## UNITED STATES OF AMERICA FEDERAL ENERGY REGULATORY COMMISSION

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PETITION OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION FOR APPROVAL OF PROPOSED RELIABILITY STANDARDS EOP-011-3 AND EOP-012-1 AND REQUEST FOR EXPEDITED ACTION

**DOCKET NO. RD23-1-000** 

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

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission")<sup>1</sup> and the Commission's Notice,<sup>2</sup> the New England Power Generators Association, Inc. ("NEPGA")<sup>3</sup> files this Motion to Intervene and Comments on the North American Electric Reliability Corporation's ("NERC") Petition for Approval of Proposed Reliability Standards, specifically proposed Reliability Standard EOP-012-1 applicable to Generator Owners (herein referred to as the "Proposed Standards").<sup>4</sup> NEPGA strongly supports the goals of improving power plant reliability and system performance in the winter months, in particular through competitive market designs. New England has long met its regional energy and reliability needs, although more work is needed to meet the existing and future winter season challenges, which would be best done through the development of wholesale market solutions.

<sup>&</sup>lt;sup>1</sup> 18 C.F.R. § 385.214 (2022).

<sup>&</sup>lt;sup>2</sup> Combined Notice of Filings #3, Docket No. AD23-1 (Nov. 2, 2022); *see also* Notice Granting Extension of Time, Docket No. RD23-1 (No. 29. 2022). NEPGA filed a timely doc-less Motion to Intervene separately on December 7, 2022.

<sup>&</sup>lt;sup>3</sup> The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular NEPGA member.

<sup>&</sup>lt;sup>4</sup> Petition of the North American Electric Reliability Corporation for Approval of Proposed Reliability Standards EOP-011-3 and EOP-012-1 and Request for Expedited Action, at 29 – 50, Exh. A-2, Docket No. RD23-1-000 (filed Oct. 28, 2022) (the "NERC Petition").

NERC naturally plays a critical role in the reliable operation of the bulk power system, and in that role periodically proposes new bulk system standards. When generators must incur the costs of complying with such new standards, cost recovery market designs or mechanisms must be timely developed. The failure to create a timely and adequate cost recovery mechanism violates Federal Power Act Section 219 and risks bulk power system unreliability, inefficient market outcomes, and uneconomic retirements (undercutting, in this case, the very winter reliability improvements the Proposed Standards seek to achieve). For these reasons, NEPGA asks that if the Commission accepts the Proposed Standards that it recognize the Federal Power Act's cost recovery requirement and direct ISO New England to work expeditiously with generating unit owners subject to the Proposed Standards to develop a cost recovery market design or mechanism for effect before the Proposed Standards' effective date. If accepted the Proposed Standards will compel Generator Owners to incur compliance costs as of, or potentially even in advance of the actual effective date (NERC asks for an effective date of 18 months from acceptance). This requires timely and expeditious direction and action by the Commission and ISO New England.

Further, the Proposed Standards are ambiguous and require clarification in that they do not clearly define the basis upon which a Generator Owner may declare a constraint exempting it from the Proposed Standards' equipment freeze protection requirements. The Proposed Standards dictate that each Generator Owner may define such a constraint, a subjective standard that gives neither Generator Owners looking to comply with the standard nor the Commission or NERC, each with authority to enforce compliance, an objective standard upon which any can rely. NEPGA asks that the Commission require that NERC make a compliance filing of the Proposed Standards with direction to resolve these ambiguities.

### I. MOTION TO INTERVENE AND COMMUNICATIONS

NEPGA is the trade association representing competitive power generators in New England. NEPGA's member companies represent approximately 26,000 megawatts, or nearly 90% of the installed capacity in New England. NEPGA's mission is to support competitive wholesale electricity markets in New England. NEPGA believes that open markets guided by stable public policies are the best means to provide reliable and competitively priced electricity for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region. NEPGA's member companies are responsible for generating and supplying electric power for sale within the New England bulk power system. Each NEPGA Member owns generation in New England and thus is potentially subject to the Proposed Standards. This proceeding thus has direct and substantial impacts on NEPGA and its Members, and no other party can adequately represent those interests.

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

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### II. COMMENTS

# A. A MARKET CHANGE OR OTHER COST RECOVERY MECHANISM MUST BY IN EFFECT BY THE PROPOSED STANDARDS EFFECTIVE DATE

The Federal Power Act requires that a Generator Owner subject to a new NERC reliability requirement be permitted to recover the costs of complying with the requirement. Section 219 of the Federal Power Act directs the Commission to "allow[s] recovery of ... all prudently incurred costs necessary to comply with mandatory reliability standards."<sup>5</sup> The Commission's regulations likewise obligate the Commission to "approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to Section 215 of the Federal Power Act."<sup>6</sup> The Commission also recognized these requirements in its Order No. 672 establishing the guidelines by which it will review new NERC reliability standards.<sup>7</sup> Accordingly, in any order accepting the Proposed Standards the Commission should recognize the right to cost recovery in this context and direct ISO New England to work expeditiously with stakeholders to develop a wholesale market design element or, if a market-based solution is not possible, a cost recovery mechanism for effect prior to the effective date of the Proposed Standards. ISO-NE would appear to be a willing partner in this effort.<sup>8</sup>

The timeliness of the necessary cost recovery mechanism is critical to satisfying this right to cost recovery. NERC noted in its Filing that it received comments during the Proposed Standards development process that the first compliance steps, analyses of Cold Weather Critical Components and freeze protection measures, "may take several years to complete and may require

<sup>&</sup>lt;sup>5</sup> 16 U.S.C. § 824s(b)(4)(A) (2022).

<sup>&</sup>lt;sup>6</sup> 18 C.F.R. § 35.35(f) (2022).

<sup>&</sup>lt;sup>7</sup> See also Order No. 672 at P 259 ("[T]he Commission will allow recovery of all costs prudently incurred to comply with the Reliability Standards.").

<sup>&</sup>lt;sup>8</sup> See Comments of the ISO/RTO Council, at 11, Docket No. RD23-1-000 (filed Dec. 8, 2022).

extensive contractor support."<sup>9</sup> Thus, even before a generator "can consider implementation of [freeze protection] measures" it faces a lengthy and costly compliance process. To ensure that subject generators can begin the compliance process with rate recovery certainty, a market design or rate recovery mechanism must be in effect before the Proposed Standards trigger the compliance process.

NERC recognizes certain potential "unintended consequences [of the Proposed Standards] that could themselves have negative impacts on reliability," including "the premature retirement of generating units that are unable to implement corrective actions due to these constraints or the withdrawal of those units from the winter markets."<sup>10</sup> The Commission likewise is well aware of the winter reliability concerns in New England and the need to address them immediately. A Generator Owner subject to the Proposed Standards that cannot recover the costs necessary to comply risks an uneconomic retirement – e.g., due to the undue cost burden imposed on a Generator Owner subject to the Proposed Standards. Something New England cannot afford at this critical time is the loss of resources that economically provide New England winter system reliability, NPCC CEO Charles Dickinson explained that in order to meet reliability needs both now and as more intermittent resources come on the system, RTOs and ISOs must retain those existing resources that efficiently provide the reliability services the RTOs and ISOs rely on for energy, reserve and other needs.<sup>11</sup> If the Commission is to accept these Proposed Standards, it

<sup>&</sup>lt;sup>9</sup> NERC Filing at 52, n. 84, *citing, e.g.* Comments of Draft 1 Postings (Exhibit F of Record of Development item 27) (comments of Duke Energy).

<sup>&</sup>lt;sup>10</sup> NERC Filing at 44.

<sup>&</sup>lt;sup>11</sup> New England Gas-Electric Forum Transcript ("Transcript") at 9 (Docket No. AD22-9-000) (Sept. 8, 2022).

<sup>(&</sup>quot;[T]here's a significant need to make certain we have bridging technologies where we retain the technologies that will help use deal with [the resource mix transition].").

must be done on the basis that Market Participants have the opportunities to recover the costs of compliance in order to avoid adverse consequences such as the uneconomic retirement of generating resources that provide critical winter reliability services efficiently. To not prioritize a cost-recovery mechanism in this case risks undermining the very winter reliability the Proposed Standards seek to improve upon.

NEPGA further asks for urgency in this matter due to the experience of some generators in New England who were not given the opportunity to recover some costs of compliance with the NERC CIP V5 IROL standards.<sup>12</sup> Though the subject generator unit owners can now recover compliance costs, costs incurred prior to the effective date of the cost mechanism were denied.<sup>13</sup> NEPGA urges the Commission to avoid a repeat of this cost recovery gap by directing ISO-NE to develop a cost recovery market design or mechanism for effect prior to the Proposed Standards Effective Date.

# **B.** PROPOSED RELIABILITY STANDARD EOP-012-1 REQUIREMENTS R1 AND R2 ARE AMBIGUOUS AND REQUIRE CLARIFICATION

NERC proposes to require new and existing generators to adopt certain freeze protection measures – for new resources, measures that allow the capability to operate for at least 12 continuous hours at the Extreme Cold Weather Temperature for the unit (assuming a concurrent 20 mph wind speed), and for existing resources those measures that allow for 1 continuous hour of operation at the Extreme Cold Weather Temperature.<sup>14</sup> NEPGA entirely supports measures to

<sup>&</sup>lt;sup>12</sup> *ISO New England Inc., Order Accepting Proposed Rate Schedule*, 171 FERC P 61,160, at PP 21 (2020) (generators subject to the standard incurred substantial unrecovered compliance costs upon Commission finding that generator owner may recover costs incurred only after the effective date of a Section 205 filing cost recovery filing). <sup>13</sup> *Id.; see also Cogentrix Energy Power Mgm't*, *LLC and Vistra Corp. v. FERC*, 24 F.4<sup>th</sup> 677 (D.C. Cir. 2021) (affirming the Commission's application of the filed rate doctrine and the rule against retroactive ratemaking to rate recovery mechanism as not arbitrary or capricious).

<sup>&</sup>lt;sup>14</sup> NERC Petition at 35 - 36.

improve the reliability of the bulk power system, including most acutely in New England during the winter months, and highlights the equally important need for affected generators to be able to recover the costs necessary to comply with such measures. NEPGA Members have been and will continue to be prepared to meet any standards set under Section 215 of the Federal Power Act,<sup>15</sup> Commission and NERC regulations, and ISO-NE's Tariffs. Generator Owners, however, can best comply with standards when they are unambiguous and provide objective criteria upon which compliance is measured. The Proposed Standards fall short in this regard and thus should be clarified by NERC.

In Order No. 672, the Commission explained the legal standard of review under which it will consider whether a reliability standard is just and reasonable, not unduly discriminatory, and in the public interest.<sup>16</sup> Among other "guidelines," the proposed reliability standard "should be clear and unambiguous regarding what is required and who is required to comply."<sup>17</sup> Further, "there should be clear criterion or measure …[and] an objective measure of compliance."<sup>18</sup> The reliability standards must be "clear and unambiguous" with respect to "what is required and who is required and who

Ambiguity and uncertain consequences derive from that part of the Proposed Standards allowing a Generator Owner to "explain in a declaration any technical, commercial, or operational constraints, as defined by the Generator Owner" that preclude it from implementing the required freeze protection measures.<sup>20</sup> This holds true for both new generating units<sup>21</sup> and, it appears,

<sup>&</sup>lt;sup>15</sup> 16 U.S.C. § 824o (2022).

<sup>&</sup>lt;sup>16</sup> Rules In Re Certification of the Electric Reliability Organization, Order No. 672, 114 FERC ¶ 61,104, at P 320 (2006) ("Order No. 672"), order on reh'g, Order No. 672-A, 114 FERC ¶ 61,328 (2006).

<sup>&</sup>lt;sup>17</sup> *Id.* at P 325.

<sup>&</sup>lt;sup>18</sup> *Id.* at P 327.

<sup>&</sup>lt;sup>19</sup> *Id.* at P 325.

<sup>&</sup>lt;sup>20</sup> NERC Petition, Exh. A-2 at 4 (R1).

<sup>&</sup>lt;sup>21</sup> *Id*.

existing resources.<sup>22</sup> These parts of the Proposed Standards are inherently ambiguous in that a "constraint" is not defined but may take on many different definitions given that a constraint is "as defined by [each] Generator Owner." Further, that a generating unit may be exempt from the Proposed Standards if it declares a self-defined constraint renders the outcome of the Proposed Standards largely uncertain. With little to define what is a permissible constraint – other than it must be "technical, commercial, or operational" – the Proposed Standards fail to set an objective standard.<sup>23</sup> An objective standard is necessary in order for it to be enforced "in a consistent and non-preferential manner."<sup>24</sup> Likewise, certainty is critical for compliance in that Generator Owners subject to the Proposed Standards must be given adequate notice of the standard under which a declaration of constraint complies (though as noted above a declaration of constraint itself appears to satisfy the Proposed Standards). NEPGA thus respectfully requests that if the Commission accepts the Proposed Standards that it require<sup>25</sup> NERC to make a compliance filing clarifying the objective standard for a declaration of constraint.

<sup>&</sup>lt;sup>22</sup> The measure that applies to new resources, R1, includes with the test of R1 the option to declare a constraint. The measure that applies to an existing resource, R2, includes no such provision. The allowance for an existing resource to declare a constraint appears to come through the requirement that an existing resource Generator Owner develop a Corrective Action Plan if the generating unit "is not capable of operating for one hour at its Extreme Cold Weather Temperature." A Generator Owner must "implement" each Corrective Plan or explain in a declaration "why corrective actions are not being implemented due to any technical, commercial, or operational constraint." It is in this way, the Proposed Standards read, an existing Generator Owner may be exempt from the Proposed Standards requirement to adopt or modify freeze protections measures in order for the generating unit to operate for one continuous hour. *See* Exh. A-2 at 4-7.

<sup>&</sup>lt;sup>23</sup> This is confirmed by the Compliance Monitoring Process defined in the Proposed Standards which does not include a review of the declaration of a constraint. *See* NERC Petition Exh. A-2 at 7-8.
<sup>24</sup> Order No. 672 at P 327.

<sup>&</sup>lt;sup>25</sup> Id. at P 390 ("We will either accept or remand a proposed Reliability Standard.").

### **III.** CONCLUSION

NEPGA thanks the Commission for its consideration of this Motion to Intervene and Comments, and asks that the Commission direct ISO New England to begin developing a cost recovery design or mechanism for effect prior to the effective date of any standards accepted by the Commission, and to direct NERC to adequately clarify the declaration of constraint as discussed above.

## Respectfully Submitted,

### /s/Bruce Anderson

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# CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments via email upon each person

designated on the official service list compiled by the Secretary in this proceeding.

Dated at Westborough, Massachusetts, December 8, 2022.

/s/ Bruce Anderson

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