

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators  
Association, Inc.

v.

ISO New England Inc.

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Docket No. EL13-66-001

*THE NEW ENGLAND POWER GENERATORS ASSOCIATION'S  
REQUEST FOR CLARIFICATION AND REHEARING*

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*THE NEW ENGLAND POWER GENERATORS ASSOCIATION’S  
REQUEST FOR CLARIFICATION AND REHEARING*

The New England Power Generators Association (“NEPGA”) hereby requests clarification and rehearing of the Commission’s Order on its complaint regarding ISO-NE’s new interpretation of the Tariff that gas-fired capacity resources must always have fuel or be in violation of the Tariff.<sup>1</sup> The Commission ruled that the ISO-NE “Tariff imposes a strict performance obligation on capacity resources and that capacity resources may not take economic outages” but that “a demonstrated inability to obtain natural gas or transportation may legitimately affect whether a resource is physically available.”<sup>2</sup> It ordered ISO-NE to submit an informational filing to “provide a written explanation regarding factors the Internal Market Monitor (“IMM”) typically expects to examine” to determine “whether a particular resource has demonstrated that it was unable to procure fuel in order to satisfy its performance obligations.”<sup>3</sup>

We seek clarification and rehearing on the following issues: *First*, the Commission correctly held that “[i]f a capacity resource cannot procure fuel or transportation in real time in order to run at dispatch levels beyond its day-ahead commitment (or when not scheduled in the day-ahead market), then the resource is not physically available to perform for a reason beyond

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<sup>1</sup> *New England Power Generators Ass’n, Inc. v. ISO New England Inc.*, 144 FERC ¶ 61,157 (2013) (“Order”).

<sup>2</sup> *Id.* at P 1.

<sup>3</sup> *Id.* at P 62.

the resource's control for those additional hours and/or incremental MWs."<sup>4</sup> A resource must have fuel arrangements in place in order to meet its day-ahead obligations, but when ISO-NE has directed a capacity resource to run at dispatch levels beyond its day-ahead commitment (or to run when it was not scheduled in the day-ahead energy market), the Commission's finding presupposes that a capacity resource may prudently wait until after it receives a dispatch instruction beyond its day-ahead commitment to procure at least some portion of its fuel. A resource may not take an economic outage in real time (*i.e.*, refuse to buy available gas because it is too expensive), but may rely upon standard intra-day measures to procure fuel in response to an increased dispatch request.

ISO-NE, however, contrary to this plain reading of the Order, has indicated that it will continue to take the position that a capacity resource must ensure that it will have fuel to cover any potential real-time dispatch instruction up to its Capacity Supply Obligation. Under ISO-NE's interpretation, for example, if a capacity resource procured sufficient fuel to satisfy its day-ahead market schedule, but received a subsequent request for increased generation and then was unable to procure enough fuel on an intra-day basis to operate according to the new request due to an inability to get fuel or the transportation to deliver fuel to the generator, it may be in violation of the Tariff. As we previously demonstrated, this strained interpretation is impossible to meet and the practical effect of it would be to overwhelm existing gas infrastructure.

The Commission required ISO-NE to establish the factors that it will take into account to determine whether a resource is physically unavailable, but the Commission should clarify that when ISO-NE increases a resource's real-time dispatch instructions above its day-ahead energy market schedule, it is consistent with the Tariff's requirements for the resource to do everything

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<sup>4</sup> *Id.* at P 56.

within its control on an intra-day basis to procure the additional fuel required to satisfy that incremental commitment. Capacity resources thus are not required under the Tariff to pre-arrange fuel procurement services to satisfy incremental dispatches that occur if and when real-time dispatches exceed day-ahead energy market schedules.

*Second*, the Commission erred in ordering ISO-NE to submit “factors” to consider whether or not a generator will be excused for being unable to obtain fuel in an informational filing rather than in a Federal Power Act section 205 application. The Commission erred in rejecting the argument that the Good Utility Practice standard applies to fuel procurement, and it then never identified what standard should apply in its place.<sup>5</sup> Absent any other applicable Tariff standard, the factors identified by ISO-NE in its informational filing will be a critical part of the market design and should be approved under section 205. As these factors will affect jurisdictional rates, as well as being new and certain to be controversial, they should be subject to Commission approval after the parties’ full statutory exercise of rights for notice and to comment.

The clarification that we seek—that capacity resources are not required to procure all potential incremental real-time fuel needs in advance—likely will affect the factors that ISO-NE files. Regardless, the Commission cannot defer to ISO-NE to set these standards, but must approve them under the Federal Power Act.

*Third*, the Commission correctly held that “the Tariff has not allowed appropriate cost-recovery for fulfilling a Capacity Supply Obligation in all circumstances,” but then erred by not providing a remedy.<sup>6</sup> The Commission acknowledged that “*one aspect* of this issue” was being addressed in a contemporaneous proceeding,<sup>7</sup> but many other fuel-procurement costs remain

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<sup>5</sup> *Id.* at PP 53-54.

<sup>6</sup> *Id.* at P 59.

<sup>7</sup> *Id.* (emphasis added).

unrecoverable under the Tariff. It is unjust and unreasonable to impose obligations upon capacity resources without any ability to recover the costs associated with those obligations. To the extent the clarification requested above is not granted, there will be additional costs with no reasonable opportunity for recovery.

### *BACKGROUND*

As the Commission is well aware, growing reliance on natural gas-fired generation in the Northeast and uncoordinated gas and electric markets have created unease for both those who operate the grid and those who supply its electricity. No one disagrees that changes are required to ensure that reliability is maintained. But, in the midst of recent efforts to reform existing market rules, ISO-NE announced via a memorandum dated November 5, 2012 that capacity resources must maintain or arrange for sufficient fuel supplies to accommodate *potential* operational requests above and beyond what they need to satisfy their day-ahead commitments.<sup>8</sup> According to the November 5 Memo, if ISO-NE asked a capacity resource to operate without a day-ahead energy market commitment or to continue operating beyond its day-ahead energy market schedule, any inability to obtain fuel would expose the resource to nonperformance penalties and referral to the Commission.

On May 17, 2013, NEPGA filed a complaint against ISO-NE, explaining that the November 5 Memo unilaterally created a new requirement that capacity resources must always have fuel. NEPGA explained that this new requirement is contrary to the filed ISO-NE Tariff and longstanding industry practice, and that it is physically impossible for generators to comply. NEPGA requested that the Commission reject the November 5 Memo as unlawful; “restore the status quo” and find that capacity resources are bound by Good Utility Practice to procure fuel;

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<sup>8</sup> See Peter Brandien, David LaPlante & Raymond Hepper, ISO-NE Memorandum re: Market Participant Performance Obligations (Nov. 5, 2012) (“November 5 Memo”).

and, “[t]o remove any doubt,” also “hold that there is no firm fuel obligation in the existing tariff.”<sup>9</sup>

The Commission granted the complaint “in part, finding that, under the Tariff, a demonstrated inability to obtain natural gas or transportation may legitimately affect whether a resource is physically available.”<sup>10</sup> But it rejected the argument that the use of Good Utility Practice that NEPGA cited from the tariff “would excuse a capacity resource’s performance obligation.”<sup>11</sup> The Commission also determined that “the Tariff imposes a strict performance obligation on capacity resources and that capacity resources may not take economic outages, including outages based on economic decisions not to procure fuel or transportation.”<sup>12</sup>

Finally, the Commission required ISO-NE “to provide a written explanation regarding factors the [Internal Market Monitor] typically expects to examine to determine whether there is a reason to believe that a violation [of the Tariff] has occurred.”<sup>13</sup> It directed that ISO-NE “submit an informational filing containing a non-exhaustive list of factors that the IMM will consider in this regard, and publish the same on the ISO-NE website.”<sup>14</sup>

#### *STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS*

Pursuant to Rule 713(c), 18 C.F.R. § 385.713(c), NEPGA includes the following statement of issues and specification of errors:

1. The Commission should clarify that the Order did not require capacity resources to guarantee fuel availability for the resource’s entire output in real time regardless of day-ahead energy

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<sup>9</sup> Complaint at 57.

<sup>10</sup> Order at P 1.

<sup>11</sup> *Id.* at P 47.

<sup>12</sup> *Id.* at PP 1, 47.

<sup>13</sup> *Id.* at P 62.

<sup>14</sup> *Id.*

market schedules. If a resource is asked to operate at levels above its day-ahead energy market schedule, it must do everything in its control to procure fuel for the additional request, but it is not a Tariff violation if the resource is unable to obtain fuel or the transportation to deliver fuel to the generator using intra-day measures. Failure to so clarify would be inconsistent with record evidence demonstrating that it is physically impossible for generators to comply with a fuel guarantee requirement. 16 U.S.C. § 824e; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956) (“*Sierra Pac. Power*”).

2. The Commission erred in ordering ISO-NE to submit an informational filing to identify standards and factors that will change the substance of the Tariff’s terms and conditions. Order at PP 62, Ordering Para B. The Commission should have required ISO-NE to undertake stakeholder procedures and file an application under section 205 of the Federal Power Act. 16 U.S.C. § 824d; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 509 (2009) (“*Fox Television Stations*”); *Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 619, 628-32 (D.C. Cir. 2000); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995); *Diamond Roofing Co., Inc. v. OSHA*, 528 F.2d 645, 649 (5th Cir. 1976); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968); *Demand Response Coal. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061 at P 1 (2013); *Me. Pub. Serv. Co.*, 144 FERC ¶ 61,116 at P 12 (2013); *Midwest Indep. Transmission Sys. Operator*, 143 FERC ¶ 61,149 at P 85 (2013); *Energy Spectrum, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 141 FERC ¶ 61,197 at P 51 (2012); *In re: Hunter*, 137 FERC ¶ 61,146 at P 72 (2011); *Ocean State Power*, 69 FERC ¶ 61,146 at 61,544-45 (1994); *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, *order on reh’g*, 65 FERC ¶ 61,081 (1993).
3. The Commission erred in rejecting the Good Utility Practice standard for fuel procurement and failing to establish what the standard for fuel procurement is under the Tariff. The Commission should have ordered ISO-NE to submit an application under section 205 of the Federal Power Act to identify the appropriate standard. 16 U.S.C. § 824d; *Fox Television Stations*, 556 U.S. at 509; *Trinity Broadcasting*, 556 U.S. at 509; *Gen. Elec. Co.*, 53 F.3d at 1328-29; *Diamond Roofing Co.*, 528 F.2d at 649; *Demand Response Coal.*, 143 FERC ¶ 61,061 at P 1; *Me. Pub. Serv. Co.*, 144 FERC ¶ 61,116 at P 12; *Midwest Indep. Transmission Sys. Operator*, 143 FERC ¶ 61,149 at P 85; *Energy Spectrum*, 141 FERC ¶ 61,197 at P 51; *In re: Hunter*, 137 FERC ¶ 61,146 at P 72; *Ocean State Power*, 69 FERC ¶ 61,146 at 61,544-45; *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139.
4. The Commission erred in allowing the continuation of confiscatory rates, by requiring generators to procure fuel without a mechanism for cost recovery. Order at P 59. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-308 (1989); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974) (“*Texaco*”); *FPC v. Hope Natural Gas Co.*, 320 U.S. 59, 606-07 (1944) (“*Hope Natural Gas Co.*”); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (“*Natural Gas Pipeline Co.*”); *Bluefield Waterworks Improvement Co. v. Pub. Serv. Co.*, 262 U.S. 679 (1923); *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 597 (1896); *J.P. Morgan Ventures Energy Corp.*, 143 FERC ¶ 61,118 at PP 24-27 (2013); *El Paso Nat. Gas Co.*, 139 FERC ¶ 63,020 at P 263 (2012).

## ARGUMENT

### I. *THE COMMISSION SHOULD CLARIFY THAT CAPACITY RESOURCES MAY RELY UPON INTRA-DAY MEASURES WHEN ISO-NE INCREASES DISPATCH IN REAL TIME.*

The Order confirms that there is no “*per se* firm fuel requirement in the Tariff.”<sup>15</sup> It also acknowledges that “the November 5 Memo’s interpretation of the Tariff impermissibly narrowed the circumstances under which a capacity resource may be excused from its performance obligation” and finds that “a demonstrated inability to procure fuel or transportation . . . may legitimately affect whether a capacity resource is physically available under the Tariff, and therefore may excuse nonperformance.”<sup>16</sup> The Order also acknowledges there are obstacles to procuring natural gas or transportation, due to “both the timing differences between the electric markets and natural gas markets *and the current Tariff.*”<sup>17</sup> It recognizes, as NEPGA has explained, that “capacity resources also are subject to the gas pipelines’ tariffs and protocols . . . even if a capacity resource has firm fuel rights, it would need to nominate transportation prior to gas nomination cycle deadlines or risk losing its firm rights.”<sup>18</sup> And it underscores that there may be instances where “a capacity resource cannot procure fuel or transportation in real time in order to run at dispatch levels beyond its day-ahead commitment (or when not scheduled in the day-ahead market),” and, if it cannot procure fuel in real time, it “may be excused for non-performance.”<sup>19</sup>

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<sup>15</sup> Order at P 53.

<sup>16</sup> *Id.* at P 47.

<sup>17</sup> *Id.* at P 57 (emphasis added).

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

<sup>19</sup> *Id.* at P 56.

Distilling these findings, a capacity resource must ensure that it has made arrangements to procure fuel to satisfy its day-ahead schedule. But it would be illogical to conclude that a capacity resource must also ensure that it has lined up fuel arrangements for its entire Capacity Supply Obligation in real time to accommodate a changed dispatch order after it receives its day-ahead energy market schedule. It is one thing to be ready to perform in the day-ahead market, but quite another to ensure the availability of additional fuel to meet potentially increased dispatch instructions in real time. There are two possible scenarios: (1) ISO-NE dispatches generation from a unit in real time that it did not dispatch in the day-ahead energy market, or (2) ISO-NE increases the dispatch of a resource above its day-ahead energy market commitment. In both cases, the request for additional generation is by definition being made after all of the day-ahead windows for procuring fuel in the gas markets have closed and the nomination cycles have passed. The standard protocol that generators use is to purchase gas available from the intra-day market.

ISO-NE previously has taken the view that capacity resources must ensure that they have fuel to meet any potential increase in dispatch in real time, and apparently has retained this view since the Commission issued the Order. According to ISO-NE, it may not be enough to rely upon the intra-day gas markets to meet these above day-ahead dispatch requests. ISO-NE has proposed that capacity resources should enter into advance fuel arrangements to meet any potential real-time dispatch instruction up to its Capacity Supply Obligation. The Order, however, accurately recognized that generators appropriately fulfill their performance obligations by seeking necessary fuel following a dispatch instruction that comes after the day-ahead commitment period. The type of service that ISO-NE now proposes was never contemplated when resources contracted for capacity supply obligations three years ago.

The primary problem with ISO-NE's interpretation is that it continues to impose unfeasible obligations upon capacity resources to guarantee fuel to meet real-time dispatch requests exceeding their day-ahead commitment, at their maximum output.<sup>20</sup>

NEPGA requests that, consistent with the Order, the Commission clarify that when a resource's dispatch instructions increase after it receives its day-ahead commitment, it is consistent with the Tariff's requirements for the resource to do everything within its control to procure additional fuel in the intra-day gas markets. A capacity resource may not take an economic outage (*i.e.*, refuse to purchase available gas because it is too expensive), but must take any fuel that it can get in the intra-day markets.

As we explained in the complaint, while every capacity resource may have some distinct practices, as a general matter most utilize a mix of advance long-term contractual arrangements and shorter-term buying strategies to procure gas.<sup>21</sup> These typically include, for example, a mix of seasonal and/or month-ahead products with long-term contracts designed to manage risk in the gas markets and streamline the purchase and nomination process.<sup>22</sup> Additional procurement typically happens the day prior to the day the gas will be used, after a resource receives a day-ahead commitment or dispatch order.<sup>23</sup> NEPGA understands the Order to require that capacity resources must ensure that they have sufficient fuel to meet day-ahead commitment schedules.

That leaves the issue of what happens if there are dispatch changes in real time. As the Commission found, it is entirely reasonable for some fuel procurement to occur on an intra-day basis if a unit is dispatched after it fails to clear in the day-ahead energy market or if the unit is

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<sup>20</sup> See Complaint at 40-44.

<sup>21</sup> *Id.* at 10-11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

asked to provide increased or longer generation than scheduled in its day-ahead energy market commitment.<sup>24</sup>

Standard industry practice is *not* to purchase and nominate the full amount of gas necessary to satisfy a resource's maximum possible capacity supply offer in real time, regardless whether it receives an ISO dispatch instruction.<sup>25</sup> The key determining factor for a sensible fuel procurement strategy is how often a resource expects to run. ISO-NE's increasing practice of issuing last-minute dispatch instructions often makes this a difficult prediction. The mismatch between electric and gas scheduling further exacerbates the issue.

The Order recognizes this reality and presupposes that in circumstances where ISO-NE increases dispatch levels, the gas needed to meet the increase will not be procured until real time. ISO-NE, however, has signaled that it will continue to take the November 5 Memo's hardline approach that any failure to respond to dispatch instructions as a result of lack of fuel—absent a pipeline failure or the like—may be considered a Tariff violation.<sup>26</sup>

If this turns out to be ISO-NE's interpretation, it is erroneous. The Commission should clarify that its Order requires that capacity resources must procure gas to satisfy their day-ahead energy market commitments; and, if a resource is dispatched beyond its original day-ahead energy market commitment, it must do everything within its control in the intra-day gas market to obtain gas to meet the increased dispatch instructions. As part of such a finding, the Commission should further clarify that, consistent with this approach, when dispatch instructions are altered, generators may reasonably rely upon intra-day procurement mechanisms.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Because the Commission ordered ISO-NE to submit its informational filing on the same day that this rehearing request is due, and because the Commission did not require ISO-NE to submit a section 205 filing, we are basing our comments and request for rehearing upon what ISO-NE has represented to date.

To hold otherwise would be arbitrary and capricious and in violation of the Federal Power Act because it would amount to the Commission modifying the ISO-NE Tariff to add new obligations without making the necessary findings under section 206 of the Federal Power Act.<sup>27</sup> It also would be inconsistent with record evidence demonstrating that guaranteeing fuel in the full amount of a capacity resource's supply offer on a round-the-clock basis is not feasible, and therefore arbitrary and capricious to the extent it "entirely failed to consider" such an "important aspect of the problem."<sup>28</sup>

*II. THE COMMISSION ERRED IN ORDERING ISO-NE TO MAKE AN INFORMATIONAL FILING TO ESTABLISH THE STANDARDS TO GOVERN FUEL PROCUREMENT.*

The Order held that "[d]etermining whether a capacity resource was unable to obtain fuel and/or transportation will, of necessity, be a fact-specific inquiry."<sup>29</sup> The Commission ordered ISO-NE, through the IMM, to "provide a written explanation regarding factors the IMM typically expects to examine to determine whether there is a reason to believe that a violation has occurred."<sup>30</sup>

NEPGA had argued that the Good Utility Practice standard in the Tariff should apply, but the Commission rejected that argument. The Commission, however, failed to identify any alternative standard and instead deferred to ISO-NE to submit relevant "factors." These were errors.

The factors that the IMM identifies will, *de facto*, establish a standard for what is required when generators procure fuel. In other words, the written explanation that ISO-NE

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<sup>27</sup> See 16 U.S.C. § 824e; *Sierra Pac. Power Co.*, 350 U.S. at 353 ("The condition precedent to the Commission's exercise of its power under § 206 (a) is a finding that the existing rate is 'unjust, unreasonable, unduly discriminatory or preferential.'").

<sup>28</sup> *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

<sup>29</sup> Order at P 62.

<sup>30</sup> *Id.*; see also *id.* at Ordering Para. B.

submits in an informational filing will inappropriately fill in a gap in the existing Tariff opened by the Order, and will also alter the substance of capacity supply obligations that were contracted for three years ago. It therefore will be a “change to a practice that significantly affects the rates, terms, and conditions of a Commission jurisdictional service . . . .”<sup>31</sup>

Such changes are required to be filed with and approved by the Commission.<sup>32</sup> Informational filings, on the other hand, are not automatically noticed, and do not require Commission approval or a clear or complete record for review.<sup>33</sup> It violates the Federal Power Act and Commission precedent for the Order to allow a change affecting rates without first ensuring that ISO-NE’s proposed terms are just and reasonable.<sup>34</sup> It also implicates the fair notice doctrine because ISO-NE will use its guidelines to determine whether or not a resource may be subject to penalties under the Tariff and/or referral to the Commission for enforcement actions.<sup>35</sup> NEPGA therefore requests that the Commission clarify that ISO-NE’s “informational filing” will be considered a section 205 filing and issue a notice for comments on the filing.

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<sup>31</sup> *Energy Spectrum*, 141 FERC ¶ 61,197 at P 51; *Demand Response Coal.*, 143 FERC ¶ 61,061 at P 1.

<sup>32</sup> *Energy Spectrum*, 141 FERC ¶ 61,197 at P 51 & n.25 (citing cases).

<sup>33</sup> *See, e.g., Me. Pub. Serv. Co.*, 144 FERC ¶ 61,116 at P 12 (“Upon receipt, the Commission will not act or notice the informational filing because the formula rate implementation protocols provide specific procedures for notice, review, and challenges to the annual update.”); *Midwest Indep. Transmission Sys. Operator*, 143 FERC ¶ 61,149 at P 85 (2013) (explaining that “informational filings . . . are not themselves rates and do not constitute changes in the underlying rate itself . . . and thus are not section 205 filings that require Commission approval”); *id.* at P 85 & n.132 (citing *Ocean State Power*, 69 FERC ¶ 61,146 at 61,544-45).

<sup>34</sup> *See* 16 U.S.C. §824d; *see also* nn.31-32, *supra*; *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, *order on reh’g*, 65 FERC ¶ 61,081.

<sup>35</sup> *See Diamond Roofing Co.*, 528 F.2d at 649 (explaining that a regulated entity—in this case, an employer—“is entitled to fair notice in dealing with [its] government,” and that “statutes and regulations which allow monetary penalties against those who violate them . . . must give . . . fair warning of the conduct” that is “prohibit[ed] or require[d]”); *see also Trinity Broadcasting*, 211 F.3d at 619, 628-32 (discussing fair notice doctrine and finding “neither the regulation nor the Commission’s related statements gave fair notice” of a requirement sufficient “to justify punishing someone for violating it”); *Gen. Elec. Co.*, 53 F.3d at 1328-29 (explaining principle that “[d]ue process requires that parties receive fair notice before being deprived of property,” and in the agency context, “when sanctions are drastic . . . ‘elementary fairness compels clarity’ in the statements and regulations setting forth the actions with which the agency expects the public to comply”) (quoting *Radio Athens, Inc.*, 401 F.2d at 404; *id.* (citing cases); *In re: Hunter*, 137 FERC ¶ 61,146 at P 72 (“Due process requires that an agency provide adequate

While ISO-NE's informational filing is being submitted at the same time as this request for rehearing, as set forth above, indications to date are that ISO-NE will continue to take the view that a resource must ensure that it has sufficient fuel to meet any dispatch instruction, including those that increase in real time. NEPGA seeks clarification of this issue above, as in our view the Order established that capacity resources are not in violation of the Tariff by relying upon intra-day measures to meet real-time dispatch instructions above their day-ahead commitment. Clarification on this issue likely will affect the final standards that ultimately will govern fuel procurement. Regardless, it was an error for the Commission to defer the setting of fuel procurement standards to ISO-NE in an informational filing.

NEPGA also respectfully submits that it also was an error for the Commission to reject the Good Utility Practice standard as the appropriate Tariff standard to govern fuel procurement. We had explained in our complaint that the Tariff contains no explicit requirement that generators guarantee fuel, and that the absence of any explicit requirement in the context of the carefully negotiated Forward Capacity Market settlement indicates that no one ever intended that there be such a requirement.<sup>36</sup> Instead, we argued, the Tariff expected generators to follow the standard of "Good Utility Practice" in all of their operations, including fuel procurement decisions.<sup>37</sup> Good Utility Practice is a widely-accepted industry standard that is defined in the ISO-NE Tariff and represents a commonly understood set of principles that are followed by

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notice of the substance of a rule before penalizing a private party for violating that rule."), *rev'd on other grounds, Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013); *cf. Fox Television Stations*, 556 U.S. at 509 (noting that FCC did not seek a penalty where a change in policy had occurred, preventing the subject from having "requisite notice to justify a penalty") (citation omitted).

<sup>36</sup> Complaint at 26-27.

<sup>37</sup> *Id.* at 27-29.

generators and transmission providers across the country.<sup>38</sup> But the Order rejected Good Utility Practice,<sup>39</sup> leaving open the question of what standard generators must follow.

The Commission erred in reading fuel procurement out of the Good Utility Practice provisions in Tariff section III.1.11.3(d). That section broadly dictates that “Market Participants shall exert all reasonable efforts to operate, or ensure the operation of, their Resources in the New England Control Area as close to dispatched output levels as practical, consistent with Good Utility Practice.”<sup>40</sup> The Order finds that this general language “does not refer to how the resource submits or manages its offers or how it procures fuel, nor does it concern whether a resource will operate at all due to fuel procurement issues. Rather, *it relates to how the market participant manages the physical operation of a resource in order to respond to its dispatch instructions as closely as practical.*”<sup>41</sup>

It strains the Tariff to find that fuel procurement is not an aspect of “exert[ing] all reasonable efforts to operate, or ensure the operation of” an operating resource. There is no definition of “operate” under the Tariff, but it is difficult to see how operation of a resource *excludes* procurement of fuel, which is a critical component necessary to ensure a resource’s physical operation. It also is inconsistent with the Commission’s finding that the lack of fuel may be a reason why a resource is physically unavailable. Either fuel is or is not part of a resource’s physical operation and availability. The Commission’s order generally suggests that it is. Thus, the Commission failed to articulate a reasonable basis for excluding fuel procurement from the Good Utility Practice standard set forth in Tariff section III.1.11.3(d).

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<sup>38</sup> See NEPGA Answer at 6-7.

<sup>39</sup> Order at PP 47, 53-54.

<sup>40</sup> ISO-NE Tariff § III.1.11.3(d).

<sup>41</sup> Order at P 53 (emphasis added).

Moreover, if the Commission does not grant this requested rehearing, there will be no standard for fuel procurement left in the Tariff. Instead, suppliers will be left to the IMM's determination of what is, in essence, the IMM's view of the Good Utility Practice standard for gas procurement. The apparent creation of a hole through the Order further highlights why the Commission should require the IMM's information filing to be submitted pursuant to section 205 of the Federal Power Act.

### III. THE COMMISSION ERRED IN PERMITTING CONFISCATORY RATES TO CONTINUE WITHOUT IDENTIFYING ANY REMEDY OR TIMELINE FOR REMEDY

We explained in our complaint that one of the complicating elements of the fuel procurement problem is that the Tariff currently does not contain adequate compensation for generators' fuel costs when they are asked to operate beyond their day-ahead commitment.<sup>42</sup> The Commission acknowledged this shortcoming of the Tariff, explaining that it "has not allowed appropriate cost-recovery for fulfilling a Capacity Supply Obligation in all circumstances."<sup>43</sup> But the Order does not propose any remedy. It simply noted that the compliance filing coming out of *Dominion* would address "one aspect of this issue."<sup>44</sup> Furthermore, ISO-NE has signaled its intent to oppose additional cost recovery. In recent comments regarding the *Dominion* compliance filing, ISO-NE asserted that

[P]roviding any additional cost-of-service based cost recovery opportunity is problematic. Indeed, the ISO Compliance Filing explained in detail the importance of the narrow scope for the new cost-of-service recovery provisions, starting from the central principle of the ISO-administered markets that a market participant's Supply Offer is financially binding. This means the market participant agrees to accept remuneration equal to the price terms stated in the Supply Offer it has submitted for the operating day, as consideration for delivering the quantity of energy it has offered to supply for the operating day,

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<sup>42</sup> Complaint at 54-55.

<sup>43</sup> Order at P 59.

<sup>44</sup> *Id.* (discussing *Dominion Energy Mktg., Inc.*, 143 FERC ¶ 61,233 (2013) ("*Dominion*")).

when requested by the ISO. This central principle was recently affirmed in the Commission's order addressing the complaint of the New England Power Generators Association in Docket No. EL13-66-000. As the Commission stated:

A plain reading of these [ISO Tariff] provisions imposes on capacity resources straightforward requirements to: (1) offer into both the day-ahead and real-time energy markets a MW amount equal to or greater than its Capacity Supply Obligation when the resource is physically available; (2) respond to ISO-NE's directives to start, shutdown or change output levels; and (3) *keep supply offers open throughout the operating day*.

[citing Order at P 49 (emphasis ISO-NE's).] Providing additional detail, the Commission held that "the [ISO] Tariff imposes a strict performance obligation on capacity resources and ... capacity resources may not take economic outages." Failing to honor a Supply Offer through the operating day by attempting to take an "economic outage" is simply the other side of the same coin of seeking additional remuneration beyond that sought in the Supply Offer: both actions represent a generator's dissatisfaction with the compensation reflected in its Supply Offer and would result in an unacceptable broadening of exceptions to the core principle that day-ahead offers are financially binding.<sup>45</sup>

Notably, ISO-NE does not reference the Commission's statement that the *Dominion* compliance filing addresses only "one aspect"<sup>46</sup> of the cost recovery issue. We are not asking that under normal conditions generators be made whole if they need to pay more for intra-day gas than what was reflected in their real time supply offers, as we recognize that such a practice would jeopardize the quality of the real time energy market prices. But, there may be other circumstances, beyond those cited in the *Dominion* order, under which generators should be able to request and receive additional compensation.

But the failure to provide a mechanism for recovery of costs that resources will be required to undertake results in a confiscatory rate. The Supreme Court has explained that "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge

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<sup>45</sup> *ISO New England Inc.*, FERC Docket Nos. EL13-72-000 & ER13-2149-000, Answer of ISO New England Inc. to Comments and Alternative Proposal of the New England Power Pool Participants Committee at 8-9 (Sept. 4, 2013) (footnotes omitted).

<sup>46</sup> Order at P 59.

for their property serving the public which is so ‘unjust’ as to be confiscatory.... If the rate does not afford sufficient compensation, the [government] has taken the use of utility property without paying just compensation and so violated” the Fifth Amendment.<sup>47</sup> Moreover, a regulator “legally may not take any action that confronts the regulated entity with a zero/0% probability (i.e. certainty) that it will *not* recover all its prudent costs/investment(s). Any such action is necessarily confiscatory—an unconstitutional ‘taking.’”<sup>48</sup>

The Commission’s failure to resolve the cost recovery issue—a failure that it clearly recognizes—is therefore arbitrary and capricious. The Order essentially requires generators to, at times, procure fuel without any recovery for costs when dispatched in extraordinary circumstances with no ability to reflect those costs in real-time prices; this is a classic, unconstitutional, confiscatory rate.<sup>49</sup> NEPGA therefore requests that FERC clarify that ISO-NE must establish stakeholder processes to address cost-recovery issues, with a compliance filing due no later than March 26, 2014.

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<sup>47</sup> *Duquesne Light Co.*, 488 U.S. at 307-308; *see id.* (citing *Covington & Lexington Turnpike Rd. Co.*, 164 U.S. at 597 (explaining that a rate is too low if it is “so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,” and in so doing “practically deprive[s] the owner of property without due process of law”); *Natural Gas Pipeline Co.*, 315 U.S. at 585; *Texaco*, 417 U.S. at 391-92.

<sup>48</sup> *El Paso Natural Gas Co.*, 139 FERC ¶ 63,020 at P 263; *see also J.P. Morgan Ventures Energy Corp.*, 143 FERC ¶ 61,118 at PP 24-27 (finding that “conditions imposed by the March 19 Order may subject JP Morgan to a confiscatory rate in the event that the LMP falls below the relevant resource’s cost of producing electricity” and ordering procedures to ensure that “JP Morgan will recover its costs when its resources are dispatched”).

<sup>49</sup> *See Hope Natural Gas Co.*, 320 U.S. at 606-07; *Bluefield Waterworks Improvement Co.*, 262 U.S. 679; *see also J.P. Morgan Ventures Energy Corp.*, *supra* n.48.

*CONCLUSION*

For the foregoing reasons, NEPGA requests rehearing and clarification.

Respectfully submitted,

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September 26, 2013

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators  
Association, Inc.

v.

ISO New England Inc.

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Docket No. EL13-66-001

*CERTIFICATE OF SERVICE*

I hereby certify that I have this day caused to be served copies of the foregoing document upon each person designated on the official service list as compiled by the Office of the Secretary in the captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010.

Dated at Washington, D.C., this 26th day of September, 2013.

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