

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

ISO-New England Inc.)	
)	Docket No. ER14-1477-000
)	
New England Power Pool)	
Participants Committee)	

**MOTION TO INTERVENE AND LIMITED 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”), 18 C.F.R. §§ 385.211 and 214, and in accordance with the Commission’s Combined Notice of Filings #1, dated March 13, 2014, the New England Power Generators Association, Inc. (“NEPGA”)¹ hereby files this Motion to Intervene and Limited Protest, in response to ISO New England, Inc.’s and the New England Power Pool Participant Committee’s (together, the “Filing Parties”) joint proposal to automatically decrease the Offer Review Trigger Price (“ORTP”) for new On-Shore Wind Resource (“OSWR”) offers into the ISO-NE Forward Capacity Auction (“FCA”) should Congress pass a new Federal tax credit law. The Filing Parties’ proposal unjustly and unreasonably requires the Internal Market Monitor (“IMM”) to decrease the ORTP for OSWRs without NEPOOL stakeholder deliberation of the propriety and accuracy of the IMM’s changes to the ORTP, potentially causing significant harm to FCA outcomes. NEPGA respectfully requests that the Commission deny the Filing Parties’ proposal to create an automatic reduction of the ORTP for OSWRs based on an unknown and at present non-existent change in Federal law.

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

I. Motion to Intervene and Communications

NEPGA is a private, non-profit trade association advocating for the business interests of competitive electric power generators in New England. NEPGA's member companies represent approximately 26,000 megawatts of installed capacity throughout the New England region. NEPGA's mission is to promote sound energy policies which will further economic development, jobs, and balanced environmental policy. NEPGA's member companies are responsible for generating and supplying electric power for sale within the New England bulk power system. As active participants in the ISO-NE capacity and wholesale electricity markets, NEPGA's member companies have substantial and direct interests in the outcome of these proceedings, and those interests cannot be adequately represented by any other party in the proceeding.

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

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II. Background

In 2011, the Commission ordered ISO-NE's Internal Market Monitor ("IMM") to review new resource offers below the competitive cost of new entry for several resource types

to prevent capacity market price suppression caused by uncompetitive offers.² The Commission also ordered the ISO to develop a process for revising the ORTP estimates over time.³ The ISO proposed, and the Commission approved, a process by which the IMM will conduct a full recalculation of the ORTPs no less than once every three years and to apply an “indexing mechanism [to the approved ORTPs] to revise the ORTPs in years for which a full recalculation is not performed.”⁴ The IMM’s ORTP full recalculations are subject to NEPOOL stakeholder review and deliberation, and must be filed with and approved by the Commission prior to the FCA in which the recalculated ORTPs take effect.⁵ Conversely, the IMM’s adjustments to the ORTPs through the indexing mechanism are not subject to NEPOOL stakeholder review; instead, the ISO simply publishes the adjusted ORTPs on its website.⁶

On December 13, 2013, the ISO submitted proposed changes to the ORTPs based on its full recalculation of the ORTPs (“December 13 Filing”), to take effect in the ninth Forward Capacity Auction (“FCA 9”). The Commission rejected the ISO’s proposed ORTP for OSWRs because the ISO based the ORTP, in part, on the assumption that OSWRs offering into FCA 9 will receive revenues from the Federal Production Tax Credit (“PTC”).⁷ The Commission reasoned that because the PTC expired on January 1, 2014, and it is unlikely that an OSWR offering into FCA 9 will have begun construction prior to the expiration of the PTC, it was

² *ISO-New England, Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 at PP 17-20 (2011) (“April 2011 Order”).

³ *Id.*, at P 169.

⁴ *ISO-New England, Inc.*, 146 FERC ¶ 61,084 at P 18 (2014) (“February 2014 Order”).

⁵ ISO-NE Tariff, § III.A.21.1.2(a).

⁶ *Id.*, § III.A.21.2.1(e)(7).

⁷ *ISO-New England, Inc.*, 146 FERC ¶ 61,084 at P 33 (2014).

unjust and unreasonable for the ISO to assume PTC revenues for purposes of calculating an ORTP for OSWRs.⁸

On March 13, 2014, in response to the Commission's February 2014 Order, the Filing Parties filed several proposed changes to the ORTPs and the ISO-NE Tariff provisions governing the IMM and its ORTP indexing mechanism, including their proposal to add a new subsection to the Tariff that provides:

Federal production and/or investment tax credit values in the capital budgeting model for the on-shore wind technology type shall be updated based upon the federal production and/or investment tax credit or similar tax credits then in effect, if applicable, on the condition that the tax credit is applicable to on-shore wind resources that are qualifying as new resources for the corresponding Capacity Commitment Period.⁹

Except with respect to the issues raised in the Limited Protest articulated below, NEPGA supports the ISO's proposed Tariff changes related to the ORTP for OSWRs, specifically the ISO's proposal to set the ORTP at \$10.32/kW-mo given the Commission's finding that the IMM should not include assumed PTC revenues in its capital budgeting model. As NEPGA discussed in its Protest¹⁰ and Answer¹¹ following the ISO's December 13 Filing, the FCA will allow uneconomic new entry to interfere with FCM efficiency if the ORTPs do not reflect actual changes in costs and revenues. Now, pursuant to the Commission's February 2014 Order, ORTP values for OSWRs will be appropriately set at \$10.32/kW-month with the expired PTC revenue removed.

⁸ *Id.*

⁹ Filing Parties Revised Tariff Filing, Section III.A.21.1.2(e)(6), Docket No. ER14-1477 (filed March 13, 2014).

¹⁰ *Motion to Intervene and Protest of the New England Power Generators Association, Inc., and the Electric Power Supply Association*, Docket No. ER14-616-000 (January 8, 2014).

¹¹ *Motion for Leave to Answer and Limited Answer of the New England Power Generators Association, Inc., and the Electric Power Supply Association*, Docket No. ER14-616-000 (February 3, 2014).

An appropriate ORTP value that requires IMM review of offers below a threshold amount is critical to maintaining an efficient and economic capacity market in New England.¹² The ORTPs can be highly sensitive to certain changes in the assumptions underlying the ORTPs, and as a result the Commission approved capacity market rules that provide that the IMM and NEPOOL stakeholders deliberate a full recalculation of ORTPs no less than every three years. The Commission did not contemplate, nor did the ISO ask the Commission to consider, an annual indexing mechanism that would not only adjust the many value inputs into the capital budgeting model, but add entirely new values based on laws not in existence when the ISO and NEPOOL stakeholders most recently engaged in the three-year recalculation process. Administrative ease is served by the annual indexing mechanism, in that the ORTPs are adjusted upward or downward based on indices presented to NEPOOL stakeholders in advance and approved by the Commission. The Filing Parties' proposal ignores this construct and will likely impose an administrative burden on interested parties and the Commission by compelling litigation of potentially significant changes to the economic new offer thresholds the ORTPs are intended to represent. It is in protecting these important principles consistent with the Commission's February 2014 Order that NEPGA files this Limited Protest.

III. Limited Protest

A. Changes to the ORTPs Based on a Potential Future Law Should be Made Through the Three-Year Full Recalculation of ORTPs, Not the Annual Indexing Mechanism

The Filing Parties' proposal requires the IMM to reduce (or potentially eliminate) the ORTP for OSWRs based on several subjective criteria, including whether a tax credit is "similar" to an undefined "production tax credit or investment tax credit," and whether any

¹² See, e.g., February 2014 Order, at P 42 (finding that ORTPs set at the low end of the reasonable range of offers are vital to protecting the FCA against price-suppression).

such credit is “applicable” to an OSWR offering into FCA 10 or FCA 11¹³ as a New Generating Resource. If a renewable energy tax credit law is passed by Congress, the IMM must interpret and apply the law based on these ambiguous standards without any NEPOOL stakeholder input or transparency. The lack of NEPOOL stakeholder review of what would be a new value input into the capital budgeting model for ORTPs would violate the purpose of the indexing mechanism and is inconsistent with the Commission’s reasoning in approving the process by which the IMM fully recalculates at least every three years, and then annually revises, the ORTPs.

The Filing Parties’ proposal is troubling as well in that it compels the IMM to apply a law that could significantly reduce, if not eliminate, the ORTP for an entire category of resources. As occurred most recently in the IMM’s calculation of ORTPs for FCA 9, a tax credit revenue assumption can have an enormous effect on the ORTP for OSWR, *i.e.*, the difference of a \$10.32/kW-mo or \$0/kW-mo ORTP.¹⁴ Particularly when a significant change in the FCA’s ability to screen against uncompetitive new offers, one that could grant an effective MOPR exemption for a category of resources, is at stake, the decisions leading to such a meaningful change should not be made without NEPOOL stakeholder notice and review. The Commission approved the IMM’s calculation of ORTPs in part because stakeholders may evaluate and discuss the ISO’s proposed assumptions underlying the ORTPs prior to the ORTPs taking effect.¹⁵ The Commission reasoned that the ORTP calculation and adjustment processes are just and reasonable because the Tariff “specif[ies] how the trigger prices for each resource

¹³ The ISO must conduct a full recalculation of the ORTPs “no less than every three years,” meaning that the ISO must fully recalculate the ORTPs no later than for effect in FCA 12.

¹⁴ The IMM originally assumed that OSWRs would receive a \$23/MWh PTC credit and proposed an ORTP for OSWRs of \$0/kW-mo. Based on the protests of NEPGA and others, the Commission ordered the IMM to assume no PTC revenues for OSWRs, resulting in an ORTP, with all other variables previously proposed by the IMM held constant, of \$10.32/kW-mo. *See ISO-New England Inc.*, 146 FERC ¶ 61,084, at P 33 (2014).

¹⁵ *ISO New England, Inc.*, 142 FERC ¶ 61,107 at P 42 (2013).

type are developed,” and “stakeholders can debate the assumptions underlying trigger prices *at the next full recalculation.*”¹⁶ Consistent with that reasoning, the Commission recently held that the *pro forma* formula rate protocols in the Midwest Independent System Operator Tariff were unjust and unreasonable because they “inappropriately limit[ed] the ability of certain interested parties to obtain information and participate in review processes.”¹⁷ The Filing Parties’ proposal provides neither transparency nor stakeholder input. The Tariff language proposed by the Filing Parties’ provides no detail on how the IMM may apply any new tax credit law to the ORTP capital budgeting model, nor can it as the terms and conditions of any new tax credit law cannot be known before any such law is passed. The Filing Parties’ proposal also eliminates any stakeholder review of the IMM’s conclusions about the applicability of any new tax credit law to OSWRs seeking to offer into FCA 10 or FCA 11 (*i.e.*, the two auctions prior to the next mandated three-year recalculation) – the IMM would simply report a new ORTP for OSWRs on its website.¹⁸

An automatic reduction in the ORTP for OSWRs based on an unknown and at present non-existent tax credit law differs significantly from the indexing adjustment changes made to each of the values calculated as part of the full recalculation process. The indexing adjustment changes include:

- Cost variables adjusted based on actual cost trends, such as the U.S. Bureau of Labor Producer Price Indices or the Federal Reserve Bank Gross Domestic Product Implicit Price Deflator;¹⁹
- Energy and ancillary services revenue offsets adjusted based on actual natural gas futures and on-peak electricity prices;²⁰ and

¹⁶ *Id.* (emphasis added).

¹⁷ *Midwest Independent Transmission System Operator, Inc., et al.*, 143 FERC ¶ 61,149, at P 34 (2013).

¹⁸ ISO-NE Tariff, § III.A.21.1.2(e)(7).

¹⁹ *Id.*, § III.A.21.1.2(e)(1).

²⁰ *Id.*, § III.A.21.1.2(e)(4).

- Renewable energy credit values adjusted based on the most recent Massachusetts Class 1 REC prices.²¹

Each of these indexing mechanism adjustments share a common characteristic – they each use known values to update cost and revenue values that have been vetted through the NEPOOL stakeholder process and approved by the Commission. The Filing Parties’ seek to add up to three new values to the list of updated variables, each of which are unknown at this time and have not been vetted through the NEPOOL stakeholder process.

The Commission recently held in NYISO that the full recalculation process conducted no less than every three years, not an annual update mechanism, is the “more appropriate forum to consider future developments” and “changed circumstances, such as new regulations.”²² It would just as well be unjust and unreasonable to deny NEPOOL stakeholders the opportunity to review and deliberate the IMM’s intended application of a new tax credit law, whether it be a production tax credit, investment tax credit, or “similar tax credit then in effect.” Any of these types of tax credits, if passed by Congress, could raise significant questions of how to properly apply the new tax credit law to the ORTP for OSWRs in New England, and none therefore should trigger a change to the ORTP without an opportunity for NEPOOL stakeholder review of the IMM’s application of a new law to the ORTPs.

Several bills currently before Congress that would grant production tax credits to renewable energy resources illustrate the potential disagreements that may arise in the application of a new tax credit law to the ORTP for OSWRs offering into FCA 10 or FCA 11 as New Generating Resources. For example, the U.S. Committee on Ways and Means draft Tax Reform Act of 2014 provides for a PTC equal to \$15/MWh beginning in 2014 that would expire

²¹ *Id.*, § III.A.21.1.2(e)(6).

²² *New York Independent System Operator, Inc.*, 146 FERC ¶ 61,043, at P 74 (2014).

in 2025.²³ H.R. 2018 calls for a production tax credit through 2019, and then a gradual phaseout of the credit after several years.²⁴ H.R. 2987 calls for a production tax credit for facilities constructed by 2019 and an annual reduction in the percentage rate of such credit between 2015 and 2019.²⁵ Each of these bills, if law, would require consideration of how to apply a phase-out of the production tax credit over the assumed useful life of an OSWR (assumed to be 20 years for purposes of the IMM's most recent ORTP for OSWRs), or, with respect to H.R. 2987, how to apply a gradual reduction in the tax credit rate from 2015 – 2019. This is not to say that any of these bills may become law, but instead illustrates the potential for any new tax law to raise meaningful questions about how the law should apply to the ORTP for OSWRs, which may differ from the IMM's application of the law through the automatic change the Filing Parties propose.

The Filing Parties' proposal to require the IMM to adjust the ORTP based on a new "investment tax credit" law is perhaps even more problematic. For purposes of its FCA 9 full ORTP recalculation, the IMM assumed that OSWRs do not receive any revenues from the recently expired Investment Tax Credit ("ITC"),²⁶ and with good reason. With respect to wind energy projects, only small wind energy property (defined to include projects with a nameplate capacity of 100 kW) were eligible for the ITC,²⁷ and the IMM used an assumed nameplate capacity of 60 MW for purposes of calculating the ORTP for OSWRs. As a practical matter,

²³ *U.S. House of Representatives Committee on Ways and Means, Tax Reform Act of 2014, Discussion Draft*, § 3206, available at

http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf.

²⁴ *No More Excuses Energy Act of 2013*, H.R. 2081 (113th Congress) (2013-2014), available at

<http://www.gpo.gov/fdsys/pkg/BILLS-113hr2081ih/pdf/BILLS-113hr2081ih.pdf>.

²⁵ *PTC Certainty and Phaseout Act of 2013*, H.R. 2987 (113th Congress) (2013), available at

<http://www.gpo.gov/fdsys/pkg/BILLS-113hr2987ih/pdf/BILLS-113hr2987ih.pdf>.

²⁶ ORTP Capital Budgeting Model for FCA 9 ORTPs, Tab "CONE Calcs", available at http://www.iso-ne.com/committees/comm_wkgrps/mrks comm/mrks/mtrls/2013/oct892013/a06_iso_orpt_analysis_fin al_results_10_02_13.xlsx.

²⁷ 26 U.S.C. § 48(a)(3)(A)(vi) (2014).

the ITC variable should not appear in the capital budgeting model at all, given that it is a credit for which the proxy resource is not eligible. To apply any type of investment tax credit to the ORTPs through the Filing Parties' proposal, therefore, would represent the addition of an entirely new variable never before brought before NEPOOL stakeholders, but instead through the non-transparent annual indexing mechanism. The complexities of the recently-expired ITC further highlight the imprudence of reducing the ORTP for OSWRs based on a new investment tax credit without prior stakeholder review. For example, under the expired ITC the basis of any energy property financed by "subsidized energy financing" is reduced prior to applying the tax credit percentage²⁸ – subsidized energy financing is defined to include "financing provided under a ... State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy."²⁹ The potential application of that provision, as an example, could and should require deliberation among the IMM and NEPOOL stakeholders, and in any event should not be obscured by a lack of transparency under the Filing Parties' proposal.

Finally, it is self-evident that the Filing Parties' proposal to require the IMM to reduce the ORTP for OSWRs based on any law that is "similar" to a production or investment tax is impermissibly vague and gives neither stakeholders nor the Commission any certainty as to what the Filing Parties are asking the Commission to approve. What is certain, is that the Filing Parties are asking the Commission to give the IMM sole authority to first decide whether a new tax law is similar to some amorphous tax credit, and to then decide to what extent the ORTP for OSWRs should be reduced, no matter the substantive magnitude or amount of subjective decisions the IMM must make in applying the new law, all without any transparency. Again,

²⁸ 26 U.S.C. § 48(a)(4)(A)(i)

²⁹ 26 U.S.C. § 48(a)(4)(C).

under the Filing Parties proposal the IMM will simply publish any new ORTP to the ISO's website. If allowed, the Filing Parties' proposal will significantly and adversely affect the balance struck between the three-year recalculation and the annual indexing mechanism, and will deprive NEPOOL stakeholders of the vital ability to have notice of proposed ORTP changes and to participate in the decision-making process for each ORTP.

If the IMM is required to reduce the ORTP for OSWRs and a stakeholder disagrees with the IMM's application of a new tax credit law, the stakeholder will be compelled to file a complaint seeking a change in the ORTPs, an administratively burdensome outcome for the Commission and all interested parties. The process by which the IMM proposes and stakeholders consider full recalculations of the ORTPs is an intensive and time-consuming process, the most recent stakeholder process included six NEPOOL Markets Committee meetings from June – November, 2013, and countless communications between the IMM, its consultants, and various stakeholders. The annual indexing mechanism is intended to update the fully vetted baseline inputs into the capital budgeting model with relative administrative ease. The Filing Parties' proposal could cause litigation that could be avoided by reserving the consideration of any new tax credit law until the full recalculation process.

B. An Individual OSWR Can Use the Asset-Specific Review Process to Offer Below the ORTP Should It Be Economically Justified In Doing So

There is no need to create an automatic reduction in the ORTP for OSWRs based on an unknown variable, because to the extent an OSWR anticipates tax credit revenues during the relevant Capacity Commitment Period, it may input that information into its FCA offer. The ISO Tariff provides that a new capacity resource may submit a request to the IMM to offer into the FCA below the relevant ORTP, and that upon such request the IMM must enter all relevant non-capacity revenue data into the capital budgeting model used to calculate the ORTPs to

determine whether the new resource's requested offer price is economic.³⁰ Accordingly, if Congress passes a new tax credit law, OWSRs offering into the FCA may ask the IMM to consider anticipated revenues from the tax credit in the IMM's asset-specific review process. The absence of an automatic change to the ORTP for OSWRs, therefore, will cause no harm to an individual OSWR or lead to uneconomic FCA outcomes.

Conversely, if the IMM's reduction of the ORTP for OSWRs is based on an erroneous application of a new tax credit law, it could cause a significantly flawed outcome in the FCA with no likely remedy. If the IMM were to reduce the ORTP for OSWRs to a price lower than is economically justified under a new tax credit law, new OSWRs would be permitted to offer into the FCA at prices lower than they should otherwise be permitted to offer. If the newly reduced ORTP were \$0/kW-mo, than all OSWRs would be permitted to offer into the FCA as price-takers even though some, if not all, would otherwise be required to offer at a higher price, causing FCA price-suppression and an unjust and unreasonable market outcome. Once the FCA is complete, however, the only likely remedy would be to re-run the auction with OSWRs offering at the higher, economically justified price, a remedy the Commission has appropriately been reluctant to order in the past.³¹ With new resources having the right to seek an asset-specific offer floor determination, it is unnecessary to compel the IMM to reduce the ORTP should Congress pass a new tax credit law. Instead, a change to the ORTP based on a new tax credit should be made following NEPOOL stakeholder review during the full recalculation of ORTPs.

³⁰ ISO-NE Tariff, § III.A.21.2(b).

³¹ See, e.g., *Astoria Generating Company L.P. and TC Ravenswood, LLC, v. New York Independent System Operator, Inc.*, 140 FERC ¶ 61,189, at P 141 (2011) (declining to order NYISO to re-run a prior capacity auction that included offers below the relevant offer floor because re-running past auctions would "create market uncertainty for market participants and require resolving complex questions.").

IV. CONCLUSION

Wherefore, NEPGA respectfully requests that the Commission grant its motion for leave to intervene in this proceeding, approve the Filing Parties' proposed \$10.32/kW-mo ORTP for OSWRs, and reject the Filing Parties' proposed Tariff language compelling the IMM to reduce the ORTPs for OSWRs based on an unknown potential change in Federal law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the comments by via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts, April 3, 2014.

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