UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO – New England, Inc.	)	**Docket No. ER14-1409-000**

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

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] the New England Power Generators Association, Inc. ("NEPGA")[2] and Electric Power Supply Association ("EPSA") file this joint Motion for Leave to Answer and Answer to the several protests, objections and requests filed in this proceeding on April 14, 2014,[3] in response to the Independent System Operator - New England's ("ISO-NE") FCA 8 Results Filing.[4] Each Protest is either outside of the scope of this proceeding and/or a collateral attack on a prior Commission order and therefore should be denied.

[1] *See* 18 C.F.R. §§ 385.212, 385.213 (2013).
[2] The comments expressed herein represent those of NEPGA and EPSA as organizations, but not necessarily those of any particular member.
[3] *Joint Motion to Intervene, Protest, and Requests for Evidentiary Hearing, Investigation and Waiver of Eastern Massachusetts Consumer-Owned Systems* ("EMCOS Protest"); *Motion for Leave to Intervene and Protest and Objection of Connecticut Municipal Electric Energy Cooperative and New Hampshire Electric Cooperative, Inc.* ("CMEEC Protest"); *Motion to Intervene and Protest of Public Citizen, Inc.* ("PC Protest"); *Motion to Intervene and Protest of George Jepsen, Attorney General for the State of Connecticut* ("CT AG Protest"); *Motion to Intervene and Protest of Utility Workers Union of America Local 464, and Robert Clark* ("UWUA Protest") ; *Joint Motion to Intervene, Motion Requesting Waiver and Objection of Massachusetts Electric Company, Nantucket Electric Company, and Narragansett Electric Company, d/b/a National Grid, Massachusetts Attorney General, Massachusetts Department of Public Utilities, the Northeast Utilities Companies, and the United Illuminating Company* ("National Grid Protest") (collectively, "Protests").
[4] *ISO-New England, Inc., Forward Capacity Auction Results Filing*, Docket No. ER14-1409 (February 28, 2014) ("FCA 8 Results Filing).

I. MOTION FOR LEAVE TO ANSWER

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure generally prohibits answers to protests.[5] The Commission has accepted answers that are otherwise prohibited if they clarify the issues in dispute and assist the Commission in its decision-making.[6] In this Answer, NEPGA and EPSA respond to arguments and requests not previously raised by the Protesters, and explains why those requests should be denied. In addition, this NEPGA and EPSA Answer provides the Commission with information directly relevant to issues raised by the Protesters in their Protests, and therefore will assist the Commission in its decision-making. NEPGA and EPSA respectfully request that the Commission accept this Answer.

II. ANSWER

A. Each Protest Should be Rejected as Outside of the Narrow Scope of ISO-New England's FCA 8 Results Filing

ISO-New England's Tariff requires it to file certain information after each FCA in order for the Commission to determine whether the ISO followed its Tariff in administering the FCA. The ISO is "obligated solely to demonstrate that it conducted the FCA pursuant to its own market rules."[7] The extent of the Commission's review, therefore, is to "evaluate the filing to determine whether ISO-NE conducted the FCA in accordance with its FCM rules."[8] The Commission has repeatedly and consistently rejected protests and comments seeking to negate FCA results when they fail to question whether the ISO conducted the FCA according to the FCM rules, and instead raise other issues not germane to the ISO's Tariff obligations. And

[5] 18 C.F.R. § 385.213(a)(2) (2012).
[6] *See, e.g., Florida Gas Transmission Co., LLC*, 141 FERC ¶ 61,161 at P 7 (2012); *California Indep. Sys. Operator Corp.*, 139 FERC ¶ 61,207 at P 13 (2012).
[7] *ISO-New England Inc.*, 127 FERC ¶ 61,040 at P 28 (2009).
[8] *ISO-New England, Inc.*, 140 FERC ¶ 61,143 at P 23 (2012).

where a party seeks relief by arguing, not that the ISO misapplied a rule, but that the rule is unjust and unreasonable, it is a collateral attack on prior Commission orders. In such a case, "in essence, parties attempt to relitigate the Commission's original acceptance of those markets rules."[9] A party "may disagree with the outcome of the auction … but if so, its recourse is to seek to change the market rules" through the NEPOOL stakeholder process, not through an FCA Results Filing.[10] Except with respect to a cursory argument from one Protester, discussed *infra*, the Protesters do not question the ISO's application of its Tariff and FCM rules in FCA 8. Each of these Protester arguments, therefore, fails to raise an issue properly before the Commission in this proceeding and should be rejected.

The Commission rejected protests and comments to ISO FCA Results Filings, as not responsive to the ISO's administration of the FCM rules, following FCA 1,[11] FCA 2[12], and FCA 3.[13] Conversely, when a party raised a question of whether the ISO administered the FCA according to its Tariff in FCA 4, the Commission considered the question and substantively responded by ordering the ISO to make a compliance filing consistent with its Tariff.[14] As explained by the Commission, where a party "alleges that ISO-NE did not conduct the [ ] FCA in accordance with its market rules…[t]he protest is properly before us."[15] In each Commission

[9] 127 FERC ¶ 61,040 at P 30.
[10] *Id.*
[11] *ISO New England, Inc.*, 123 FERC ¶ 61,290, at P 27 (2008) (rejecting protests challenging the Installed Capacity Requirement and Local Sourcing Requirement because the Commission approved the Local Sourcing Requirement and Installed Capacity Requirement determinations in prior proceedings and they were "implemented by ISO-NE according to the FCM rules."
[12] *ISO New England, Inc.*, 127 FERC ¶ 61,040 at P 28 (2009) (declining to address requests for market rule changes as outside the scope of the proceeding).
[13] *ISO New England, Inc.*, 130 FERC ¶ 61,145 (2010) (rejecting protests because they offered no evidence that ISO-NE failed to conduct the FCA according to the FCM rules).
[14] *ISO New England Inc.*, 133 FERC ¶ 61,230 at PP 28-30 (2010) (ordering compliance filing to comply with market rule that requires the ISO to identify alternatives to resolve a reliability need).
[15] *Id.* at PP 28.

FCA Results Filing order[16] the Commission has repeated the extent of its review, most recently in its order on the FCA 6 Results Filing stating that "ISO-NE is required to file the results of each FCA with the Commission, and we must evaluate the filing to determine whether ISO-NE conducted the FCA in accordance with its FCM rules."[17]

The Protesters collectively and improperly ask the Commission to nullify the FCA 8 results, "rerun" the FCA, approve the FCA results subject to investigation, or "recalculate" the FCA, based on allegations that, even if proven true, are not properly before the Commission in this proceeding. Public Citizens, Inc., the Connecticut Attorney General, the Utility Workers Union of America Local 464, and the Eastern Massachusetts Consumer-Owned System ("EMCOS") each base their requests for relief, at least in part, on allegations of an individual Market Participant exercising "market manipulation" or "market power."[18] CMEEC and NHEC assert that because the ISO is obligated to provide documentation regarding the "competitiveness" of the FCA, they may properly raise issues of market outcomes in this proceeding, without citing to any Commission precedent for their proposed broadening of the Commission's inquiry in a FCA Results Filing proceeding.[19] EMCOS asserts that the Market Rules are unjust and unreasonable.[20] What each of these Protester arguments have in common is that none of them question whether the ISO properly applied the FCM rules. None of these arguments should be considered in this proceeding, and each should therefore be rejected. As the Commission has explained, when a party disagrees with the outcome of any auction based on

[16] For FCA 7, the Commission did not issue an order on the results filing. Instead, the FERC Office of Energy Market Regulation issued a letter accepting for filing the ISO's FCA 7 Results Filing, based on the ISO's explanation that it "conducted the seventh FCA in accordance with its Commission-approved Tariff." *Office of Energy Market Regulation Letter to ISO-New England, Inc.*, Docket No. ER13-992-000 (June 11, 2013).
[17] *ISO-New England, Inc.*, 140 FERC ¶ 61,143 at P 23 (2012).
[18] PC Protest at P 13; CT AG Protest at 5; UWUA Protest at 24; CMEEC Protest at 10; EMCOS Protest at PP 2-3.
[19] CMEEC Protest at 9-10.
[20] EMCOS Protest at P 3.

FCM rules the Commission has found to be just and reasonable, its recourse lies in the NEPOOL stakeholder process not in the rejection of the ISO's Results Filing.[21]

In addition, the Protests, which each assert or imply that an individual Market Participant exercised "market manipulation" or "market power," are effectively complaints, rather than properly tailored protests of the ISO's application of its Tariff. The Protesters should not be permitted to circumvent the rule that would otherwise prohibit them from filing a manipulation complaint.[22] Further, even if the Commission were to allow the Protesters' claims to proceed (whether in this or any other proceeding), they should not be permitted to seek relief that could affect the settled outcome of FCA 8 as there has been no prior notice of such a result.[23]

B. The Protesters Fail to Properly Recount Events Leading Up to FCA 8 and Fail to Understand The Risks Associated With Agreeing to Provide the ISO With an Option at a Cost of Service Agreement Strike Price

To the extent the Commission considers the merits of the Protesters claims, it should not do so under the inaccurate, and unhelpful description of the FCM Rules, important events preceding FCA 8, and the risks inherent in choosing to accept a Cost of Service ("COS")

[21] *ISO-New England, Inc.*, 130 FERC ¶ 61,145 at PP 33-34 (2010) (finding that asserted flaws in the FCA are outside of the scope of the Commission's review, and that parties should instead participate in the NEPOOL stakeholder process if they seek to change the market rules).

[22] *See* Federal Power Act, § 222(b) (no private right of action for manipulation allegations).

[23] *See, e.g.*, 125 FERC ¶ 61,016 at P 38 and n. 73 (2008) (the Commission has described the fundamental notice requirements of the Federal Power Act as follows: "Further, the FPA is generally premised on notice to sellers and customers as to when rates may be subject to change, whether they are rate increases or potential refunds. Section 205 is premised on notice to the public prior to new rates being able to take effect, and section 206 likewise is premised on notice to sellers that rates may be changed and that refunds for rates charged after a certain date may be subjected to refund. Thus, with respect to violations of the FPA section 205 filed rate requirements, public utilities are charged with following Commission rules, regulations and orders and are always "on notice" that they are subject to disgorgement or penalties if they violate the law or their filed rate tariff. While sellers are on notice that they will be subject to penalties for their own violations, they are not on notice (absent a notice of possible prospective refunds under section 206 of the FPA) that they will be subject to penalties for someone else's violations of their filing requirements. In this case, a market-wide refund remedy would only be appropriate, if at all, where all of the sellers had violated the quarterly reporting requirement. To require refunds of a seller that obeyed the orders, rules and regulations and had no notice that sales would be subject to potential refunds runs counter to fundamental notice provisions of the FPA.") (footnotes omitted).

agreement provided by the Protesters. NEPGA offers the following factual account of the several relevant events and decision-points faced by all resources seeking to enter, exit, or remain in the FCA prior to each auction. NEPGA also offers the actual business perspective of a generator presented with the option of seeking a COS agreement when its Non-Price Retirement Request ("NPRR") is rejected for reliability reasons.

1. The FCM Rules Provide Rejected Non-Price Retirement Request Resources With Options That Brayton Point Exercised In Compliance With Those Rules

The Brayton Point Units 1-4 ("Brayton Point") sought to participate in FCA 8 as Existing Generating Resources by filing static de-list bids, which the Internal Market Monitor ("IMM") rejected. The IMM apparently found that Brayton Point's de-list bids were not consistent with its net risk-adjusted going forward costs, applying the equated average unit risk for plants across New England to Brayton Point, a 53-year old coal, oil and gas plant.[24] Following that adverse IMM determination, Brayton Point exercised its right to permanently exit the market by filing an NPRR,[25] *i.e.*, a binding request to retire the resources' capacity.[26] In compliance with the FCM rules, Brayton Point filed the NPRR more than 120 days prior to the commencement of FCA 8.[27] Pursuant to its obligation under the Tariff, the ISO began its evaluation of whether one or more of the Brayton Point Units would be needed for system or local reliability during the 2017-2018 Capacity Commitment Period ("CCP") associated with FCA 8.[28] On December 20, 2013, ISO announced that all four of the Brayton Point Units would be needed for system reliability in the 2017-2018 CCP, with the ISO also noting that Brayton Point Units 2-4 would not be needed for

[24] ISO-NE Tariff, §§ III.13.1.2.3.2.1.2 and III.13.1.4.1.1.
[25] *See ISO New England Inc. Informational Filing for Qualification in the Forward Capacity Market*, at 11-12, Docket No. ER14-329-000 (November 5, 2013).
[26] ISO-NE Tariff, § III.13.2.5.2.5.
[27] ISO-NE Tariff, §§ III.13.1.2.3.1.5.1, III.13.1.2.3.1.5.2.
[28] *Id*. at § III.13.1.2.3.1.5.3.

reliability should expected transmission projects receive the appropriate state approvals.[29] Given the then-lack of schedule commitments on those transmission projects, the ISO rejected the Brayton Point NPRR. Brayton was then faced with the options provided under the Tariff – retire the units despite the ISO's reliability finding,[30] accept the market clearing price, or seek Commission approval for a COS agreement.[31] Brayton Point was required to notify the ISO of its decision within 6 months of the ISO's NPRR rejection determination, *i.e.*, by June 20, 2014.

Though the ISO found that, as of December 20, 2013, Brayton Point would be needed for system reliability in the FCA 8 CCP, an ISO decision to reject an NPRR is not final and does not, by itself, establish that a resource that elects to either accept the market clearing price or seek a COS agreement at the Commission will, in fact, be entitled to any revenues. The ISO may, up until one year prior to the relevant CCP, change its reliability determination and find that a resource whose NPRR the ISO initially rejected for reliability is no longer needed for reliability.[32] A resource's decision to withdraw its NPRR and accept either a market or regulatory price for its capacity must do so with the knowledge that it is not entitled to any revenues until the deadline has passed for the ISO to reverse its reliability determination. Implicit in the resource's decision, therefore, is the risk that incurring the legal and operations and maintenance costs necessary to make the resource available in the relevant CCP (which could include necessary unit upgrades to meet performance obligations, costs necessary to comply with environmental regulations, or other expenditures) will not be recovered if the ISO reverses its reliability determination.

[30] *Id.* at § III.13.2.5.2.5.3.
[31] *Id.* at § III.13.2.5.2.5.1(c)(i).
[32] *Id.* at § III.13.2.5.2.5.1(c)(ii).

When, on January 27, 2014, Brayton Point notified the ISO that it planned to retire prior to the FCA 8 CCP, it did so following regulatory and NEPOOL Reliability Committee announcements that new transmission in New England would very likely negate the ISO's need to retain Brayton Point for reliability during the FCA 8 CCP. On June 21, 2012, National Grid petitioned the Massachusetts Energy Facilities Siting Board ("EFSB") for approval to construct the Massachusetts portion of a 345kV transmission line (the "Interstate Reliability Project").[33] On January 23, 2014, the Presiding Officer issued an "Issues Memorandum"[34] to the EFSB, explaining, in part, that the relevant siting agencies in Connecticut and Rhode Island have already approved their jurisdictional segments of the Interstate Reliability Project, that following evidentiary hearings the EFSB Staff had "not identified any significant environmental issues", and that the Massachusetts Attorney General and ISO-NE each took the position that the Interstate Reliability Project is needed for reliability.[35]

Based on the system modeling the ISO performed in evaluating Brayton Point's NPRR, as presented to the NEPOOL Reliability Committee in December, 2013, the Interstate Reliability Project, once in-service, will eliminate the need to retain at least 3 of the 4 Brayton Point units for reliability. Stated otherwise, the ISO's finding that all four units at Brayton Point are needed for reliability in the 2017-2018 CCP is contingent on certain segments of the Interstate Reliability Project not being in-service prior to June 1, 2017.[36] It therefore appears highly likely that if Brayton Point had elected to accept the FCA 8 clearing price or seek a COS agreement with the Commission, rather than retire, that the ISO would have reversed its reliability decision

[33] *New England Power Company d/b/a National Grid*, EFSB 12-1/DPU 12-46/12-47.
[34] The Presiding Officer issues a memorandum after the evidentiary hearing, and the filing of briefs and rely briefs, summarizing conclusions and issues for EFSB consideration. *See The Energy Facilities Siting Board Handbook*, at 11, *available at :* http://www.mass.gov/eea/docs/dpu/siting/handbook.pdf.
[35] *Id.*, Presiding Officer Issues Memorandum, at 1 (January 23, 2014), *available at* http://www.env.state.ma.us/dpu/docs/siting/efsb12-1/dpu12-46/47/12314efsbmem.pdf
[36] *Id.*

prior to June 1, 2016 (*i.e.*, more than one year prior to the FCA 8 CCP). To the extent there continues to be a reliability need for one Brayton Point unit (Brayton Point 1), that need could very well be satisfied by relatively *de minimis* fixes to the transmission system or through non-transmission solutions, which ultimately could lead the ISO to find that Brayton Point Unit 1 likewise is not needed for reliability in the FCA 8 CCP.[37]

Compounding the difficult nature of its retirement decision, Brayton Point faced significant pressure to make its decision prior to FCA 8. On January 8, 2014, NEPGA filed a complaint with the Commission, due to NEPGA's concerns that the Brayton Point MWs, if administratively offered into FCA 8 as price-taker MWs, would have significant adverse effects on the economic clearing of resources in FCA 8.[38] Because Brayton Point could make its decision (to either retire, accept the FCA 8 clearing price, or seek a COS agreement) after the conclusion of FCA 8, the auction would have cleared its MWs even though there was no certainty that the Brayton Point MWs would actually be available to meet the Installed Capacity Requirement during the CCP. This risk to system adequacy, as well as the price suppressing effect of entering potentially "phantom" MWs in the FCA, compelled NEPGA to ask the Commission to order ISO to not count the Brayton Point MWs towards the Installed Capacity Requirement.[39] In its Answer to NEPGA's Complaint, ISO-NE asked the Commission to order Brayton Point to make a retirement decision prior to FCA 8, specifically by January 29, 2014, to

[37] *Id.* Of note, had Brayton Point elected to not retire Brayton Point 1, based on a belief that the ISO would not have reversed its reliability determination for that unit, and therefore offered Brayton Point 1 into FCA 8, that, by itself, would not have precluded administrative pricing in FCA 8, as the 240 MW Brayton Point Unit 1 capacity is less than the difference between MWs of demand and MWs offered into FCA 8 (*i.e.*, 699 MWs). *See* FCA 8 Results Filing, at p. 4 (reporting that in FCA 8 32,732 MW of capacity from existing resources and 424 MW of capacity offered from New Generating Capacity Resources and New Demand Resources were offered to meet the Net Installed Capacity Requirement of 33,855 MW).

[38] *Complaint Requesting Fast Track Processing and Shortened Comment Period and Request for Tariff Waiver of the New England Power Generators Association, Inc.*, Docket No. EL14-17 (filed January 8, 2014) ("NEPGA Complaint").

[39] *Id.* at 2.

avoid the potential outcomes raised by NEPGA.[40] On January 27, 2014, prior to the Commission issuing an order on NEPGA's Complaint, Brayton Point voluntarily notified the ISO that it would retire Brayton Point Units 1-4 prior to the FCA 8 CCP beginning on June 1, 2017.[41] Soon thereafter, NEPGA withdrew its Complaint.[42]

The ISO held FCA 8 on February 3, 2014, and, as confirmed by ISO-NE in its Results Filing, the clearing prices were determined by the FCM rules the Commission found to be just and reasonable. More specifically, the Insufficient Competition Rule ("IC Rule"), the Capacity Carry Forward Rule ("CCF Rule") and the Capacity Clearing Price Floor Rule ("Price Floor Rule"), determined the prices paid to resources in FCA 8.[43] The IC Rule applied because at the auction starting price the amount of capacity offered from all existing resources was less than the Net Installed Capacity Requirement (the difference defined as "New Capacity Required"), and the amount of capacity offered from new resources was less than twice the amount of New Capacity Required.[44] In the NEMA/Boston capacity zone, the CCF Rule applied because in FCA 7 a resource cleared in an amount in excess of the Local Sourcing Requirement, and did not ration its cleared capacity.[45] The Price Floor Rule applied because, following the application of the IC Rule and CCF Rule, the clearing price in NEMA/Boston was less than the clearing price in Rest-of-Pool.[46] FCA 8 proceeded exactly as it should have according to the FCM rules. The vertical demand curve that applied to FCA 8 necessarily results in relatively high prices when the auction is short, and relatively low prices when the auction is long. With the exception of FCA 7

[40] *Answer of ISO New England Inc.*, Docket No. EL14-17-000 (January 17, 2014).
[41] *Letter From Brayton Point to ISO-New England Re: Non-Price Retirement Election for Brayton Point Units 1, 2, 3 and 4*, Docket No. EL14-17-000 (filed January 27, 2014).
[42] *Notice of Withdrawal of Complaint of the New England Power Generators Association, Inc.*, Docket No. EL14-17-000 (January 28, 2014).
[43] FCA 8 Results Filing, at 4.
[44] ISO Tariff, § III.13.2.8.2.
[45] FCA Results Filing, at 4-5; ISO Tariff, § III.13.2.7.9.1.
[46] ISO Tariff, § III.13.2.7.1.

in the NEMA/Boston capacity zone, the FCA cleared at the price floor in every FCA prior to FCA 8, reflecting, in part, the dynamics of a market long on resources under the vertical demand curve construct. The IC Rule, the CCF Rule, and the Price Floor Rule are some of the several FCM rules the Commission found to be just and reasonable administrative constructs intended to correct for some of the shortcomings of a vertical demand curve. That they applied exactly according to their plain terms is not, and should not be the basis for invalidating the resulting prices.

2. The "Cost of Service Option" Is Risky and Typically Not a Desirable Outcome For Resources Seeking to Exit the Market

Several Protesters assert that resources in Brayton Point's position would necessarily find that seeking a COS agreement with the Commission is an attractive and good business decision, and the failure to petition the Commission for such an agreement is *prima facie* evidence of malevolent motives. The Protesters, however, fail to understand that seeking a COS agreement is not an assurance of compensation, is far from risk-free, and in every material respect a largely undesirable option from a business judgment perspective. Seeking a COS agreement at the Commission introduces major risks to the project owner, with little or no potential upside to justify taking those risks. Those risks include the likelihood that the ISO will withdraw its determination of reliability need (with no obligation to pay the resource the COS agreement rate after withdrawal), the likelihood that a litigated COS filing will actually yield a reasonable return, and the risk of losses during operation even given a continuing reliability need and successful COS outcome. A resource owner must balance these risks against potential revenues that, in the best possible case, may only allow the owner to merely achieve a one year stream of revenue at its cost of service. Rational market players do not take major risks when the risks so far outweigh the potential benefits.

a. Risk of Continued Reliability Need

A Market Participant first faces the risk that the ISO may revoke its finding of reliability need, which in turn would extinguish the need for the COS and entitlement to payment. The ISO's finding of reliability need during the NPRR review process is only preliminary. The ISO may "change its mind" any time between the point of the initial decision (in the case of Brayton Point, December 20, 2013), and one year before the start of the associated Commitment Period (relative to the FCA 8 CCP, May 31, 2016).[47] To the extent the unit owner has spent large amounts of time and money to ensure the unit may be available for the CCP,[48] those costs are all lost if the ISO later decides to revoke the reliability finding. The chance of the ISO revoking its reliability need finding is hardly a remote risk. Several times the ISO has deemed a resource needed for reliability, prior to or during the auction, but later reversed its decision, including:

- In FCA-1, the ISO rejected NRG's delist requests for Norwalk Harbor Units 1 and 2. Fifteen months later, on May 15, 2009, the ISO withdrew the reliability finding and associated CSO from Unit 2.

- In FCA-4, the ISO rejected Entergy's delist request for Vermont Yankee. Twenty-one months after the FCA, on May 10, 2012, the ISO stated that it had resolved the reliability concern, and withdrew the reliability finding and associated CSO.

- In FCA-5, the ISO rejected Entergy's subsequent delist request for Vermont Yankee. Entergy proceeded through a litigated Commission case to resolve the potential payment rate (Docket ER11-3891). Seventeen months later, on November 15, 2012, the ISO withdrew the reliability finding and associated CSO.

- In FCA-3 and FCA-4, Dominion requested to delist Units 1-4 at its Salem Harbor Station. The ISO determined that all four units would be needed in FCA-3, and Units 3 and 4 in FCA-4. Dominion then requested an NPRR for the entire station in FCA-5; the ISO rejected that request on reliability grounds for Units 3 and 4. In a case

[47] ISO-NE Tariff, § III.13.2.5.2.5(d).

[48] There is a very narrow exception for certain capital improvements that can be reimbursed if the reliability finding is revoked. However, the list of non-reimbursable costs at risk is long, and could include physical expenses at the plants, internal engineering and regulatory support, long-term fuel arrangements, labor arrangements, permit extensions and the litigation expense of developing the Cost of Service.

> very similar to what transpired in FCA-8 with the Brayton Point Units, Dominion ultimately elected to retire Units 3 and 4. Notably, the ISO informed the NEPOOL Reliability Committee on January 21, 2014, that transmission upgrades necessary to address the Salem Harbor reliability need would be completed by March 1, 2014, several months before the beginning of the FCA-5 CCP for which Salem Units 3 and 4 had been preliminarily found needed for reliability. Had Dominion accepted the CSO for FCA-5 and litigated the Cost of Service, it seems quite likely that ISO would have withdrawn the reliability finding and associated CSO prior to the relevant CCP.

The history of the ISO changing reliability determinations after the relevant FCA clearly shows that a resource that elects to seek a COS agreement, and incurs costs to meet its performance obligations, is at great risk of never recouping those investments because a reliability determination made in advance of or during an FCA is quite likely to be revoked before any actual compensation changes hands.

It appears that this would have been the likely outcome for Brayton Point had it chosen to seek a COS agreement. The ISO's finding that the Brayton Point Units are needed for reliability in the FCA 8 CCP hinged, in large part, on whether or not the Interstate Reliability Project would be completed by June 1, 2017.[49] NEPOOL stakeholders, however, largely disagreed with the ISO's findings, in part due to beliefs that the ISO's reliability studies were overly conservative and that the relevant section of the Interstate Reliability Project would, in fact, be in-service prior to the FCA 8 CCP.[50] At its December 19, 2013, meeting, the NEPOOL Reliability Committee took an unprecedented step by failing to support the ISO's recommendation that Brayton Point

[49] *See* pp. 6-7, *supra*. While completion of the Interstate Reliability Project would not resolve 100% of the identified overloads with Brayton retired, it addresses the most significant overloads, leaving the need for only a single unit (Brayton Point 1) at the 4-unit station under certain N-1-1 conditions. It also made potential resolution of the limited, remaining reliability concerns significantly easier.

[50] This belief was later supported by the relevant Transmission Owner's 'Certification" that the Interstate Reliability Project would indeed be complete by December 2015, 18 months earlier than the CCP for FCA 8. Memorandum from ISO-NE System Planning to the NEPOOL Reliability Committee (February 13, 2014), *available at:* http://www.iso-ne.com/committees/comm_wkgrps/relblty_comm/relblty/mtrls/2014/feb182014/a_rc_memo_2014_fcm_irp_certification.pdf .

Units 1-4 would be needed for reliability.[51] The RC vote was overwhelmingly opposed to the ISO's findings, with only 22% approving the ISO's proposal.[52] This point should be underscored - a diverse set of market participants overwhelmingly found that based on technical assessments of the New England electricity system the Brayton Point Units would not be needed for reliability in the FCA 8 CCP.

b. Risk of Cost of Service Pricing

That a unit is potentially eligible for COS compensation provides no guarantee that a COS agreement will provide, from an actual business and investment perspective, sufficient compensation to the resource owner. New England has a long history of contested COS cases – dozens of them in the period leading up to the initiation of the FCM. Each case was heavily litigated at the Commission, the costs of which alone could easily reach into the millions and take years to resolve. In the end, not one of those COS petitions resulted in compensation at the levels the owner had originally requested as a compensatory rate for delivering their full COS. Each was settled, or after lengthy hearings, reduced – in many cases significantly. Even if a COS could be successfully litigated to a cost level acceptable to the owner, the financial impetus to do so is extremely limited. At best, a resource may recover its demonstrated costs. The only potential upside is a small return on rate base, which, depending on the age of the resource, may be small or non-existent.

In addition, the ISO's rules force a unit owner to blindly accept the litigated outcome in advance of the Commission's findings in the COS proceeding. In other procedural contexts, a resource owner seeking a COS agreement may accept or decline the litigated outcome. But

[51] *Actions of NEPOOL Reliability Committee – Revision 2, December 19, 2013, Meeting*, at 2, Agenda Item 3.6 (December 23, 2013), *available at*: http://www.iso-ne.com/committees/comm_wkgrps/relblty_comm/relblty/actions/2013/121913_rc_actions_letter_rev_2.pdf.
[52] *Id.*

under the ISO Tariff, the decision to accept a reliability obligation is binding (on the owner) at the time it is made – long before the COS rate is litigated and determined by the Commission. A resource owner faced with the option of retiring the unit or seeking a COS agreement must decide whether it is worth the risk to commit to making a unit available, three to four years in the future, at a compensation rate that is "To Be Determined," which at best will allow the resource to recover its costs and small return on rate base. Few if any Market Participants would be willing to take on this risk.

c. Operational Risk

Even if a resource were to successfully resolve the risk that the reliability determination may be withdrawn, and an acceptable COS rate is established, there remains significant operational risk. Unanticipated costs (*e.g.*, environmental compliance or repairs) to make the unit available for the CCP are at risk. And under ISO-NE's Form of Cost of Service Agreement,[53] the generator is in no way guaranteed it will receive its full COS rate. Compensation is explicitly reduced by the "COS Availability Penalty" if the unit is not available during Shortage Events, and the entire payment can be canceled upon a major failure of the unit.

Taken together, a resource risks: (1) a change in reliability finding before the resource receives any compensation for the necessary costs to satisfy the performance obligation; (2) significant litigation expenses and a binding commitment to accept the rate determined by the Commission; and (3) unanticipated costs and operational risks. In exchange for assuming these risks, a resource, at best, *might* recover its cost of service. It should come as no surprise that, since the beginning of the FCM, no generator has ever agreed to accept this path. As Dominion aptly stated when facing a similar situation at Salem Harbor in FCA-5:

[53] ISO Tariff, Market Rule 1, Appendix I.

> "The current FCM timeline governing Non-Price Retirement Requests requires plant owners like Salem Harbor to make a binding election to serve an identified reliability need long before knowing whether it will recover its costs under a cost-of-service or other arrangement. In this respect, the plant must commit to being available and, thereby, obligated to comply with environmental regulations long before final cost recovery is determined by the Federal Energy Regulatory Commission. In addition, construction lead time requirements dictate that owners must begin spending millions of dollars toward compliance with no assurance that they will recover the costs. Moreover, even if a generator risks taking on the capacity obligation to meet ISO-NE's reliability need, there remains the very real possibility that ISO-NE will determine one year prior to the commitment period that the generator is no longer needed for reliability, potentially stranding any investment made by the resource to meet the need. Regrettably, no company can reasonably elect to travel this route notwithstanding a genuine desire to address a reliability need identified by ISO-NE."[54]

Declining to accept the option to seek a COS agreement at the Commission following the ISO's rejection of an NPRR for reliability reasons seems a rational response to the risks and potential rewards. Generators have long argued that reform of reliability compensation is needed for it to be a viable alternative to retirement or delist under the FCM. [55] That a resource chooses to retire rather than assume the risks associated with a COS agreement request at the Commission should therefore come as no surprise.

[54] *Letter from Katheryn B. Curtis, Vice President, Fossil & Hydro, Dominion Generation to Stephen Rourke, Vice President, ISO-NE System Planning, Re: Non-Price Retirement Election for Salem Harbor Units 3 and 4,* (May 1, 2011) *available at* http://www.iso-ne.com/genrtion_resrcs/reports/non_prc_retremnt_lttrs/2011/salem_retirement_election.pdf.

[55] *See, e.g.*, NEPOOL Participants Committee, April 5, 2013, Agenda Item #5 *available at*: http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/prtcpnts/mtrls/2013/apr52013/npc_20130405_supp_notice.pdf.

C. National Grid, *et al.*, Improperly Seek a Waiver of a Market Rule That the ISO Properly Applied and the Commission Approved as Just and Reasonable

National Grid, *et al*. ("Joint Parties"), are seeking a "waiver"[56] of the Price Floor Rule, a rule that is intended to dictate zonal pricing for import constrained zones when the FCA has erroneously failed to price that capacity according to its value to system adequacy. The Joint Parties assert that they have now "identified" what they assert is a "flaw" in the Price Floor Rule, and ask the Commission to reverse the application of the Price Floor Rule in FCA 8. The Joint Parties, however, had constructive and actual knowledge of the application of the Price Floor Rule well in advance of FCA 8, and therefore cannot excuse their failure to object to the rule prior to FCA 8. The Joint Parties also fail to satisfy the Commission's burden for granting a waiver of a market rule. Accordingly, the Joint Parties' request to reverse the application of the Price Floor Rule should be denied.

As an initial matter, the Joint Parties' request, like the other Protests discussed above, is outside of the scope of this proceeding and should be denied on those grounds. The Joint Parties do not assert that the ISO misapplied the Price Floor Rule, but only that it is unjust and unreasonable. As noted, *supra*, though the Joint Parties "may disagree with the outcome of the auction … its recourse is to seek to change the market rules" through NEPOOL, not through a protest to an FCA Results Filing.[57] To the extent the Commission considers the Joint Parties' request on its merits, it should likewise be denied.

[56] The Joint Parties' "waiver" request is, as explained *infra*, more in the nature of a request to retroactively change a Market Rule found just and reasonable by the Commission. As such, granting the Joint Parties' request would violate the Commission's long-standing principle against retroactive ratemaking. *See, e.g., Maryland Public Service Comm., et al. v. PJM Interconnection, LLC,* 124 FERC ¶ 61,276, at P 24 (2008), *reh'g denied*, 127 FERC ¶ 61,274 (2009) (finding that potential prospective changes to market rules that are alleged to be unjust and unreasonable "does not justify … changing the results of past auctions."); *id.* at P 32 (reasoning that its decision to not change auction-determined rates is consistent with the Federal Power Act and Commission precedent).

[57] 127 FERC ¶ 61,040 at P 30.

In 2006, the Commission approved a settlement agreement filed by ISO-NE ("FCM Settlement Agreement") that established the original FCM rules.[58] In 2007, the Commission approved ISO-NE's Tariff changes as consistent with the FCM Settlement, including the Inadequate Supply Rule ("IS Rule"), the IC Rule, and the Price Floor Rule.[59] The Price Floor Rule in effect for FCA 8 was identical, *verbatim*, to the Price Floor Rule approved by the Commission in 2007.[60] The IC and IS Rules in effect in FCA 8 were different in form from those approved by the Commission in 2007, but the same in substance. Since the beginning of the FCM, therefore, all Market Participants have been on notice of the administrative pricing rules that may trigger in an FCA.

If that were not enough to establish knowledge of the administrative pricing rules in effect for FCA 8, over the course of several Commission proceedings and months of NEPOOL stakeholder meetings, the Joint Parties, like all other participants in the NEPOOL process and in litigation before the Commission, thoroughly vetted and discussed the FCM administrative pricing rules that could be triggered by market conditions in FCA 8. Indeed, the ISO and stakeholders spent an unprecedented amount of time in advance of an FCA in bringing attention to the possible application of certain Market Rules. Included among these many discussions was the mechanics and potential outcomes from the application of the Price Floor Rule. For example, at the November 18, 2013, NEPOOL Markets Committee meeting, ISO-NE discussed the potential operations and market outcomes due to the triggering of the IS and IC Rules, the

[58] *Devon Power LLC.* 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006), *aff'd in relevant part sub nom. Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008).
[59] *ISO New England Inc.*, 119 FERC ¶ 61,045, *on reh'g* 120 FERC ¶ 61,087 (2007); *ISO New England Inc.*, 119 FERC ¶ 61,239 (2007), *reh'g denied*, 122 FERC ¶ 61,171 (2008).
[60] *ISO New England Inc., Filing Containing Revisions to Market Rules Implementing FCM Settlement Agreement*, Part 4 of 6, Docket Nos. ER07-546-000, ER07-547-000 (February 15, 2007).

CCF Rule and the Price Floor Rule.[61] A slide from the ISO's presentation at that meeting describes the exact course of rule application that occurred for NEMA/Boston in FCA 8.[62]

Specifically, the ISO explained that where the IC Rule applies system-wide, and the CCF Rule applies to an import-constrained zone, the CCF Rule in the import-constrained zone will cause the Price Floor Rule to trigger. Putting values to its example, the ISO assumed administrative pricing of $5 under the IC Rule and $10 under the CCF Rule, and a clearing price of $12 in both Rest-of-Pool and in the import-constrained zone. The ISO explained that the IC Rule first reduces the payment to existing resources in Rest of System to $5, but the application of the CCF Rule and Price Floor Rule cause all resources, both existing and new, in the import-constrained zone to receive $12. This is exactly how the rule is intended to operate, and is how it did in fact operate in FCA 8. The ISO clearly and thoroughly explained the application of those rules *three months in advance of the auction*, and none of the Joint Parties sought to change the rule or brought a complaint to the Commission prior to FCA 8. NEPGA, conversely, identified an administrative pricing rule issue and filed an expedited complaint prior to FCA 8.[63] While the issues associated with that complaint are not at issue in this proceeding, NEPGA demonstrated that for issues readily known before an auction (like those raised by the Joint Parties) the appropriate forum for such concerns is through the NEPOOL participant processes followed by a filing and/or complaint at the Commission. Even if there were merit to the Joint Parties' complaint filed as a waiver request, the Joint Parties should not be excused from their failure to do so prior to FCA 8.

[61] ISO-NE Presentation, *Administrative Pricing Rules for Forward Capacity Auction #8*, *available at*: http://www.iso-ne.com/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2013/nov182013/index.html.
[62] *Id*. at 10.
[63] *See* NEPGA Complaint, n. 38, *supra*.

In any event, the Joint Parties' fail to satisfy their burden to justify a waiver of a market rule. The Commission has granted a waiver in limited circumstances when a party demonstrated that: (1) an underlying error was made in good faith; (2) the waiver was of limited scope; (3) a concrete problem required a remedy; and (4) the waiver did not have undesirable consequences, such as harming third parties."[64]

First, the Joint Parties fail to assert an error made in good faith consistent with facts upon which the Commission has granted a waiver, which include, for example:

- A resource failed to submit a deposit to ISO-NE to participate in the FCA by the deposit deadline when the resource's bank failed to make a timely deposit without the resource's knowledge;[65]

- CAISO and a utility scheduling coordinator inadvertently failed to convert load data from kWh to MWh, resulting in an overcharge of $30 million;[66] and

- PJM Interconnection temporarily suspended payment obligations until it corrected coding and billing errors.[67]

Unlike the errors the Commission found compelling in those cases, the Joint Parties' seek to reverse the application of a Market Rule that the Commission has found to be just and reasonable, that the ISO unquestionably applied according to its plain terms, and that resulted in pricing that every Market Participant knew well in advance of FCA 8 could occur. There simply is no error for the Commission to remedy. In addition, the Joint Parties fail to establish that their waiver request will be of limited scope and will not adversely affect any Market Participants. If granted by the Commission, all existing resources in NEMA/ Boston would have their capacity revenues significantly reduced, causing significant harm to those parties that relied on the proper

[64] *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225, at P 28 (2007).
[65] *Waterbury Generation, LLC, Invenergy Thermal LLC, v. ISO New England., Inc.*, 120 FERC ¶ 61,007 at PP 10, 30 (2007).
[66] *California Independent System Operator Corporation*, 132 FERC ¶ 61,004 at PP 2-4 (2010).
[67] *PJM Interconnection LLC*, 137 FERC ¶ 61,184 at PP 2-7 (2011).

application of the Price Floor Rule by offering into FCA 8. To, after the FCA, reduce the revenues those resources are entitled to under the Tariff would have a significantly adverse affect not only on those resources, but on confidence in the FCM generally that Market Participants can rely on the application of the FCM rules as written and approved by the Commission.

D. The ISO Properly Applied the Market Rule Governing Import-Constrained Zone Pricing

EMCOS alleges that the ISO "misappli[ed]"[68] its Tariff, by failing to properly apply the FCM rules governing the price for resources that clear the FCA in an import-constrained capacity zone, *i.e.*, the Price Floor Rule.[69] EMCOS appears to imply that the ISO exercised some amount of discretion in applying these rules, suggesting that the ISO felt bound to apply the rules "notwithstanding the absence of any justification for the application of multiple default rules to the same price."[70] NEPGA and EPSA respond to EMCOS' allegation only because it represents a *prima facie* argument properly before the Commission in this proceeding, *i.e.*, a question of the ISO properly applying its Tariff. EMCOS, however, provides no support for its blanket assertion that the ISO in some manner improperly applied its Tariff in FCA 8 (which is particularly noteworthy given the ISO's thorough explanation of the application of these rules in November 2013, as discussed *supra*), and fails to provide a contrary reading of the Tariff that, in its view, may be the proper reading of the Tariff language. EMCOS' assertion that the ISO failed to apply its Tariff properly should therefore be rejected.

[68] EMCOS Protest at 11.
[69] *Id.* at 28.
[70] *Id.* at 29.

III. Conclusion

NEPGA and EPSA respectfully request that the Commission grant this Motion to Answer and adopt NEPGA's and EPSA's recommendations herein, and accept ISO-NE's FCA 8 Results Filing unconditionally.

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 29, 2014.

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