0.00/kW-month, while ISO-NE's is above the auction starting price.[24] With this divergence, two months after making irrevocable retirement decisions, suppliers still do not know what the final Trigger Prices will be for FCA 16. The purported notice provided by ISO-NE in the stakeholder process was even less specific than that rejected in *ODEC*, where PJM at least stated precisely what rate it intended to file.[25]

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[22] *Coakley v. Bangor Hydro-Elec. Co.*, 139 FERC ¶ 61,090 at P 2 (2012) ("The New England TOs recover their transmission revenue requirements through formula rates included in the ISO-NE OATT … calculated using a single base ROE").

[23] *See* Tariff Appx. A § III.A.21.1.2(b) and (c).

[24] *See ISO New England Inc.*, Docket No. ER21-1637-000, ISO-NE Transmittal Letter at 4 (Apr. 7, 2021).

[25] *See ODEC*, 892 F.3d at 1229 ("PJM posted a statement on its website that … expressed its intent to file with the Commission 'as soon as practical' a 'retroactive waiver' of the rate cap to compensate those generation capacity resources whose costs for electricity generation had exceeded the Tariff's rate cap."); *see also ISO New England Inc.*, 172 FERC ¶ 61,251 at PP 16-18 (costs are not recoverable until costs are known with certainty).

Allowing Regional Transmission Owners to submit rates after a key auction deadline, for retroactive effect, would violate the purposes of the filed rate doctrine, to promote stability and rate predictability.[26] Fundamental fairness requires that suppliers know with near certainty what cost constraints will apply in the auction process before entering an unchangeable bid to remove a resource from the markets permanently.[27]

For a similar reason, NEPOOL is incorrect that the IMM's memorandum cures the notice problem in a way that allows for retroactive effect of the Trigger Prices.[28] As NEPGA explained in its Protest, although resources could submit bids to apply to three different scenarios, those scenarios (apart from the status quo) were purely hypothetical.[29] That is, suppliers were required to guess for each option because the actual Trigger Price proposals were not known.[30] The memorandum is also no cure for suppliers who, due to this great uncertainty or their reliance on the Trigger Prices in the filed rate, did not submit Exit Bids. As explained below, if the Commission gives retroactive effect in the FCA 16 process to either set of Trigger Prices, suppliers who did not submit Exit Bids on March 12 will be harmed irreparably.

2. The Joint Filers have proposed to apply their Trigger Prices retroactively to the FCA 16 process.

NEPOOL claims that "[t]he rule against retroactive ratemaking [] is not implicated here" because "[t]he FCA 16 ORTPs to be established in this proceeding are to be applied prospectively,

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[26] *Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 222-23 (1998); *Consol. Edison Co. of N.Y. Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

[27] *See ISO New England Inc.*, 172 FERC ¶ 61,251 at P 18 ("the requested effective date of Schedule 17 does not provide notice of the *proposed costs* that [reliability suppliers] will seek to recover") (emphasis added)).

[28] *See* NEPOOL Answer at 10-11.

[29] *See ISO New England Inc.*, Docket No. ER21-1637-000, Protest of the New England Power Generators Association, Inc. at 15 (Apr. 28, 2021) ("NEPGA Protest") (citing IMM Memorandum).

[30] *See id.*

not retroactively."[31] To reach this conclusion, NEPOOL applies far too narrow a view of the effects of market rules.

Market rules are rates that provide critical parameters applicable throughout an auction process.[32] On March 12, 2021, market participants were required to decide whether to submit Exit Bids.[33] Decisions to retire, or not, each carry significant economic consequences. Without certainty as to whether ISO-NE would file to change the Trigger Prices, and what the changes would be, market participants had no reasonable alternative but to rely on the existing filed Tariff to make their Exit Bid decisions. With the Jump Ball Filing, Joint Filers have asked the Commission to change the rules in the middle of the game.[34]

It is no answer for NEPOOL to say that suppliers can avoid harm by submitting static de-list bids in FCA 16.[35] Static de-list bids are not substitutes for Exit Bids and will not alleviate the harm of retroactive application of NEPOOL's proposed Trigger Prices.[36] This is because:

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[31] NEPOOL Answer at 11.

[32] *See N.Y. Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,178 at P 17 & n.13 (2011) (treating market rules as rates). *See also ISO New England, Inc.*, 90 FERC ¶ 61,141 at 61,425 (2000) (stating that market rules are the filed rate).

[33] *See* ISO-NE, *Forward Capacity Auction 16 Schedule – Capacity Commitment Period: 2025-2026*, (revised Mar. 23, 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; 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.").

[34] ISO-NE and NEPOOL had previously assured the Commission 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." *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER19-335, Transmittal Letter, at 4 (Nov. 14, 2018).

[35] NEPOOL Answer at 11-13. As NEPGA explained in its Protest, suppliers are harmed who did not submit an Exit Bid due to reliance on the existing Trigger Prices at the Retirement Deadline. NEPOOL is unresponsive to this harm when it advocates for withdrawal of Exit Bids. NEPOOL Answer at 13.

[36] *See, e.g., Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703 (D.C. Cir. 2010) (tariffs should be interpreted to give effect to all provisions).

(1) there is no guarantee that a static de-list request will be accepted, and at a desirable level; and (2) even if the request is accepted, a resource cannot begin certain unwinding activities until after Forward Capacity Auction 17 is held.

First, there is no assurance that a unit submitting a static de-list bid will be successful, or yield capacity revenue sufficient to offset actual going-forward costs. Under the Tariff, although suppliers can submit static de-list requests to remove resources from the market for one year,[37] those requests are subject to review both by the IMM and the ISO.[38] Specifically, the IMM can deny a static de-list request and mitigate the requested price, which could leave the supplier with a capacity obligation with insufficient revenue to cover the supplier's expected net going forward costs.[39] It may be possible for the resource to unwind this unwanted capacity obligation in a later reconfiguration auction, but there is no guarantee. Moreover, if all suppliers that seek to exit the market given the unreasonable Trigger Prices follow NEPOOL's advice, there is significant risk that the price of the reconfiguration auction will be above the clearing price of the FCA, requiring suppliers to make net payments to shed capacity obligations. Thus, by submitting a static de-list bid, a supplier could be stuck with a capacity supply obligation, the price of which does not reasonably represent its expected capacity costs, and then shed the obligation only by increasing its out-of-pocket costs even more.

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[37] Tariff § III.13.1.2.3.1.1.

[38] *See id.* § III.13.1.2.3.2.1 (IMM Review); *id.* § III.13.2.5.2.5 (ISO Review).

[39] *See id.* § III.13.1.2.3.2.1.1.1. ("The Internal Market Monitor shall review Static De-List Bids … and … shall develop an Internal Market Monitor-accepted Static De-List Bid. … If the de-list bid price(s) submitted by the Lead Market Participant are more than 10% greater than the Internal Market Monitor-accepted de-list bid price(s), the Internal Market Monitor shall calculate an Internal Market Monitor-accepted Static De-List Bid … that is consistent with the sum of the resource's net going forward costs plus reasonable expectations about the resource's Capacity Performance Payments plus reasonable risk premium assumptions plus reasonable opportunity costs.").

In addition, the ISO may reject a static de-list request for reliability reasons.[40] But unlike with Exit Bids,[41] if the ISO rejects a static de-list request for reliability reasons, the supplier has no recourse.[42] It must accept a capacity supply obligation at a clearing price that it would have been able to avoid had the new Trigger Prices not gone into effect retroactively. And NEPOOL glosses over the fact that if the ISO rejects a static de-list bid for reliability reasons, the resulting capacity obligation cannot be unwound in a reconfiguration auction.[43]

Even if a static de-list request is approved by the IMM and ISO, there is still no certainty that the market participant will receive the capacity revenue it requires. For example, suppliers are constrained in the level of their static de-list requests by the prescriptive cost workbook, which may not permit them to offer at a resource's estimate cost of providing capacity.[44] Any variation from the strictures of the cost workbook or the assumptions of the IMM regarding inputs to the workbook may expose suppliers to the litigation expense of a FERC Enforcement investigation or

[40] *Id.* § III.13.2.5.2.5(f) ("Participants that have submitted a Retirement De-List Bid will be notified by ISO New England if their resource is needed for fuel security reliability reasons no later than 90 days after the Existing Capacity Retirement Deadline.").

[41] *Id.* § III.13.1.2.4.1(a) ("A Lead Market Participant may elect to retire the resource, or portion thereof, for which it has submitted a Permanent De-List Bid or Retirement De-List Bid. The capacity associated with a Permanent De-List Bid or Retirement De-List Bid subject to this election will not be subject to reliability review and *will be retired*.") (emphasis added).

[42] *See id.*

[43] *Id.* § 13.2.5.2.5A(e) ("If an Existing Generating Capacity Resource is identified as being needed for fuel security reasons, and the reliability need is not met through a reconfiguration auction or other means, that resource, or portion thereof, as applicable may not participate in Annual Reconfiguration Auctions for the Capacity Commitment Period(s) for which it is needed for fuel security.")

[44] *See* ISO-NE, *Qualification Process for Existing Generators*, https://www.iso-ne.com/markets-operations/markets/forward-capacity-market/fcm-participation-guide/qualification-process-for-existing-generators (last visited May 20, 2021) ("The lead market participant must submit a completed cost workbook and an affidavit executed by a corporate officer attesting to the accuracy of the delist package."); *see also* ISO-NE, *FCM Delisting Participant Training Webinar* (Jan. 20, 2021), https://www.iso-ne.com/static-assets/documents/2021/01/20210120-fcm-delisting.pdf.

worse, even if they ultimately withdraw their static de-list bid.[45] Likewise, it is possible for other parties to protest de-list bids, resulting in costly litigation and lower capacity payments.[46]

Second, a static de-list bid is not a substitute for an existing supplier that would otherwise retire because it cannot begin the most cost-efficient unwinding activities until a year later after its Exit Bid clears in FCA 17. Consider a resource owner who wants to exit the ISO-NE market as soon as possible. If the owner submitted an unconditional retirement bid in FCA-16, on the day the auction is conducted in February 2022, it could unwind any existing capacity obligations in reconfiguration auctions, and then sell its land, dismantle the unit for sale of parts and salvage, or sell its appurtenant facilities (like switchyards). However, suppliers that did not submit an Exit Bid in FCA 16—based on reliance on the existing ORTPs on file with the Commission—have to wait a year to take such actions. This is so even if the owner follows NEPOOL's suggestion and its static de-list bid is accepted. The owner would have to wait a year until its unconditional retirement bid was cleared in FCA 17 to begin what are likely the most profitable wind-up tasks, meanwhile incurring unavoidable costs for a year because it cannot dismantle the resource.[47]

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[45] *See NRG Power Mktg. LLC*, 174 FERC ¶ 61,016 (2021) (imposing penalty because, in part, "Enforcement concluded that NRG misstated (by overstatement) its expectation regarding scarcity hours").

[46] *See, e.g., ISO New England Inc.*, Docket No. ER11-3891, *Motion to Intervene, Protest or, in the Alternative, Request for Evidentiary Hearing of the Vermont Department of Public Service* (Aug. 11, 2011) ("VDPS in particular objects to the Dynamic De-List Bid submitted by Entergy Nuclear Power Marketing [] for the Vermont Yankee Power Station [], which bid was rejected by ISO-NE for reliability reasons.").

[47] *See, e.g.*, ISO-NE Open Access Transmission Tariff § I.3.9.3("Once a demand resource or generating resource has a cleared de-list bid pursuant to Section III of the Tariff it may reduce its capacity consistent with the terms of its de-list bid for all or any part of the Capacity Commitment Period of the approved de-list without further reliability review. However, any proposed physical modification to a de-listed generating facility must comply with the requirements, including the reliability review process."); *see also* ISO-NE, *Generator Asset Retirement Checklist*, https://www.iso-ne.com/static-assets/documents/2016/08/generator_asset_retirement_checklist.pdf (if a retirement bid has not cleared "the generator asset is not eligible for retirement").

One year can cause a substantial decline in the value of any asset, and this is especially true in the rapidly changing generation marketplace. All of this is to show that suppliers in the ISO-NE market face real-world business risks and significant harm that they cannot reasonably manage if the filed rate is changed without proper notice, as the Joint Filers propose to do here.

3. Trigger prices are an important part of ISO-NE's rates and not mere administrative thresholds.

NEPGA explained in its protest that the Trigger Prices are part of the filed rate.[48] ISO-NE asserts that "ORTPs are not rates, and do not factor into the calculation of rates."[49] The Commission should not adopt such a narrow view of what constitutes a rate. Trigger prices are part of ISO-NE's market rules, and market rules are part of ISO-NE's filed rate.[50]

Reducing Trigger Prices to mere "mitigation thresholds," fails to acknowledge the roll of trigger prices in shaping market outcomes. There is no dispute that approval of NEPOOL's proposed $0.00/kW-month Trigger Price for off-shore wind would allow for hundreds of megawatts to be price takers in FCA 16, driving down the auction clearing price. This in turn affects the degree to which an existing resource can expect to be competitive. By contrast, accepting ISO-NE's proposal would all but guarantee that off-shore wind resources would remain out of the market. Trigger Prices are key values on which existing resources reasonably rely to determine likely market outcomes and whether or not to exit given those market outcomes.

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[48] NEPGA Protest at 12.

[49] *ISO New England Inc.*, Docket No. ER21-1637-000, Motion for Leave to Answer and Answer of ISO New England Inc. at 63 ("ISO-NE Answer").

[50] *ISO New England, Inc.*, 90 FERC ¶ 61,141, at 61,425 (stating that the NEPOOL market rules are the filed rate); *Allete, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,142 at P 36 (2007) ("[A]n ISO has the authority, and is required, to correct all prices that do not reflect operation of the ISO's market rules (which are the filed rate)."); *Black Oak Energy, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,261 at P 32 (2008) (noting NYISO's obligation to calculate market prices in accordance with market rules, which are the filed rate).

ISO-NE's answer to NEPOOL's Extended Horizon (also called "Economic Life") proposal confirms that Trigger Prices are rates. Responding to NEPOOL's decision to apply its new Extended Horizon method only to two technology types, ISO-NE argues that "NEPOOL's Economic Life proposal … produces a result inconsistent with the filed rate doctrine."[51] The Extended Horizon, of course, is a component of the Trigger Price calculation. Thus by ISO-NE's own argument, if the definition of Economic Life is part of the filed rate, so are Trigger Prices.

B. NEPOOL's proposed Trigger Prices are unjust and reasonable.

1. Because NEPOOL fails to account for tax consequences, its proposed off-shore wind Trigger Prices do not properly reflect prevailing industry and market conditions.

In its Protest, NEPGA demonstrated that NEPOOL's Trigger Prices rely on a commercially implausible financing structure that significantly exaggerates the effect of investment tax credits and other tax benefits.[52] As Messrs. Homich and Moritz explained in their affidavit, correcting these errors would "increase [] the total NEPOOL offshore wind ORTP to between $2.15/kW-month to $7.92/kW-month."[53]

In its Answer, NEPOOL brushes this aside, claiming that "it has no bearing on the Commission's evaluation of NEPOOL's proposed offshore wind ORTP" because NEPOOL used the ISO's model, which it says is reasonable.[54] But NEPOOL's assertion is belied by Messrs. Moritz' and Homich's observation that they "are not aware of any utility scale renewable projects"

[51] ISO-NE Answer at 54.
[52] NEPGA Protest at 28-31.
[53] *Id.* Attachment A, ¶ 29.
[54] NEPOOL Answer at 21.

using NEPOOL's assumed capital structure.[55] That is especially true where the assumed structure is "unviable" because it ignores key components, like a partnership financing structure, and would be out of compliance with the Internal Revenue Code ("IRC").[56] Because this error serves only to *increase* the applicable Trigger Price, to the extent these errors affect ISO-NE's Trigger Price calculation, the outcome would not change, as ISO-NE has proposed that new off-shore wind resources offer at the starting price of the auction.

Moreover, if "NEPOOL is trying to get the MOPR right" for renewables, as it asserts,[57] it is more than disingenuous to selectively change some assumptions and parts of the ISO-NE model without bringing the entire model in line with "prevailing industry and market conditions."[58] In modifying ISO-NE's model, NEPOOL willfully ignored evidence that was put forward by NEPGA's experts in the stakeholder process regarding inability of project sponsors to fully realize investment tax credit benefits in a timely manner.[59] NEPOOL then refuses to even acknowledge that the unrebutted Homich-Moritz affidavit shows that the financing model NEPOOL uses is not the industry standard for renewable projects.[60] Because NEPOOL ignores the relevant partnership structure and the IRC rules, and diversification needs of investors, its representation of how tax

[55] *See* NEPGA Protest Attachment A, ¶ 10; *see also ISO New England Inc.*, Docket No. ER21-1637-000, Motion for Leave to Answer and Answer of the New England Power Generators Association, Inc. at 4 (May 11, 2021) (pointing out additional deficiencies with NEPOOL's model).

[56] *Id.* ¶ 27.

[57] NEPOOL Answer at 4 (quotations omitted)

[58] *Id.*; *see also id*. at 2, 3, 5, 20 (describing the same).

[59] *See* Advantage for Analysts, *Assessment of ORTP Calculations for Offshore Wind Projects* (Feb. 2021), https://www.iso-ne.com/static-assets/documents/2021/02/a02biii_mc_2021_02_24_nepga_osw_ortp.pdf; Recent reporting shows that the December 2020 change in the investment tax credit lowered the energy price of off-shore wind significantly less than expected with off-shore wind developers unable to meet the declining contract rate required under Massachusetts law. Meyers, Ellen, IHS, *Massachusetts Drops Plan to Lower Price Cap for Offshore Wind* (May 10, 2021).

[60] NEPOOL Answer at 21; *see* NEPGA Protest at 28 & Attachment A ¶ 10.

benefits would be realized by the sponsor of an off-shore wind asset is completely inconsistent with prevailing market conditions.[61]

2. The Commission should reject NEPOOL's Extended Horizon proposal.

The time horizon is a key inputs used to calculate the discounted cash flow.[62] Put simply, because the time horizon defines the period over which costs are spread out, a longer horizon will yield lower annual costs. As NEPGA and other protestors explained, NEPOOL's general extended-horizon framework is fatally flawed for four main reasons: (1) NEPOOL fails to follow its own proposed Tariff change, which is challenging to administer and would provide unlimited discretion; (2) there is no commercial data available to calculate the horizon for certain technologies, like off-shore wind; (3) the proposal is out of sync with the 20-year term of power purchase agreements; and (4) NEPOOL provided no justification for its outer horizon of 35 years.[63] In addition, NEPGA noted that NEPOOL's proposal was especially problematic as applied to off-shore wind, as NEPOOL's analysis was based on *on-shore* wind studies and applied a static methodology for calculating future energy and ancillary services revenues.[64]

In its Answer, NEPOOL hardly addresses any of these arguments. In fact, NEPOOL only responds to bolster the data underlying its 25-year estimate, but in doing so, it proves NEPGA's point. In particular, NEPOOL points to developer's claims that off-shore wind "resources and are 'designed to have a minimum physical operating life of 25 years'" and may last as long as 35 years.[65] But design life and actual useful life are distinct. NEPOOL, to date, has provided no

[61] *See* NEPGA Protest 28-31.
[62] Protest at 31.
[63] *Id.* at 31-34.
[64] *Id.* at 34-36.
[65] NEPOOL Answer at 16-17.

study of how off-shore wind turbines actually performed compared to their design. Without any real-world confirmation, it is unreasonable and speculative to carve out off-shore wind for a longer horizon based solely on design criteria.

III. CONCLUSION

Good cause exists to allow this Answer to the Answer filed by NEPOOL. For the reasons discussed above and in NEPGA's Protest, the Commission should reject, without prejudice, ISO-NE and NEPOOL's proposed ORTPs as having impermissible retroactive effect and thereby upending the settled expectation of suppliers. Should the Commission decline use the ORTPs in effect at the time of the Retirement Deadline (i.e., those from FCA 15), it should reject NEPOOL's proposed ORTP for off-shore wind resources and NEPOOL's proposed changes to the Tariff as unjust, unreasonable, and unduly discriminatory as explained in NEPGA's Protest, this answer, and ISO-NE's Answer.

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 20001
Telephone: 202 639-6000
jamerkhail@jenner.com
zcohen@jenner.com

Attorneys for New England Power Generators Association, Inc.

Dated: May 20, 2021.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Answer and Answer was served this 20th day of May, 2021, upon the official service list maintained by the Secretary in this proceeding.

/s/ Zachary B. Cohen
Zachary B. Cohen