

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

| | | |
|------------------------------|---|------------------------|
| New England Power Generators |) | |
| Association, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Docket No. EL13-66-000 |
| |) | |
| ISO New England Inc., |) | |
| |) | |
| Respondent. |) | |

*THE NEW ENGLAND POWER GENERATORS ASSOCIATION'S
MOTION FOR LEAVE AND ANSWER*

Dan Dolan
President
NEW ENGLAND POWER GENERATORS
ASSOCIATION
141 Tremont St.
Boston, MA 02111
(617) 516-5355

Bruce F. Anderson, Esq.
Director of Market & Regulatory Affairs
NEW ENGLAND POWER GENERATORS
ASSOCIATION
141 Tremont St.
Boston, MA 02111
(617) 902-2354

June 20, 2013

Paul F. Wight
Karis Anne Gong
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7365

*Counsel for New England Power Generators
Association*

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

| | | |
|------------------------------|---|------------------------|
| New England Power Generators |) | |
| Association, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Docket No. EL13-66-000 |
| |) | |
| ISO New England Inc., |) | |
| |) | |
| Respondent. |) | |

*THE NEW ENGLAND POWER GENERATORS ASSOCIATION’S
MOTION FOR LEAVE AND ANSWER*

The New England Power Generators Association (“NEPGA”) moves for leave to answer ISO New England Inc.’s June 6, 2013 Answer (“ISO-NE Answer”).¹ NEPGA’s Complaint challenged ISO-NE’s creation of a tariff violation for generation resources that are unable to procure fuel after exercising Good Utility Practice to do so. The Complaint further asserted that industry and Commission efforts to improve gas coordination and reliability issues should be allowed to continue, and that ISO-NE should not be allowed to unilaterally impose its preferred solution solely upon the backs of generators. ISO-NE’s answer is that it is not actually requiring resources to have firm fuel but only enforcing the longstanding provisions of the tariff. ISO-NE’s arguments do not withstand scrutiny. Good cause exists to accept this Answer as it clarifies the record in response to ISO-NE’s Answer.

ANSWER

I. ISO-NE’S INTERPRETATION IMPOSES A REQUIREMENT TO ALWAYS HAVE FUEL

ISO-NE’s primary defense is that it is not imposing a firm fuel obligation (*see, e.g.*, ISO-NE Answer at 2-3), and it maintains this defense even as it reasserts its (new) interpretation that

¹ See 18 C.F.R. §§ 385.212, 385.213.

the inability to procure fuel is a tariff violation (*see, e.g., id.* at 3). This is like saying that there is nothing wrong with criticizing the government, but you will be arrested if you do so. If the failure to always have fuel is a tariff violation (as it is under ISO-NE's interpretation), then a capacity resource must always have fuel.

It perhaps is possible that ISO-NE has been confused by the shorthand term we adopted in the Complaint, "firm fuel obligation," and ISO-NE goes so far as to call it a "strawman." ISO-NE Answer at 11, 13, 14. ISO-NE correctly states that "the Tariff does not impose a 'firm fuel obligation' or any other specific obligation with respect to fuel procurement." *Id.* at 10. We agree, and that in fact is one of the grounds for our Complaint. *See, e.g.,* Complaint at 26-27. But ISO-NE incorrectly thinks that this means their November 5 interpretation passes muster. It does not.

ISO-NE's new interpretation mandates that capacity resources have fuel available for their entire capacity supply obligation any time that ISO-NE may call upon them, without exception outside of physical pipeline interruptions, or else be considered in violation of the tariff. That is what we meant by a "firm fuel obligation." ISO-NE's response is that it does not mandate *how* generators procure fuel so long as they do so (*e.g.,* via dual fuel capability or liquefied natural gas ("LNG")). Therefore, according to ISO-NE, it is not requiring that "firm" gas arrangements be in place, or any particular fuel arrangements, so long as capacity resources always have fuel. This response is a technicality that misses the point. The point of the Complaint is that ISO-NE has unilaterally imposed a non-tariff requirement that capacity resources must always have fuel. Rather than a "firm fuel obligation," perhaps a more precise way to label it is as a "requirement to always have fuel," but the meaning is the same. If a

resource does not always succeed in its attempts to obtain fuel, it is considered in violation of the tariff.

ISO-NE never denies that its November 5 interpretation “mandat[es] that a capacity resource *must* have fuel for every dispatch scenario.” *Id.* at 25. Nor does ISO-NE deny that its proposed requirement to always have fuel is contradicted by commonly accepted industry practice in every region of the country. As we explained in the Complaint, the tariff includes no such requirement and it therefore is unlawful.

ISO-NE attempts to lessen the impact of its “requirement to always have fuel” by pointing out other ways—besides locking in firm gas around the clock—that a resource may guarantee that it always has fuel. ISO-NE points to “several other options for meeting performance obligations,” ISO-NE Answer at 30, but none of them would immediately enable generators to fulfill the requirement to always have fuel. LNG will not always be available, and generators still will require lead time—which they often do not get in real-time dispatch scenarios—to secure transportation of LNG supplies. Not all generators are capable of dual-fuel operations, and those that are often will not have the physical ability to switch fuel sources quickly enough to respond to a real-time dispatch request. And ISO-NE’s suggestion that generators should sign up for new pipeline capacity simply is another way of saying that generators should procure firm fuel arrangements, even though having firm pipeline capacity would not provide generators use of that capacity during all times of the day.

Under any of these options, ISO-NE’s tariff interpretation still requires a resource to always succeed in obtaining fuel or be in violation of the tariff. There is, moreover, no current way to recover most of the costs of implementing these alternative fuel arrangements. *See, e.g., Dominion Energy Marketing, Inc.*, 143 FERC ¶ 61,233 at P 25 (2013) (instituting a Federal

Power Act section 206, 16 U.S.C. § 824e, proceeding to establish cost recovery rules because “despite complying with ISO-NE’s directives to maintain reliability, [gas-fired] resources could suffer significant financial loss in unrecovered costs. The Commission finds that this outcome for resources called upon to respond to critical reliability needs is unjust and unreasonable”) (footnote omitted).² ISO-NE and stakeholders also are debating a set of possible reforms for next winter that could permit a subset of capacity resources to recover *some* of the costs of implementing these actions. All options on the table are for payments outside of the existing markets. As of today, however, arranging firm gas supply around the clock is the only available option for most to meet a “requirement to always have fuel,” but, as we explain in the next section, that option only is available in theory.

II. *IT IS IMPOSSIBLE FOR ALL CAPACITY RESOURCES TO ALWAYS HAVE GAS*

The only available option—always having gas—also fails because it currently is *impossible* for every gas-fired capacity resource to always have enough gas to operate at its full capacity supply obligation whenever called upon. There is not enough gas pipeline capacity, as ISO-NE admits. *See* Complaint at 41 (quoting ISO-NE Gas Dependence White Paper at 4) (on “peak winter days, the pipelines are fully utilized with not enough infrastructure to meet the needs of the gas-fired fleet.”). Yet, according to ISO-NE, notwithstanding this impossibility (which ISO-NE largely ignores), the tariff requires all capacity resources to always have fuel. The Commission never would have approved a tariff obligation that was (and is) impossible to meet. *See, e.g., Trunkline Gas Co.*, 87 FERC ¶ 61,146 at 61,608 (1999) (“If one possible interpretation of a pipeline’s tariff would require it to take actions that are operationally

² While the *Dominion* order is helpful in providing cost recovery to generators that ISO-NE dispatches beyond their day-ahead schedules, it does not answer the key question in the Complaint, which is whether the tariff includes an obligation for capacity resources to always have fuel.

impossible or difficult, while an equally plausible interpretation would not, it may be reasonable to conclude that the latter interpretation was the intended interpretation.”); *Sw. Power Pool, Inc.*, 137 FERC ¶ 61,075 at PP 30-31 (2011) (rejecting interpretation of case that “would impose a standard . . . that would be difficult, if not impossible, to meet”); *S. Co. Servs.*, 132 FERC ¶ 61,091 at PP 30-32 (2010) (approving compliance filing language that varied from Commission directive where parties argued that the directive—“if read literally”—would be impossible to comply with); *Midwest Indep. Transmission Sys. Operator, Inc.*, 112 FERC ¶ 61,311 at PP 35, 40 (2005) (requiring MISO to work with objecting parties to resolve scheduling requirements that would be impossible to comply with).

The impossibility of a requirement to always have fuel is not limited to the fact that the existing pipeline infrastructure cannot accommodate such a rule. It also includes situations when it is impossible for generators and the gas pipelines to accommodate last-minute changes in dispatch instructions, resulting from the way ISO-NE chooses to dispatch its system. Yet under ISO-NE’s tariff interpretation, the only excused reason for not always having fuel is if there is a physical problem with the pipeline, but, even then, ISO-NE’s interpretation would say that a resource should have dual-fuel capability or some other back-up plan.

ISO-NE did not address these impossibility arguments head-on, instead reciting some isolated quotes from utility executives purporting to show that there normally is plenty of gas on weekends. *See* ISO-NE Answer at 27-28. NEPGA does not dispute that there normally is sufficient gas on weekends. But that is a far cry from saying that there is enough gas for every gas-fired resource to ensure that it always has enough gas to meet its maximum potential dispatch in real time on short notice. NEPGA also is “more than ready to work” with the natural

gas industry on solutions to gas coordination and reliability issues (*see id.* at 28), but that has nothing to do with whether the current tariff imposes a requirement to always have fuel.

ISO-NE also nowhere mentions the gross inefficiency that a requirement to always have fuel would inflict upon the natural gas system and the enormous new costs that this would impose upon consumers. *See, e.g.*, Comments of the New England Pipelines at 3 (“In addition, a generator faces risk if it secures adequate fuel supply and pipeline capacity prior to dispatch by the ISO, for if the generator is not dispatched or cannot operate in the real-time market it faces the possibility of reselling its gas supply and transportation at a loss.”). ISO-NE’s new interpretation of the tariff, if ratified, would wreak havoc on gas pipeline scheduling and operations. If generators were to buy up as much firm gas supply and transportation as possible and nominate gas to satisfy the full amount of their capacity supply obligations, the pipelines would be flooded with unnecessary flow requests. The costs ultimately would be borne by consumers.

III. THE TARIFF REQUIRES THE EXERCISE OF GOOD UTILITY PRACTICE TO PROCURE FUEL

The plain language of the tariff supports the industry standard that generators should exercise “Good Utility Practice” to procure fuel. ISO-NE castigates the “Good Utility Practice” standard—the standard that has been a part of the ISO-NE tariff for many years—as undefined and meaningless and essentially a free pass to never procure fuel. *See, e.g.*, ISO-NE Answer at 36 (referring to Good Utility Practice as an “[e]xcuse” that “would allow generators to evade ... performance obligations”). This is incorrect. “Good Utility Practice” is defined in ISO-NE’s own tariff. *See* ISO-NE Tariff § I.2.2. It is a widely-accepted industry standard. *See also Policy Statement on Matters Related to Bulk Power System Reliability*, Docket No. PL04-5-001, Supplement to Policy Statement on Matters Related to Bulk Power System Reliability (Feb. 9,

2005) (discussing “Good Utility Practice”); PJM Open Access Transmission Tariff, Attachment K § 1.7.4(a) (“In performing its obligations to the Office of the Interconnection hereunder, each Market Participant shall at all times (i) follow Good Utility Practice ...”); Order No. 888,³ *pro forma* OATT §§ 1.14, 1.6, 28.2, 33.7, 35.2 (referencing “Good Utility Practice”); Midcontinent Independent System Operator Tariff § 38.2.5(a)(i) (“Each Market Participant shall at all times: (i) follow Good Utility Practice...”); CAISO Fifth Replacement FERC Elec. Tariff § 7.4 (“When the CAISO is exercising Operational Control of the CAISO Controlled Grid, the CAISO and Market Participants shall comply with Good Utility Practice.”).

It is commonplace for industries and the law to adopt such standards. In the energy context, the Federal Power Act itself adopts the “just and reasonable” rates standard without much more specificity. Yet “just and reasonable” is not a meaningless abstraction.

Similarly, “Good Utility Practice” is not a get-out-of-jail-free card, but requires gas-fired generators to use commercially reasonable efforts consistent with industry standards to procure fuel in line with ISO-NE’s dispatch instructions. Furthermore, it also is the same standard that ISO-NE itself is obligated to employ in carrying out its duties under the Transmission Operating Agreement—including its obligation to maintain system reliability. ISO-NE Transmission Operating Agreement § 3.05; *id.* Schedule 1.01 (defining Good Utility Practice identically to the ISO-NE Tariff’s definition).

Rather than acknowledge Good Utility Practice as a tariff-based standard, ISO-NE attempts to circumscribe the application of Good Utility Practice to only apply to narrow

³ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. and Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. and Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

“mechanical” or “moment to moment” aspects of physical generator performance. ISO-NE Answer at 36-38. But it offers no rational explanation for its reading of the tariff, which broadly states that market participants must “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.” ISO-NE Tariff § III.1.11.3(d). ISO-NE asserts that “Good Utility Practice ... , in this instance, is obviously tied to physical operation from moment to moment, allowing deviation from dispatch instructions if the safety of equipment or personnel is at risk.” ISO-NE Answer at 38. But if that were so obvious, the tariff would have said so. Instead, the tariff recognizes that generators must exercise Good Utility Practice in satisfying dispatch orders. This is not an absolute requirement that generators operate at the levels requested by ISO-NE in all situations, no matter the risks or limitations they face. Rather, it is a reasonable standard that will generally ensure that ISO-NE can reliably operate the grid without imposing an impossible burden upon generators. ISO-NE of course also has other arrows in its quiver to assure reliability, including setting Replacement Reserves requirements, and ISO-NE just filed to seek a new Reserve Constraint Penalty Factor for Replacement Reserve that can set real-time energy prices at \$250/MW-hour. *See ISO New England Inc.*, Docket No. ER13-1736-000, Revisions to Market Rule 1 to Establish a Reserve Constraint Penalty Factor for Replacement Reserve Requirement (Jun. 20, 2013).

ISO-NE also criticizes Good Utility Practice as “wholly unworkable,” because “[e]ach time a resource failed to operate because of a claimed lack of fuel despite the generator’s efforts, the ISO’s [Internal Market Monitor] would have to evaluate such claim in real-time.” ISO-NE Answer at 38. But nothing about Good Utility Practice or the tariff requires such procedures; whether or not a generator’s performance was consistent with Good Utility Practice could easily

be evaluated after-the-fact when ISO-NE determines how to account for the generator's performance consistent with the tariff's existing availability measures. And the tariff also imposes significant financial penalties for any resource that fails to be available during shortage hours. This was the incentive mechanism in the Forward Capacity Market ("FCM") settlement to ensure that capacity resources fulfilled their obligations to exercise Good Utility Practice to be available when called upon.

Nor does Good Utility Practice grant generators the *carte blanche* that ISO-NE suggests. ISO-NE treats the arrangement of fuel under the Good Utility Practice standard as completely a generator's "choice," *see, e.g.*, ISO-NE Answer at 5, and, if a generator does not have sufficient fuel when dispatched in real time, ISO-NE considers the generator to have chosen to not arrange for fuel. This is too simplistic a view of generators' obligations. Good Utility Practice, as defined in the tariff, still requires that generators comply with standard industry practices "which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition." ISO-NE Tariff § I.2.2. This is hardly permission for capacity resources to glibly decide to not procure fuel. It requires that generators undertake reasonable efforts that could be expected to ensure they will be able to honor the terms of supply offers.

ISO-NE so waters down the Good Utility Practice standard that it asserts that it jeopardizes long-term planning and reliability. *See, e.g.*, ISO-NE Answer at 33 ("[t]he [Installed Capacity Requirement ("ICR")] calculation does not assume that generators are making choices to not have fuel arrangements to support honoring Supply Offers when dispatched, such that they cannot run even though their equipment is in good working order."). ISO-NE expresses concern

that the ICR calculation will fail to account for generators that may be unavailable due to fuel reasons. *Id.* at 34. The ICR calculation, however, does not assume that generators always are available but instead reflects probabilistic assumptions by ISO-NE and stakeholders on total forecasted load requirements, generator forced and planned outages, and the maintenance of sufficient reserve capacity to meet reliability standards. *See ISO New England Inc.*, 127 FERC ¶ 61,142 at P 15 (2009). Every bulk power system—including ISO-NE—relies upon various types of reserves to manage a variety of issues and to ensure sufficient reserve capacity. It is unreasonable to assume that generators exercising Good Utility Practice pose a threat to long-term planning and reliability.

In sum, just as it is illogical to suppose that application of the Good Utility Practice standard would eviscerate ISO-NE’s responsibility to reliably operate the grid, it is equally illogical to conclude that the Good Utility Practice standard for procuring fuel would “eviscerate the requirement to provide Supply Offers that remain open.” ISO-NE Answer at 4.

IV. THE TARIFF DOES NOT IMPOSE A REQUIREMENT TO ALWAYS HAVE FUEL

ISO-NE makes many tariff arguments but fails to refute the fact that the current tariff does not have a requirement to always have fuel.

First, the linchpin of ISO-NE’s tariff argument is the provision that offers “shall remain open through the Operating Day.” ISO-NE Answer at 14 (ISO-NE’s emphasis); *see id.* at 3, 44 (same). As we stated in the Complaint at 27, it is reading far too much into this language to suggest that it translates into a requirement to always have fuel. This provision *does* mean that an offer that is not accepted in the Day-Ahead market is not excused from possible performance in real time. The offer remains open consistent with existing tariff obligations. *Id.* But much more precise language would be necessary if this language also was meant to convey a requirement that a resource must always ensure available fuel for the entire offered output,

particularly in the circumstances here where such an interpretation is impossible to meet, *id.* at 40-44, contrary to ISO-NE's past practice and statements, *id.* at 47-51, contrary to how every other Regional Transmission Organization ("RTO") does it, *id.* at 45-47, and contradicted by the FCM settlement, *id.* at 26-27, 32-34.

Second, ISO-NE tries to get around the lack of a clear tariff requirement to always have fuel by arguing that the tariff need not explicitly state whether a particular action is a tariff violation. In support, it cites *Dartmouth Power Assocs. Ltd. P'ship*, 134 FERC ¶ 61,085 (2011). ISO-NE Answer at 38-41. In *Dartmouth Power*, the Dartmouth unit had become unavailable for physical reasons and the unit failed to inform ISO-NE of that fact until ISO-NE dispatch operators called to ask to dispatch the unit. *Dartmouth Power*, 134 FERC ¶ 61,085 at PP 4-7. There, Dartmouth Power's actions failed to comply with clear, tariff-based operating procedures because the generator did not inform ISO-NE prior to taking the Dartmouth facility out of service for maintenance. *Id.* at PP 10-11.

The tariff may not need to explicitly state whether a particular action is a tariff violation, *see* ISO-NE Answer at 39, but it must state whether a particular action is required. In this case, there is no requirement in the ISO-NE tariff to always have fuel. Such a critical point would not be *implied* in the tariff, but must be set forth in express terms. ISO-NE's position—that there *is* a requirement to always have fuel—invents a new tariff obligation that has not been reviewed or approved by stakeholders or the Commission. Generators should not be penalized for their inability to comply with ISO-NE's new, impossible, and unlawful interpretation of the tariff. Nothing in *Dartmouth Power* suggests otherwise.

Third, ISO-NE ignores other provisions in the tariff that contradict its interpretation of the tariff:

- Flexibility provisions in the tariff that recognize that circumstances will sometimes arise that inhibit a generator’s ability to operate. For example, the tariff includes “Limited Energy Generator” provisions and related practices to allow flexibility when generators are unable to procure fuel “to operate continuously at full output on a daily basis.” *See* Complaint at 35-36. Its new tariff interpretation ignores this and a related dispatch practice that allows deviations even from day-ahead schedules. *Id.* at 36-37 (discussing procedure).
- Section III.1.7.20(f) of the tariff, which requires market participants to “report[] to the ISO anticipated availability and other information ... including but not limited to the Market Participant’s ability to procure fuel and physical limitations that could reduce Resource output for the pertinent Operating Day.” ISO-NE argues that this merely is a notice provision (*see* ISO-NE Answer at 35-36), but the point is that this tariff provision in no way references any requirement to always have fuel.
- Availability penalties in the tariff also indicate that the tariff intended financial consequences for being unable to procure fuel after exercising Good Utility Practice. *See* Complaint at 32-34. ISO-NE claims that availability penalties only address “failure of a capacity resource to operate in accordance with the capacity market rules,” but not “the violation of failing to honor energy Supply Offers.” ISO-NE Answer at 34-35. According to ISO-NE, “[t]he Shortage Event/availability penalty structure in the capacity market rules is distinct from a generator’s obligation under the energy market rules to honor its Supply Offers.” *Id.* at 34. But, here again, nowhere in the tariff is there any mention of a requirement to always have fuel. Instead, the tariff imposes a series of financial penalties for when a resource is unavailable.⁴ *See infra* at 15-16 (further discussing ISO-NE’s argument).

All of these provisions contemplate a structure where resources sometimes are unable to procure fuel even after exercising Good Utility Practice. The tariff provides flexible dispatch options, it requires notice, and it imposes financial penalties for the failure to be available in Shortage Hours. But none of these tariff provisions—nor any other part of the tariff—mentions or even contemplates a requirement to always have fuel.

Fourth, ISO-NE improperly relies on the North American Electric Reliability Corporation (“NERC”) Generator Availability Data System (“GADS”) Reporting Standards to argue that the “lack of fuel is not an excuse for taking a generator out-of-service, as it remains

⁴ ISO-NE measures availability during periods of actual operating reserves shortages of at least thirty contiguous minutes. A resource with availability below its Capacity Supply Obligation is assessed a stiff penalty of five percent of the annual capacity payment. For example, if the capacity clearing price is \$4/kW-month, each MW unavailable at a resource during a thirty-minute Shortage Event would be penalized \$4,800 (\$2,400/MW-hour).

entirely within the control of the plant's operator as to whether it obtains fuel." ISO-NE Answer at 21 (citing NERC GADS Reporting Standards). The NERC GADS Reporting Standards are not in the tariff, yet ISO-NE seeks to use them to impose new obligations on generators. The GADS data, however, is only used for reporting and related purposes, such as calculating the equivalent demand forced outage rate. ISO-NE Tariff § III.13.1.2.3.2.1.2. Nothing in the ISO-NE Tariff indicates that (i) the NERC GADS Reporting Standards defining outages as "out of management control" govern ISO-NE's own definitions or (ii) it is a tariff violation if a generator has an outage that, according to NERC GADS data, is "within management control."

NERC itself recognizes that a requirement to always have fuel is "not a guaranteed solution" to gas availability problems. *See* NERC, 2013 Special Reliability Assessment, Phase II at 80 (May 2013) (a "requirement[] for procuring firm natural gas transportation service is not a guaranteed solution"). NERC states:

However, firm transportation may not alleviate all reliability issues. For example, it does not resolve reliability problems arising from:

- Significant electric load variations that occur from unexpected weather events. Generator gas demand can be significantly different from the nominated gas volumes (only under traditional firm contracts with non-ratable takes).
- Reductions in gas pipeline pressures that occur due to an anomalous or man-made event and cause the high-pressure combined-cycle gas turbine units to trip offline.
- Gas curtailments as a common-mode failure.
- The problems that arise from the differences between the "gas day" and the "electric day."

Id. Regardless, the GADS Reporting Standards do not impose a requirement to always have fuel, nor does anything else in the ISO-NE tariff.

Fifth, ISO-NE brushes by the fact that its prior statements indicate that there is no requirement to always have fuel in the ISO-NE tariff. *See* ISO-NE Answer at 42; *id.* at 41-42

(not discussing prior statements as they relate to fuel-related outages). As we have explained, ISO-NE's new position is wholly inconsistent with its prior views on fuel-related outages. Complaint at 47-51. In describing its proposed reforms, however, ISO-NE asserts that there is room for incremental obligations above what ISO-NE claims is already an absolute obligation to procure fuel for all dispatch scenarios: "The proposed reforms (and additional incentives) respond to recent performance obligation issues and related short-term reliability concerns by building upon the existing energy market performance obligations, and would provide improved price signals to meet those obligations." ISO-NE Answer at 42. We support improved market signals, but the fact that incremental incentives are necessary is compelling evidence that there is no requirement to always have fuel in the current tariff.

Sixth, ISO-NE alludes to capacity payments as justification for a requirement to always have fuel, trotting out the old war horse that otherwise capacity payments would be money for nothing: "[i]f resources are not obligated to provide energy when dispatched, despite their owners' receipt of capacity payments exceeding \$1 billion annually, then those making capacity payments would be justified in wondering what they are receiving for those payments." ISO-NE Answer at 31. The Commission, however, has repeatedly rejected the "money-for-nothing" arguments lodged against centralized capacity markets in general, and past payments for capacity specifically. See *Devon Power LLC*, 115 FERC ¶ 61,340 at PP 77, 89 (2006) (rejecting arguments that capacity "transition payments are not connected to an added service or benefit" and are "money for nothing.").

Regardless, this argument is a sideshow. Capacity resources are obligated to respond to dispatch instructions in accordance with Good Utility Practice. When they are unavailable in Shortage Hours, they face significant financial penalties. Complaint at 37-38. This was the deal

struck during the FCM settlement process. It does not mean that generators were paid for doing nothing. To the contrary, generators have responded to dispatch instructions and provided sufficient energy to satisfy load. There have been no Shortage Events since the start of the FCM. Now, however, ISO-NE seeks to use \$1 billion in capacity payments as an *ex post* justification for a tariff requirement to always have fuel. That is the equivalent of arguing that I have paid taxes for my entire life and therefore should always be able to drive in the HOV lane. That was not the original deal, even if some now wish it had been.

Seventh, ISO-NE argues that “failing to make fuel arrangements, and then refusing to operate a resource because available fuel is costly, is not permitted and constitutes a violation of the ISO Tariff” because it “is equivalent to taking an ‘economic outage.’” ISO-NE Answer at 20; *see also id.* at 5, 19 & n.35, 22, 30-31. This is a strawman. The Complaint does not seek permission for economic outages. The Complaint instead seeks enforcement of the tariff as filed, which omits any requirement to always have fuel. There are situations when generators simply are unable to procure fuel in time to respond to real-time dispatch requests beyond their day-ahead schedules. No amount of cost recovery will solve that scenario. For example, resources often receive a day-ahead commitment and procure gas for that commitment, but then in real-time ISO-NE increases the dispatch and the resources sometimes are unable to procure gas—after exercising Good Utility Practice—for the increased amount. The resources cannot procure excess gas above and beyond their initial day-ahead dispatch, but this is not an economic outage. It was a prudent business decision not to purchase surplus and most likely unneeded gas. But then it sometimes is impossible to get the extra gas on short notice.

ISO-NE appears to equate the elimination of economic outages in the FCM settlement with a requirement to always have fuel in the energy market. *See, e.g.*, ISO-NE Answer at 19-20.

This argument distorts the fundamental deal struck in the FCM settlement. As we explained in our Complaint (at 32-33), the FCM settlement provided that capacity resources that failed to be available to provide energy in the energy market would pay stiff financial availability penalties. As part of the FCM settlement package, economic outages were prohibited as an excuse for being unavailable during Shortage Hour events, subjecting a capacity resource to paying a substantial financial penalty. The FCM settlement never imagined the absolute physical requirement to always have fuel that ISO-NE now posits.

It of course goes without saying that poor market signals and the inability to recover the costs of fuel exacerbate the problem, and the Commission already is taking action to address those issues. *See, e.g., Dominion Energy Mktg., Inc.*, 143 FERC ¶ 61,233 at P 27 (2013) (“the Commission finds that it is appropriate to require that resources providing critical reliability services have a reasonable opportunity to recover costs associated with providing that service.”). But this Complaint is about what the tariff says, not the high price of gas.

V. GENERATORS ALSO SEEK TO ENSURE RELIABILITY

A. NEPGA Supports Market-Based Reforms To Ensure Reliability

ISO-NE is not alone in wanting to ensure reliable operations in the Northeast. NEPGA and its Members, too, recognize that “issues associated with market design that can adequately ensure continued reliability of electricity service in New England need to be addressed,” and are actively working with ISO-NE and other NEPOOL stakeholders to attempt to remedy existing fundamental market design deficiencies. Complaint at 51-52. But reliability needs to be addressed in a sensible way as part of Commission initiatives, not upon the backs of generators. ISO-NE’s November 5 Memo attempts to resolve a widespread industry problem by imposing a retroactive tariff requirement. This is as misguided as it is unlawful.

As we explained in the Complaint, “a number of measures” exist “that could improve the gas availability problem,” none of which are an impossible requirement to always have fuel. *Id.* at 55. For example, ISO-NE could implement measures to improve load forecasting, encourage load to procure more of its needed energy on a day-ahead basis, and provide hourly re-offer periods. We are eager to participate in developing the short-term and long-term market solutions to address the gas shortage issue, but the starting point cannot be a trumped up requirement to always have fuel. ISO-NE has actions of its own that it could be taking.

B. ISO-NE’s Tariff Interpretation Will Not Guarantee Reliability

ISO-NE attempts to construe its interpretation of the tariff as the only way to read the tariff and ensure reliable operations. It suggests that generators are not willing to meet their supply offers outside of their day-ahead obligations, with the implication that generators have no intent to operate reliably. *See, e.g.*, ISO-NE Answer at 25 (“[T]he Complaint is arguing that beyond having fuel to meet a commitment in the Day-Ahead Energy Market, a generator does not have an obligation to produce energy in accordance with its offer.”). But this was not our argument. Rather, we explained in the Complaint that ISO-NE’s interpretation of the tariff is impracticable because it demands that generators procure fuel to satisfy any possible dispatch scenario. In contrast to ISO-NE, which has a view of the entire system, generators have relatively little information regarding whether or not they will be dispatched after the day-ahead schedules are issued, and must make educated forecasts—best guesses—about likely dispatch, and exercise Good Utility Practice to procure fuel for any likely dispatch scenario.

There is a middle ground between declaring generators in violation of the ISO-NE tariff if they are unable to procure gas in all situations and saying that “generators need only have fuel to meet the obligations undertaken in the day-ahead market.” Neither of these two extreme views is correct. As we explained above, it is impossible for all generators to take measures that

would guarantee their ability to procure fuel in all dispatch scenarios. And generators are bound by the standard of Good Utility Practice in fulfilling their supply offer obligations, including in real time.

Finally, as we explained in the Complaint and above, ISO-NE's new requirement that generators must always have fuel is impossible to comply with and, if ratified, is more likely to do harm to reliability than good.

VI. OFFICE OF ENFORCEMENT INQUIRIES DO NOT HALT LITIGATION

ISO-NE cites *O'Connor & Hewitt, Ltd v. Energy Transfer Partners, L.P., et al.*, 122 FERC ¶ 61,103 (2008), to urge dismissal of the Complaint because there are related enforcement procedures underway. ISO-NE Answer at 43. But *O'Connor* involved a third party that was seeking to intervene in an investigation because it believed it was entitled to some measure of damages from the target of the investigation. That is not the situation here. Here ISO-NE apparently has referred at least some gas-fired resources to FERC Enforcement for allegedly violating that tariff by not always having fuel. NEPGA filed the Complaint because the tariff has no such requirement. A prompt answer on the Complaint—far from wasting resources or complicating existing investigations—would assist in resolution of the any such existing enforcement actions.

It also cannot be the case that a pending enforcement action automatically halts or prevents litigation before the Commission. Otherwise, any time that an RTO seeks to forestall the filing of a complaint, for example, it simply could make a referral to the Office of Enforcement and thereby block the litigation. Such a rule would in essence give RTOs and other litigants an opportunity to undermine market participants' statutory right to file a section 206 complaint. 16 U.S.C. § 824e. Indeed, the Commission has granted a complaint even though there was a pending enforcement investigation regarding related subject matter. *See BJ Energy*,

LLC v. PJM Interconnection, L.L.C., 127 FERC ¶ 61,006 (2009). Under section 206 of the Federal Power Act, the Commission has the obligation to interpret the tariff, and the correct interpretation is of course critical to any ongoing enforcement investigation. Pending enforcement investigations thus do not provide a rational basis for dismissing the Complaint.

CONCLUSION

For the foregoing reasons, NEPGA requests that the Complaint be granted. We renew our request for a Commission ruling as soon as is practicable on this complaint, within 60 days of the filing date or by July 16, 2013, as capacity resources continue to incur obligations and exposure under ISO-NE's new interpretation of the tariff.

Respectfully submitted,

_____/s/
Dan Dolan
President
NEW ENGLAND POWER GENERATORS
ASSOCIATION
141 Tremont St.
Boston, MA 02111
(617) 516-5355

Bruce F. Anderson, Esq.
Director of Market & Regulatory Affairs
NEW ENGLAND POWER GENERATORS
ASSOCIATION
141 Tremont St.
Boston, MA 02111
(617) 902-2354

_____/s/
Paul F. Wight
Karis Anne Gong
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7365

*Counsel for New England Power Generators
Association*

June 20, 2013

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

| | | |
|------------------------------|---|------------------------|
| New England Power Generators |) | |
| Association, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Docket No. EL13-66-000 |
| |) | |
| ISO New England Inc., |) | |
| |) | |
| Respondent. |) | |

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 20th day of June, 2013.

_____/s/
Amber Thornhill
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7495