

144 FERC ¶ 61,157  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony Clark.

New England Power Generators Association, Inc.

Docket No. EL13-66-000

v.

ISO New England Inc.

ORDER ON COMPLAINT

(Issued August 27, 2013)

1. On May 17, 2013, the New England Power Generators Association (NEPGA) filed a complaint alleging that ISO New England Inc. (ISO-NE) impermissibly reinterpreted its Transmission, Markets and Services Tariff (Tariff) to impose a firm fuel obligation on all resources with Capacity Supply Obligations (capacity resources) through the Forward Capacity Market (FCM). In this order, the Commission grants in part and denies in part the complaint. The Commission finds 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. However the Commission also grants 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.

**I. Background**

2. ISO-NE operates the FCM, which is intended to send appropriate price signals to attract new investment, and maintain existing resources where and when they are needed, in order to ensure the reliability of the New England electricity grid. ISO-NE conducts periodic Forward Capacity Auctions in which it seeks to procure enough capacity to meet its forecasted demand plus reserves three years in advance. For each resource that clears in a Forward Capacity Auction, the FCM provides a predictable, future revenue stream in

exchange for a Capacity Supply Obligation.<sup>1</sup> In general terms, a Capacity Supply Obligation represents a resource owner's assurance that the resource will be available to supply capacity and energy three years in the future.

3. In recent years, the New England region, like many parts of the nation, has seen a marked increase in the proportion of its electric power that is generated by natural gas-fired resources.<sup>2</sup> Due to fundamental differences in how the markets for electricity and natural gas work, this increased dependence on natural gas-fired generation has challenged the existing gas and electric market structures and necessitated a conversation, at the regional and national levels, about how best to address those challenges. The Commission, ISO-NE, and stakeholders in New England have engaged, and continue to engage, in robust discussions about how to coordinate the natural gas and electric markets.<sup>3</sup> Amidst those ongoing discussions, on November 5, 2012, ISO-NE issued a

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<sup>1</sup> The Tariff defines Capacity Supply Obligation as “an obligation to provide capacity from a resource, or a portion thereof, to satisfy a portion of the Installed Capacity Requirement that is acquired through a Forward Capacity Auction in accordance with Section III.13.2, a reconfiguration auction in accordance with Section III.13.4, or a Capacity Supply Obligation Bilateral in accordance with Section III.13.5.1 of Market Rule 1.”

<sup>2</sup> For example, according to ISO-NE, in 1990, natural gas-fired generators produced approximately five percent of the electricity consumed in New England. In 2010, that figure was at 34 percent. ISO-NE's 2010 Annual Markets Report at 78, available at: [http://www.iso-ne.com/markets/mkt\\_anlys\\_rpts/annl\\_mkt\\_rpts/2010/amr10\\_final\\_060311.pdf](http://www.iso-ne.com/markets/mkt_anlys_rpts/annl_mkt_rpts/2010/amr10_final_060311.pdf). By 2012, the figure had grown to 51 percent. ISO-NE July 2012 paper, *Addressing Gas Dependence*, at 3, available at: [http://www.iso-ne.com/committees/comm\\_wkgrps/strategic\\_planning\\_discussion/materials/natural-gas-white-paper-draft-july-2012.pdf](http://www.iso-ne.com/committees/comm_wkgrps/strategic_planning_discussion/materials/natural-gas-white-paper-draft-july-2012.pdf).

<sup>3</sup> For example, the Commission has issued requests for comments and held a series of technical conferences to foster this conversation and attempt to facilitate solutions to the gas-electric coordination issues. See, e.g., *Coordination Between Natural Gas and Electricity Markets*, Docket No. AD12-12-000 (Feb. 15, 2012) (Notice Assigning Docket No. and Requesting Comments); *FERC Staff Report on Gas-Electric Coordination Technical Conferences*, Docket No. AD12-12-000 (Nov. 15, 2012); *Coordination Between Natural Gas and Electricity Markets*, 141 FERC ¶ 61,125 (2012) (directing further technical conferences and reports). The Commission also recently issued a Notice of Proposed Rulemaking seeking comments regarding a proposal to revise the Commission's regulations to provide explicit authority to permit interstate natural gas pipelines and public utilities that own, operate, or control facilities used for the

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memorandum entitled *Market Participant Performance Obligations* purporting to explain the performance obligations of market participants that have undertaken Capacity Supply Obligations in the FCM (November 5 Memo).<sup>4</sup> On December 18, 2012, NEPGA submitted a memo to ISO-NE seeking clarification regarding the November 5 Memo (December 18 Response).<sup>5</sup> ISO-NE responded in another memo dated January 18, 2013 (January 18 Reply).<sup>6</sup> NEPGA subsequently filed the instant complaint asserting that ISO-NE has impermissibly reinterpreted its Tariff through the November 5 Memo.

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transmission of electric energy in interstate commerce to share non-public, operational information with each other for the purpose of promoting reliable service or operational planning on either the public utility's or pipeline's system. *Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators*, 144 FERC ¶ 61,043 (2013).

In addition, ISO-NE has held numerous meetings with stakeholders regarding topics and proposals related to gas-electric coordination, including, for example, special, joint Reliability Committee/Markets Committee (RC/MC) meetings on January 29, 2013, March 19, 2013, April 2, 17 and 30, 2013, May 1 and 30, 2013 and June 13, 2013 to discuss the Winter 2013/14 proposal that was submitted with the Commission in Docket No. ER13-1851-000 on June 28, 2013; MC and Participants Committee (PC) meetings regarding the proposal to share information with the New England pipelines submitted in Docket No. ER13-356-000 (October 10-11, 2012 (MC) and November 9, 2012 (PC)); the proposal to move the timing of the day-ahead energy market submitted in Docket No. ER13-895-000 (December 11-12, 2013 (MC) and January 4, 2013 (PC)); and the energy offer flexibility proposal submitted in Docket No. ER13-1877-000 (June 4-5, 2013 (MC) and June 7, 2013 (PC)). Additionally, ISO-NE held several meetings regarding gas-electric operations through the Electric/Gas Operations Committee to promote greater electric and natural gas system reliability through improved education, understanding, communications, and coordination (e.g., May 31, 2012; September 19, 2012; December 19, 2012; February 8, 2013; and March 20, 2013).

Finally, the New England States Committee on Electricity (NESCOE) hosted various Gas-Electric Focus Group meetings (e.g., October 3, 2012; November 19, 2012; December 19, 2012; January 23, 2013; February 26, 2013; March 22, 2013; and May 3 and 29, 2013).

<sup>4</sup> See Exhibit 1 to NEPGA Complaint.

<sup>5</sup> Exhibit 2 to NEPGA Complaint.

<sup>6</sup> Exhibit 3 to NEPGA Complaint.

## II. Complaint

4. In the complaint, NEPGA contends that ISO-NE's November 5 Memo unlawfully reflects a new Tariff interpretation, requiring capacity resources to secure firm fuel and transportation around the clock, regardless of the likelihood that ISO-NE will call the resource to run. NEPGA states that ISO-NE's Tariff interpretation would require capacity resources to maintain or arrange for sufficient fuel supplies to accommodate any potential operational requests above and beyond commitments scheduled in the day-ahead market, including those made very late in the day during real time, when significant gas nominations typically are "impossible."<sup>7</sup> Disputing ISO-NE's assertion that the November 5 Memo merely clarifies an existing rule, NEPGA asserts that ISO-NE has impermissibly reinterpreted the Tariff to mean that a capacity resource: (1) can only be excused from meeting its supply obligation "if it is physically unable to do so due to events *that are beyond its control*;"<sup>8</sup> (2) cannot claim a forced outage caused by the inability to procure or schedule fuel; and (3) violates the Tariff if the resource fails to comply with a dispatch instruction due to fuel procurement reasons.<sup>9</sup>

5. NEPGA claims that the only reasonable interpretation of the November 5 Memo is that, absent a purely physical problem, capacity resources must have "100% firm fuel availability 100% of the time[.]"<sup>10</sup> NEPGA explains that it raised this issue with ISO-NE in its December 18 Response to the November 5 Memo and that ISO-NE responded by stating that the Tariff does not require a resource to use a particular fuel procurement strategy to satisfy its performance obligations, but that a performance obligation necessarily entails a willingness to procure fuel in a way that will "*generally assure* the resource can operate when dispatched."<sup>11</sup> NEPGA contends that ISO-NE's reply failed to explain how a capacity resource could possibly comply with the Tariff without having a firm fuel commitment, and also imposed a standard—to "generally assure" availability—that is too vague to comply with. NEPGA states that ISO-NE is in effect mandating that a capacity resource must have fuel for every dispatch scenario, even beyond the resource's day-ahead commitment, and that failure to have fuel is a Tariff violation subject to referral to the Commission through the Office of Enforcement. According to NEPGA, the only way for a resource to comply with this requirement is by

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<sup>7</sup> NEPGA Complaint at 3.

<sup>8</sup> *Id.* at 23 (quoting November Memo at 5) (NEPGA's emphasis).

<sup>9</sup> NEPGA Complaint at 23-24.

<sup>10</sup> *Id.* at 24.

<sup>11</sup> *Id.* (quoting ISO-NE's January 18 Reply at 1) (NEPGA's emphasis).

obtaining firm transportation and firm fuel supply, and nominating the resource's maximum level of fuel consumption, rather than its expected fuel consumption.<sup>12</sup>

6. NEPGA argues that ISO-NE's interpretation is contrary to the filed rate. NEPGA asserts that the Tariff requires that capacity resources act "consistent with Good Utility Practice" to procure fuel but does not reflect a firm fuel requirement. More specifically, NEPGA states that Tariff section III.13.6 requires a capacity resource to offer into the day-ahead and real-time energy markets capacity greater than or equal to its Capacity Supply Obligation "*whenever the resource is physically available[,]*"<sup>13</sup> and that under Tariff section III.13.6.1.1.2, the offer must reflect the resource's known operating characteristics "*consistent with Good Utility Practice.*"<sup>14</sup> NEPGA argues that, based on the Tariff definition of Good Utility Practice, Tariff section I.2.2., capacity resources are expected to inform ISO-NE of the physical availability of their resource and to "manage that physical availability consistent with the 'practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry.'"<sup>15</sup> Similarly, NEPGA states that the Tariff, under section III.1.11.3(d), requires resources to follow Good Utility Practice by making "all *reasonable* efforts" to operate as close to dispatched levels as possible.<sup>16</sup> According to NEPGA, it has been the practice of capacity resources to use good faith efforts to obtain fuel necessary to meet their obligations when called upon in the day-ahead and real-time markets, consistent with Good Utility Practice. NEPGA argues that the November 5 Memo improperly narrows the meaning of "physically available" by limiting the circumstances under which a capacity resource with a Capacity Supply Obligation is excused from keeping a supply offer open and from responding to dispatch instructions.<sup>17</sup>

7. NEPGA states that ISO-NE's November 5 Memo ignores certain relevant Tariff provisions, and is therefore contrary to what NEPGA describes as well-settled Commission precedent that a tariff must be interpreted to give meaning to all of its

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<sup>12</sup> NEPGA Complaint at 25.

<sup>13</sup> *Id.* at 28 (quoting ISO-NE Tariff § III.13.6.1.1.1) (NEPGA's emphasis).

<sup>14</sup> *Id.* (quoting ISO-NE Tariff § III.13.6.1.1.2) (NEPGA's emphasis).

<sup>15</sup> *Id.* (quoting ISO-NE Tariff § I.2.2).

<sup>16</sup> NEPGA Complaint at 29 (quoting ISO-NE Tariff § III.1.11.3(d)) (NEPGA's emphasis).

<sup>17</sup> NEPGA Complaint at 29.

provisions.<sup>18</sup> NEPGA specifically points to: (1) Tariff section III.13.7.2.7.1.2, which imposes availability penalties on resources with Capacity Supply Obligations, based on the resource's availability during Shortage Events rather than the resource's ability to secure fuel for all hours of every day;<sup>19</sup> (2) Tariff section III.1.7.20(f), which requires resources to report to ISO-NE their "ability to procure fuel;"<sup>20</sup> and (3) Tariff provisions and operating procedures that allow a resource to become a Limited Energy Resource<sup>21</sup> due to "fuel limitations,"<sup>22</sup> or to request to "stay off" in any hour despite being scheduled in the day-ahead market.<sup>23</sup> These provisions, NEPGA argues, would be unnecessary and presumably would not exist if the Tariff contained a "firm fuel" requirement. NEPGA further states that ISO-NE's Tariff interpretation imposing a firm fuel obligation is contrary to standard industry practice because such an obligation is unworkable and inefficient, and because no other regional transmission operator imposes such a requirement.

8. NEPGA further contends that ISO-NE's interpretation contradicts the fundamentals of the FCM design. NEPGA contends that the November 5 Memo ignores the principle underlying the FCM Settlement, which, according to NEPGA, was to incentivize performance through market signals, especially during times of system stress.<sup>24</sup>

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<sup>18</sup> *Id.* at 32.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 35.

<sup>21</sup> Limited Energy Resource is defined as generating resources that, due to design considerations, environmental restriction on operations, cyclical requirements, such as the need to recharge or refill or manage water flow, or fuel limitations, are unable to operate continuously at full output on a daily basis. Tariff Section I.2.2.

<sup>22</sup> NEPGA Complaint at 35-36 (quoting ISO-NE Transmission, Markets and Services Tariff § I.2.2; ISO-NE Manual for Market Operations M-11 § 2.5.3(9)).

<sup>23</sup> NEPGA Complaint at 36 (citing ISO New England, *The Multi-Settlement System, available at: [http://www.iso-ne.com/nwsiss/grid\\_mkts/how\\_mkts\\_wrk/multi-settle/index-p2.html](http://www.iso-ne.com/nwsiss/grid_mkts/how_mkts_wrk/multi-settle/index-p2.html)*; ISO-NE Manual for Market Operations M-11 § 6.3.6).

<sup>24</sup> NEPGA Complaint at 37 (citing *Devon Power LLC*, 115 FERC ¶ 61,340, at PP 157-159 (2006)).

9. NEPGA further argues that ISO-NE's Tariff interpretation is inconsistent with ISO-NE's past practices and its current statements and proposals. NEPGA asserts that ISO-NE's recent statements and proposals concerning market design changes to incentivize performance do not indicate that the failure to perform constitutes a Tariff violation.<sup>25</sup> NEPGA states that ISO-NE already has commenced a stakeholder process to develop market incentives to better compensate resources for performance and that those proposed changes, which would impose “*incremental obligations* and financial consequences for resources to maintain fuel inventories[,]” confirm that the Tariff currently does not have a firm fuel obligation.<sup>26</sup>

10. NEPGA asserts that ISO-NE's interpretation fundamentally alters the Tariff-based Capacity Supply Obligations allocated on a three-year forward basis via the FCM. This is because, NEPGA explains, when generators accepted their Capacity Supply Obligations, they could not have foreseen the firm fuel requirement that ISO-NE now asserts exists in the Tariff. Accordingly, NEPGA argues that ISO-NE's interpretation is unjust and unreasonable because it would abrogate the three-year notice that the FCM

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<sup>25</sup> NEPGA Complaint at 48 (citing ISO-NE Strategic Planning Initiative, FCM Performance Incentives (Oct. 2012), *available at*: [http://www.iso-ne.com/committees/comm\\_wkgrps/mrkts\\_comm/mrkts/mtrls/2012/nov162012/fcm\\_performance\\_white\\_paper.pdf](http://www.iso-ne.com/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2012/nov162012/fcm_performance_white_paper.pdf); ISO-NE, *Addressing Gas Dependence (Draft)* at 1 (Jul. 2012) (*Gas Dependence White Paper*); 2013 Winter Operations Summary at 12; NEPGA May 17, 2013 Complaint at 49-51 (citing *Gas Dependence White Paper* at 13-14; ISO-NE Internal Market Monitor, *2011 Annual Markets Report* at 74 (May 15, 2012), *available at*: [http://www.iso-ne.com/markets/mkt\\_anlys\\_rpts/annl\\_mkt\\_rpts/2011/2011\\_amr\\_final\\_051512.pdf](http://www.iso-ne.com/markets/mkt_anlys_rpts/annl_mkt_rpts/2011/2011_amr_final_051512.pdf)). NEPGA also points to an ISO-NE memorandum from September 2012 and asserts that the authors assumed that generators do not secure fuel around the clock. NEPGA Complaint at 47 (quoting ISO-NE, Robert Ethier and Peter Brandien, *Memorandum re: Quantitative and Qualitative Implications of Moving the Day-Ahead Energy Market Forward Three Hours* at 1 (Sept. 25, 2012), *available at*: [http://www.iso-ne.com/committees/comm\\_wkgrps/mrkts\\_comm/mrkts/mtrls/2012/sep282012/a02a\\_iso\\_memo\\_09\\_25\\_12.pdf](http://www.iso-ne.com/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2012/sep282012/a02a_iso_memo_09_25_12.pdf) (stating that the current practice of energy scheduling makes it unlikely that market participants can get fuel overnight, and shifting the timing of the day-ahead energy market would allow market participants to obtain their energy market schedules before they procure the associated gas)).

<sup>26</sup> NEPGA Complaint at 51 (quoting ISO-NE's Proposal for Winter 2013/2014 Fuel Reliability Enhancements at 1 (NEPGA's emphasis)).

was designed to give generators, while providing no opportunity to recover the costs of the expanded obligation.<sup>27</sup>

11. Finally, NEPGA argues that ISO-NE's November 5 Memorandum reflects an attempt to change a filed rate without a proper filing pursuant to section 205 of the Federal Power Act (FPA) and the requisite demonstration that the changes are just and reasonable.<sup>28</sup> NEPGA asserts that *Energy Spectrum* and *Demand Response Coalition* confirm the inappropriateness of using a memorandum to alter jurisdictional rates or terms and conditions of service pertaining to Capacity Supply Obligations.<sup>29</sup> NEPGA further asserts that ISO-NE's interpretation would be unjust and unreasonable even if ISO-NE had pursued it through the proper procedures.<sup>30</sup> NEPGA also states that referring generators to the Commission for enforcement actions based on the interpretation in the November 5 Memo would violate the fair notice doctrine and due process.<sup>31</sup>

12. For these reasons, NEPGA requests that the Commission find that ISO-NE's interpretation of the Tariff is unlawful, and that the Commission "restore the status quo," meaning that capacity resources must exercise Good Utility Practice to procure fuel but are not held to a strict Capacity Supply Obligation. Additionally, NEPGA requests that, "to remove any doubt," the Commission definitively find that there is no firm fuel obligation in the existing Tariff and that it is not a Tariff violation to be unable to procure fuel after exercising Good Utility Practice to do so.

### **III. Notice of Filings and Responsive Pleadings**

13. Notice of the complaint was published in the *Federal Register*, 78 Fed. Reg. 32,384 (2013), with interventions and protests due on or before June 6, 2013.

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<sup>27</sup> NEPGA Complaint at 52-53.

<sup>28</sup> *Id.* at 38.

<sup>29</sup> NEPGA Complaint at 38-39 (citing *Energy Spectrum*, 141 FERC ¶ 61,197; *Demand Response Coal. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061 (2013); citing also *N.Y. Indep. Sys. Operator, Inc.*, 143 FERC ¶ 61,011 (2013)).

<sup>30</sup> NEPGA Complaint at 53-54.

<sup>31</sup> *Id.* at 39-40 (citing *EnerNOC, Inc.*, 134 FERC ¶ 61,158 (2011)).

14. Numerous parties filed timely motions to intervene and some of those parties also filed comments.<sup>32</sup> The Connecticut Public Utilities Regulatory Authority (Connecticut PURA) filed a notice of intervention. The Maine Public Utilities Commission (Maine PUC) filed a notice of intervention and comments. Several parties filed motions to intervene and/or comments out-of-time.<sup>33</sup>

15. On June 6, 2013, ISO-NE filed its response to the complaint (ISO-NE Answer). On June 20, 2013, NEPGA filed an answer to ISO-NE's Answer. On July 2, 2013, ISO-NE filed an answer to NEPGA's answer. On July 5, 2013, Calpine filed a limited answer to both of ISO-NE's answers, and on July 10, 2013 the Maine PUC filed an answer to ISO-NE's Answer.

**A. ISO-NE's Response**

16. ISO-NE argues that the Commission should reject NEPGA's complaint because, according to ISO-NE, it is premised on the false claim that ISO-NE has reinterpreted the Tariff to impose a firm fuel obligation on generators. ISO-NE states that the November 5 Memo did not reinterpret or change the Tariff, but instead simply reviewed the existing Tariff provisions governing generator performance obligations and explained what those provisions require. ISO-NE asserts that, because the November 5 Memo did not reinterpret or change the Tariff, the cases NEPGA cites—*Energy Spectrum*, *Demand Response Coalition*, and *EnerNOC*—are inapposite.<sup>34</sup> ISO-NE explains that it did not issue the November 5 Memo unilaterally, but instead the memo was written in response to stakeholder requests and ISO-NE's observations of increased nonperformance by gas-fired generators.<sup>35</sup>

17. ISO-NE argues that the Tariff neither imposes a firm fuel obligation nor does the November 5 Memo interpret the Tariff to impose such an obligation.<sup>36</sup> ISO-NE asserts that its January 18 Memo responding to NEPGA's concerns made clear that, rather than mandating any particular fuel procurement strategy, the Tariff allows generators to meet their performance obligations through a variety of fuel strategies, including "dual-fuel capability, services from [a liquefied natural gas] provider, or other flexible gas supply

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<sup>32</sup> See Appendix A.

<sup>33</sup> *Id.*

<sup>34</sup> ISO-NE Answer at n.8.

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.* at 10-11.

options.”<sup>37</sup> ISO-NE further argues that the complaint seeks to convince the Commission to agree with a Tariff interpretation that would reduce the performance obligation for generators by requiring them merely to have fuel to meet a day-ahead commitment. ISO-NE contends that this flawed interpretation would remove a generator’s obligation to produce energy in accordance with its supply offer, and would shift all of the fuel risk to ISO-NE and all of the associated cost to load. ISO-NE insists that this is illogical because generators are best positioned to manage their own fuel strategies in a way that meets their supply obligations.<sup>38</sup>

18. ISO-NE argues that the Tariff requires a resource to submit a supply offer in the day-ahead energy market, to provide energy up to the “Economic Maximum Limit”<sup>39</sup> listed in the supply offer, and to keep the supply offer open throughout the operating day, i.e., the real-time energy market.<sup>40</sup> ISO-NE states that these obligations exist regardless of whether a generator is actually committed in the day-ahead energy market; thus, the balance of a resource’s supply offer is subject to dispatch throughout the operating day.<sup>41</sup> ISO-NE explains that these requirements, which apply to all generation resources, are heightened for capacity resources due to the “must offer” requirement in the Tariff’s

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<sup>37</sup> *Id.* at 11.

<sup>38</sup> *Id.* at 13.

<sup>39</sup> The Economic Maximum Limit or Economic Max is “the maximum available output, in MW, of a resource that a Market Participant offers to supply in the Day-Ahead Energy Market or Real-Time Energy Market, as reflected in the resource’s Supply Offer. This represents the highest MW output a Market Participant has offered for a resource for economic dispatch. A Market Participant must maintain an up-to-date Economic Maximum Limit for all hours in which a resource has been offered into the Day-Ahead Energy Market or Real-Time Energy Market.” Tariff Section I.2.2.

<sup>40</sup> ISO-NE Answer at 14. ISO-NE indicates that Tariff section III.1.10.1A(d) is the source of the generators’ “core” obligations, noting that a generator may update its supply offer during the “Re-Offer Period” that occurs after the day-ahead market results are posted before the operating day. *Id.*

<sup>41</sup> ISO-NE explains that these obligations are reiterated in the dispatch instructions in Market Rule 1 and in the Market Participant Service Agreement that all generators execute. ISO-NE Answer at 15 (citing Tariff § III.1.7.20(b); Market Participant Service Agreement at § 4.4).

FCM rules, which compels a capacity resource to offer “a MW amount equal to or greater than its Capacity Supply Obligation *whenever the resource is physically available.*”<sup>42</sup>

19. ISO-NE states that while there are limited exceptions to these obligations, failure to procure fuel does not qualify because it is within the generator’s control. According to ISO-NE, the Tariff uses three terms to describe the condition of a resource being rendered unavailable—“Forced Outage,”<sup>43</sup> not being “physically available,”<sup>44</sup> and “Force Majeure”<sup>45</sup>— all of which describe situations where performance is excused due to an unanticipated event beyond the resource owner’s control.<sup>46</sup> ISO-NE argues that the outage scheduling procedures contained in Operating Procedure No. 5 provide the only means for a generator owner to intentionally remove a generator from service and that procedure does not allow removal from service based on a decision not to obtain fuel.<sup>47</sup>

20. ISO-NE argues that a lack of fuel caused by a failure to make fuel arrangements sufficient to support a supply offer does not excuse a resource from being physically available, because such failure is not beyond the generator’s control, but instead amounts to an attempt to take an “economic outage.”<sup>48</sup> Similarly, ISO-NE argues, taking an outage based on economic concerns, such as fuel price, is equivalent to taking an economic outage. However, ISO-NE explains, economic outages have not been permitted under the Tariff since 2007; so such outages therefore are impermissible and constitute Tariff violations. ISO-NE further contends that allowing generators to choose not to honor a supply offer based on fuel availability would amount to a reauthorization

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<sup>42</sup> ISO-NE Answer at 16 (quoting Tariff § III.13.6.1.1.1) (ISO-NE’s emphasis).

<sup>43</sup> ISO-NE Answer at 17 (citing ISO-NE, Operating Procedure No. 5, available at [http://www.iso-ne.com/rules\\_proceeds/operating/isone/op5\\_b/op5\\_rto\\_final.pdf](http://www.iso-ne.com/rules_proceeds/operating/isone/op5_b/op5_rto_final.pdf)).

<sup>44</sup> ISO-NE Answer at 17 (citing Tariff § III.13.6.1.1.1).

<sup>45</sup> ISO-NE Answer at 17 (citing Tariff § I.5.1; Tariff § I.2.2 (definition of Force Majeure)).

<sup>46</sup> In addition, ISO-NE states that the Tariff allows market participants to determine when a facility should be operated below its full capacity to the “*extent safety requires.*” ISO-NE Answer at 18 (citing Tariff § I.3.4) (ISO-NE’s emphasis).

<sup>47</sup> ISO-NE Answer at 19.

<sup>48</sup> ISO-NE Answer at 19-20 (citing *ISO New England Inc.*, 120 FERC ¶ 61,087 (2007)).

for capacity resources to take economic outages.<sup>49</sup> ISO-NE also asserts that prohibiting economic outages under the Tariff is consistent with industry standards concerning resource outages, as seen in the North American Electric Reliability Corporation (NERC) Generating Availability Data System (GADS) Data Reporting Instructions.

21. ISO-NE argues that the performance obligations in the Tariff are reasonable, manageable, and crucial to market function and system reliability. As a result, ISO-NE asserts that diminishing these obligations would have many adverse consequences, including creating uncertainty that would threaten short-term reliability, undermining the integrity of price signals, and shifting both the risk and associated costs from the generators to load.

22. ISO-NE states that the Tariff highlights the fact that fuel procurement strategies are a generator's responsibility and provides generators the ability to make necessary fuel arrangements by allowing supply offer adjustments to accommodate the associated costs.<sup>50</sup> ISO-NE also argues that the natural gas industry is willing to provide alternatives to firm natural gas transportation<sup>51</sup> and that the Tariff contains provisions to accommodate any costs associated with these alternative fuel arrangements.<sup>52</sup> ISO-NE also states that other alternatives to firm fuel are available to gas-fired generators, including dual-fuel capability, signing up for new pipeline capacity, and contracting with Canadian suppliers or liquefied natural gas facilities to the north and east, where pipelines are unconstrained.<sup>53</sup>

23. ISO-NE argues that following Good Utility Practice does not excuse a capacity resource's performance obligations, and permitting such an excuse would allow resources to evade their obligations with respect to any supply offer. ISO-NE states that neither of the two Tariff provisions that NEPGA cites in support of its contention that following Good Utility Practice excuses non-performance refer to fuel availability, nor can they be read to apply in that context because they only refer to the physical, mechanical

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<sup>49</sup> ISO-NE Answer at 30 (citing *ISO New England Inc.*, 120 FERC ¶ 61,087 (2007) (accepting Tariff § III.13.6.1.1.3 ("Economic outages are not permitted for listed resources...")). *See also* n.79 *infra*.

<sup>50</sup> ISO-NE Answer at 26.

<sup>51</sup> *Id.* at 26-28.

<sup>52</sup> *Id.* at 29.

<sup>53</sup> *Id.* at 30.

capabilities<sup>54</sup> and operation of a unit.<sup>55</sup> In addition, ISO-NE argues applying the Good Utility Practice Tariff provisions to fuel procurement would be unworkable because it would require ISO-NE's Internal Market Monitor (IMM) to evaluate each claim in real-time.

24. ISO-NE argues that the Commission should reject NEPGA's various other arguments, including the argument that an action cannot be a Tariff violation unless the Tariff states so explicitly. According to ISO-NE, failure to comply with a Tariff obligation constitutes a Tariff violation regardless of whether the Tariff authorizes ISO-NE to impose a penalty for the activity.<sup>56</sup> To that end, ISO-NE rejects the notion that any of its recent section 205 filings intended to increase Tariff compliance evidence that the existing Tariff does not already impose a strict capacity obligation.<sup>57</sup>

25. Lastly, ISO-NE argues that the Commission should summarily dismiss the complaint and allow the Commission's Office of Enforcement to make its recommendations following a factual examination of the pending nonperformance referrals from the IMM.<sup>58</sup>

## **B. Comments**

26. The NEPOOL Participants Committee (NEPOOL) argues that the Commission should limit its inquiry to whether the November 5 Memo does or does not change the Tariff. If the answer is no, NEPOOL states that the complaint should be denied. If the answer is yes, NEPOOL requests that the Commission grant the complaint, clarify the Tariff, and direct ISO-NE to follow the stakeholder process in making any necessary changes.

27. Northeast Utilities Service Company, NESCOE, and the Connecticut PURA request that the Commission assist gas-electric coordination dialog in the region by promptly and completely explaining capacity resources' performance obligations.

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<sup>54</sup> ISO-NE Answer at 37 (citing tariff § III.13.6.1.1.2).

<sup>55</sup> ISO-NE Answer at 38 (citing Tariff § III.1.11.3(d)).

<sup>56</sup> ISO-NE Answer at 40-41 (citing *Dartmouth Power Associates L.P.*, 134 FERC ¶ 61,085 (2011)); *see also* ISO-NE Answer at 40, n.65.

<sup>57</sup> ISO-NE Answer at 41-42.

<sup>58</sup> *Id.* at 43.

28. The Maine PUC states that, in ruling on the complaint, the Commission must consider the difficulty in applying NEPGA's proposed standard—"commercially reasonable" effort—for determining whether a generator has satisfied its Capacity Supply Obligation, and whether such a standard can be reconciled with the notion that consumers making capacity payments are procuring a reliable energy supply.

29. The New England Pipelines and INGAA both state that more pipeline capacity is needed in New England, and that achieving this requires ISO-NE policies that send appropriate price signals regarding the value of firm transportation service. The New England Pipelines and INGAA contend that firm transportation service and appropriate nominations would solve the operational challenges at issue, which are a result of the lower priority interruptible transportation for which the New England generators have contracted.

30. Electric Power Supply Association (EPSA), Independent Power Producers of New York, Inc., TransCanada Power Marketing Ltd. (TransCanada), PSEG Companies (PSEG), Dominion Resources Services, Inc. (Dominion), Entergy Nuclear Power Marketing, LLC (Entergy), and Shell Energy Marketing (US) L.P. (Shell) generally echo NEPGA's arguments. PSEG, Entergy, and Shell also state that market participants should be allowed to continue pursuing gas-electric coordination solutions through the stakeholder process.

31. TransCanada further states that ISO-NE's interpretation essentially places gas-fired capacity resources in violation of the Tariff without any reasonable or feasible means to comply and imposes an unduly discriminatory obligation, since it mainly impacts gas-fired resources. PSEG also argues that the Tariff does not allow capacity resources to include pipeline demand charges or the cost of carrying physical fuel inventories in day-ahead and real-time energy offers, or otherwise recover these costs in the FCM. Dominion emphasizes that the issues raised by the complaint have real, practical impacts, pointing to its experience this past winter, and explained in the Commission's order regarding Dominion's recent cost recovery filing.<sup>59</sup>

### C. Answers to Answers

32. NEPGA argues that ISO-NE's statement that it does not mandate how generators procure fuel, as long as they do so, is a distinction without a difference. NEPGA states that whether the obligation is termed a "firm fuel obligation" or a "requirement to always have fuel," the point of the complaint is that ISO-NE's interpretation requires capacity resources to always have fuel available for their entire Capacity Supply Obligation at any

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<sup>59</sup> *Dominion Energy Marketing, Inc.*, 143 FERC ¶ 61,223, at P 25 (2013) (*Dominion*).

time ISO-NE may call upon them or the resource will be in violation of the Tariff. NEPGA contends that the alternative options ISO-NE suggests for meeting performance obligations—liquefied natural gas, dual-fuel capability, and new pipeline capacity—would not immediately enable generators to satisfy the requirement to always have fuel, and that resources currently have no way to recover the costs of these alternatives.<sup>60</sup>

33. In further support of its argument that it is physically impossible for all gas-fired generators to always have enough gas to operate up to their full Capacity Supply Obligations whenever called upon, NEPGA points to ISO-NE's acknowledgement that there is not enough pipeline capacity for this to occur. NEPGA asserts that the Commission "never would have approved a tariff obligation that was (and is) impossible to meet."<sup>61</sup> In addition, NEPGA explains, in some situations it is impossible for generators and gas pipelines to accommodate last-minute changes in dispatch instructions resulting from the way ISO-NE operates the system. NEPGA notes that it does not dispute that sufficient gas usually is available on weekends, but explains that this does not mean that sufficient gas is available to allow every resource to meet its maximum potential real-time dispatch on short notice. NEPGA observes that ISO-NE does not mention the inefficiency a requirement to always have fuel would have on the natural gas system and the new costs this would impose on consumers.

34. NEPGA further asserts that holding generators to the Good Utility Practice standard is not a free pass to never procure fuel, but is instead a Tariff-defined term and a "widely-accepted industry standard"<sup>62</sup> that is also the same standard ISO-NE must use in meeting its duties under the Transmission Operating Agreement.<sup>63</sup> NEPGA contends that, in the context of fuel procurement, the Good Utility Practice standard "requires gas-

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<sup>60</sup> NEPGA Answer to Answer at 3 (citing *Dominion*, 143 FERC ¶ 61,223 at P 25).

<sup>61</sup> NEPGA Answer to Answer at 4.

<sup>62</sup> NEPGA Answer to Answer at 6 (citing *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); PJM Open Access Transmission Tariff, Attachment K § 1.7.4(a); Order No. 888, pro forma OATT §§ 1.14, 1.6, 28.2, 33.7, 35.2; Midcontinent Independent Transmission System Operator Tariff § 38.2.5(a)(i); CAISO Fifth Replacement FERC Elec. Tariff § 7.4).

<sup>63</sup> NEPGA Answer to Answer at 7 (citing ISO-NE Transmission Operating Agreement § 3.05; *id.* Schedule 1.01 (defining Good Utility Practice identically to the ISO-NE Tariff's definition)).

fired generators to use commercially reasonable efforts consistent with industry standards to procure fuel in line with ISO-NE's dispatch instructions."<sup>64</sup>

35. NEPGA asserts that ISO-NE attempts to circumscribe the Good Utility Practice standard by claiming that it applies only to "'mechanical' or 'moment to moment' aspects of physical generator performance[,]"<sup>65</sup> without providing a rational explanation for that Tariff reading. NEPGA states that if the Good Utility Practice standard was meant only to apply in such narrow circumstances the Tariff would have stated it explicitly. NEPGA argues that the Good Utility Practice standard is not unworkable, as ISO-NE asserts, and that a generator's performance could easily be evaluated against the standard after-the-fact.

36. In further support of its argument that the Tariff does not impose a requirement to always have fuel, NEPGA asserts that the Tariff provision requiring that supply offers remain open throughout the operating day "mean[s] that an offer that is not accepted in the day-ahead market is not excused from possible performance in real time[,]" but that more precise language would be necessary if this Tariff provision was intended to require a resource to always ensure it has fuel for its full offered output.<sup>66</sup> NEPGA emphasizes that this is particularly the case in circumstances where, as here, such an interpretation imposes a requirement that is impossible to meet, that is contrary to ISO-NE's past practices and statements, contrary to every other Regional Transmission Organization's practices, and contradicted by the FCM Settlement.

37. With respect to ISO-NE's contention that the Tariff need not explicitly state whether a particular action constitutes a Tariff violation, NEPGA argues that, regardless, a tariff must expressly state whether a particular action is required. NEPGA emphasizes its argument that the Tariff contains no requirement to have fuel at all times, stating that such an important requirement cannot be implied in the Tariff, but must instead be expressly stated. NEPGA further states the ISO-NE improperly relies on the NERC GADS Reporting Standards, which are not in the Tariff, for the premise that fuel procurement is within a plant operator's control and, therefore, that a generator cannot be removed from service due to lack of fuel.<sup>67</sup>

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<sup>64</sup> NEPGA Answer to Answer at 7.

<sup>65</sup> *Id.* at 7-8.

<sup>66</sup> *Id.* at 10-11.

<sup>67</sup> *Id.* at 13.

38. NEPGA dismisses the argument that capacity payments are “money-for-nothing” if capacity resources are not obligated to have fuel available, noting that the Commission has repeatedly rejected this argument both as an attack on capacity markets in general and on specific, past capacity payments. NEPGA asserts that the FCM Settlement obligates capacity resources to respond to dispatch instructions in accordance with Good Utility Practice and imposes on the resources significant financial penalties if they are unavailable during shortage hours, noting that there have been no shortage events since the start of the FCM. NEPGA asserts that the FCM Settlement’s imposition of substantial financial penalties for unavailability “never imagined the absolute physical requirement to always have fuel that ISO-NE now posits.”<sup>68</sup>

39. Lastly, in response to ISO-NE’s request that the Commission summarily dismiss the complaint to allow the Office of Enforcement to make its recommendations on the pending referrals, NEPGA argues that inquiries by the Office of Enforcement do not halt litigation<sup>69</sup> and that finding otherwise would allow a regional transmission operator to forestall litigation simply by making a referral to the Commission through the Office of Enforcement, thereby undermining market participants’ rights under FPA section 206.

40. In its answer to NEPGA’s answer, ISO-NE states that NEPGA mischaracterizes ISO-NE’s position by asserting that failure to procure fuel is a Tariff violation. ISO-NE reiterates that its position is that generators are obligated to honor the terms of their supply offers. ISO-NE restates its position that fuel procurement is not subject to a Good Utility Practice “qualifier,” explaining that Tariff section III.1.11.3(d) addresses the precision with which a resource operates, not “whether a Resource will operate at all, whether based on fuel or other reasons.”<sup>70</sup>

41. ISO-NE rejects NEPGA’s assertion that it is impossible for generators to honor their supply offers throughout the operating day because fuel is unavailable in real time, stating that NEPGA ignores comments made at a Commission technical conference, including comments by an executive of a NEPGA member-generator, confirming that real-time and weekend gas is available.<sup>71</sup> ISO-NE also contends that the costs associated

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<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Id.* at 18-19 (citing *BJ Energy LLC v. PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,006 (2009)).

<sup>70</sup> ISO-NE Answer to Answer at 4-5.

<sup>71</sup> *Id.* at 26, referencing Technical Conference on Coordination between Natural Gas and Electricity Markets, held April 25, 2013, Docket No. AD12-12-000 (not transcribed).

with these fuel arrangements do not pose an insurmountable burden because, according to ISO-NE, the Tariff provides ample opportunities to recover those costs. ISO-NE states that in addition to revenues from the FCM, which provide a three-year lead time for making fuel arrangements, generators also have opportunities to adjust offer prices after consulting with the IMM and also may seek cost recovery under FPA section 205 in some circumstances. ISO-NE argues that the Commission's recent decision in *Dominion* supports ISO-NE's view of performance obligations under the Tariff and also provides another mechanism for generators to recover the costs of fuel arrangements.<sup>72</sup>

42. Calpine states that its Answer is limited to addressing ISO-NE's mischaracterization of comments made by a Calpine representative at a Commission technical conference. Calpine explains that the comments were intended to show that generators *typically* can obtain gas for weekend and short-term purchases, but did not suggest that they will *always* be able to do so on short notice, particularly during cold weather events or during times of system constraints.

43. The Maine PUC agrees with ISO-NE that a variety of fuel procurement strategies are available to generators, and further states that the FCM provides a significant timeframe and revenues for generators with Capacity Supply Obligations to use those strategies. The Maine PUC argues that, if the Commission concludes that Good Utility Practice applies to fuel procurement, the issue of *when* generation resources must act to secure fuel would need to be addressed. The Maine PUC further states that if generators complied with their Tariff obligations as described by ISO-NE, it is possible that programs like ISO-NE's emergency stop-gap measures for the winter of 2013-2014<sup>73</sup> would not be necessary; thus, the Maine PUC urges the Commission to quickly resolve the alleged uncertainty concerning these Tariff obligations.

#### **IV. Discussion**

##### **A. Procedural Matters**

44. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

45. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission will grant the late-filed motions to

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<sup>72</sup> *Id.* at 8-9 (citing *Dominion*, 143 FERC ¶ 61,233).

<sup>73</sup> ISO New England and New England Power Pool, Winter Reliability Program Proposed Tariff Revisions, Docket No. ER13-1851-000 (filed June 28, 2013).

intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

46. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept NEPGA's, ISO-NE's, Calpine's and Maine PUC's answers to answers because they provided information that assisted us in our decision-making process.

## **B. Commission Determination**

47. Addressing NEPGA's allegations that ISO-NE impermissibly imposed a firm fuel obligation on capacity resources, the Commission denies the complaint in part, and grants the complaint in part. The Commission agrees with ISO-NE 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. However, we agree in part with NEPGA 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. As discussed below, we find that a demonstrated inability to procure fuel or transportation, as opposed to an economic determination not to procure fuel or transportation, may legitimately affect whether a capacity resource is physically available under the Tariff, and therefore may excuse nonperformance. However, we reject NEPGA's argument that Tariff sections III.1.11.3(d) and III.13.6.1.1.2, upon which NEPGA bases its "Good Utility Practice" argument, would excuse a capacity resource's performance obligation.

### **1. Capacity Supply Obligations**

48. ISO-NE's Tariff imposes a number of requirements on resources that have a Capacity Supply Obligation, i.e., capacity resources. Most relevant here are the following provisions:

Section III.1.7.20(b) requires that "Market Participants selling from Resources within the New England Control Area shall ... respond to the ISO's directives to start, shutdown, or change output levels of generating unit ...; continuously maintain all Offer Data concurrent with on-line operating information ...."

Section III.1.10.1A(d)(vi) requires that capacity resources' supply offers "shall remain open through the Operating Day for which the Supply Offer is submitted."

Section III.13.6.1.1.1 requires that "A Generating Capacity Resource having a Capacity Supply Obligation shall be offered into both the Day-Ahead Energy Market and Real-Time Energy Market at a MW amount equal to or greater than its Capacity Supply Obligation whenever the resource is physically available."

49. A plain reading of these 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. Both NEPGA and ISO-NE agree with this reading of the Tariff.<sup>74</sup>

50. However, NEPGA argues that ISO-NE impermissibly "stretches" these requirements to make a capacity resource's failure to comply with dispatch instructions based on fuel procurement reasons a Tariff violation. NEPGA contends that ISO-NE's reading of the Tariff creates a *de facto* "firm fuel" requirement. NEPGA maintains that the Tariff does not require capacity resources to ensure that they have fuel at all times, but rather that capacity resources are required to procure fuel pursuant to "Good Utility Practice."

51. NEPGA cites the following Tariff provisions in support of its position:

Section III.1.11.3(d): "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."

Section III.13.6.1.1.2: "For each day, Day-Ahead Energy Market and Real-Time Energy Market offers for the listed portion of a resource must reflect the then-known unit-specific operating characteristics (taking into account, among other things, the physical design characteristics of the unit) consistent with Good Utility Practice. Resources must re-declare to the ISO any changes to the offer parameters that occur in real time to reflect the known capability of the resource."

Section I.2.2 (Definitions): "Good Utility Practice means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts 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. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather includes all acceptable practices, methods, or acts generally accepted in the region, including those practices required by Federal Power Act Section 215(a)(4)."

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<sup>74</sup> NEPGA Complaint at 23; ISO-NE Answer at 14-15.

52. According to NEPGA, Good Utility Practice is the standard governing operation of resources, and extends to use of “good faith efforts to obtain fuel necessary to generate electricity when called upon” under Tariff section III.1.11.3(d).<sup>75</sup> NEPGA also states that Good Utility Practice applies to managing a capacity resource’s physical availability under Tariff section III.13.6.1.1.1. NEPGA also contends that the interpretation put forth in the November 5 Memo is inconsistent with: (1) ISO-NE’s historical interpretation of its tariff; (2) ISO-NE’s recent statements and proposals regarding potential revisions to the FCM; and (3) the shortage hour performance metric established under the FCM Settlement.

53. Although the Commission agrees with NEPGA (as conceded by ISO-NE) that there is not a *per se* firm fuel requirement in the Tariff, the Commission disagrees with NEPGA’s contention that Tariff section III.1.11.3(d) extends to fuel procurement activities. A plain reading of Tariff section III.1.11.3(d) reveals that it applies to *operations*: it requires market participants to “exert all reasonable efforts *to operate, or ensure the operation of,*” their resource in accordance with dispatch instructions. It 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.

54. Similarly, a plain reading of Tariff sections III.13.6.1.1.1 and III.13.6.1.1.2 establishes that a capacity resource must offer its capacity whenever the resource is physically available, and the offer must take into account the physical operating characteristics of the unit, consistent with Good Utility Practice. On their face, these provisions, which describe the formation and submission of supply offers, do not apply to fuel procurement activities. Tariff section III.13.6.1.1.2 states that an offer “must reflect the then-known unit-specific *operating characteristics* (taking into account, among other things, the *physical design characteristics* of the unit) consistent with Good Utility Practice (emphasis added).” This Tariff provision deals explicitly with *operating* characteristics. Put another way, the Good Utility Practice clause applies to the physical, mechanical operations of the unit – not fuel procurement. As discussed below, the Tariff excuses nonperformance by a capacity resource in only limited circumstances, and merely exercising Good Utility Practice in an effort to procure fuel is not one of them. For these reasons, the Commission finds that Tariff sections III.1.11.3(d) and III.13.6.1.1.2 do not apply to fuel procurement or transportation activities.

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<sup>75</sup> NEPGA Complaint at 29.

## 2. Exceptions to Performance

55. Although the Tariff imposes strict performance obligations on capacity resources, it also recognizes that certain events may cause a capacity resource to be unable to follow dispatch instructions. In particular, Forced Outages,<sup>76</sup> Force Majeure events<sup>77</sup> and other events that result in a capacity resource not being physically available<sup>78</sup> may excuse a capacity resource from following dispatch instructions.

56. ISO-NE argues that none of these exceptions to a capacity resource's performance obligations apply to a failure to make fuel arrangements, which ISO-NE believes is equivalent to an "economic outage." There is, however, an important distinction between being *unable* to procure fuel or transportation and *making an economic determination* not to procure fuel or transportation. Contrary to ISO-NE's position, the Commission finds that, under the Tariff, a *demonstrated* inability to procure fuel or transportation for a resource to run beyond (in terms of hours and/or incremental MWs) its day-ahead commitment, or when not scheduled in the day-ahead market, may legitimately affect whether a resource is physically available. If 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 the resource's control for those additional hours and/or incremental MWs; thus the resource may be excused for non-performance.

57. Aside from the specific issues at dispute here, the Commission recognizes that both the timing differences between the electric markets and natural gas markets and the current Tariff may make it difficult for generation resources to not only procure natural gas or transportation but also to reflect any accompanying fuel premium in a revised offer, particularly when ISO-NE dispatches a resource after the day-ahead commitment process.<sup>79</sup> As NEPGA states, capacity resources also are subject to the gas pipelines' tariffs and protocols that, among other things, require resources with firm fuel supply to "nominate" gas they plan to use the following day; thus, even if a capacity resource has

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<sup>76</sup> See ISO-NE Operating Procedure No. 5, available at: [http://www.iso-ne.com/rules\\_proceeds/operating/isone/op5\\_b/op5\\_rto\\_final.pdf](http://www.iso-ne.com/rules_proceeds/operating/isone/op5_b/op5_rto_final.pdf) at 6.

<sup>77</sup> Tariff § I.2.2 (definition of Force Majeure).

<sup>78</sup> See Tariff § III.13.6.1.1.1.

<sup>79</sup> The Commission is aware that ISO-NE and the NEPOOL stakeholders are considering Tariff revisions to address general gas/electric issues as well as capacity resource obligations.

firm fuel rights, it would need to nominate transportation prior to gas nomination cycle deadlines or risk losing its firm rights.

58. The Commission finds that economic considerations are irrelevant to determining whether a unit is “physically available,” based upon a natural interpretation of the term “physical,” as pertaining to that which is material or mechanical. Only a strained reading of that term would include consideration of price. Thus, the price of fuel may not affect a unit’s physical availability, nor does an unwillingness to procure fuel at the prevailing price qualify as a “Forced Outage” or “Force Majeure” event based upon a reasonable interpretation of those terms. As discussed above, a resource with a Capacity Supply Obligation must offer a MW amount equal to or greater than its Capacity Supply Obligation into the day-ahead and real-time energy markets when that resource is physically available, and those offers must remain open through the operating day for which the supply offer is submitted. Given that the exceptions to performance for physical unavailability, Forced Outage or Force Majeure are not applicable when a resource owner declines to purchase fuel due to price considerations, the Commission finds that a capacity resource that fails to comply with dispatch instructions when it is physically available but has determined not to procure fuel or transportation due to economic considerations is in violation of the Tariff. This finding is consistent with the FCM settlement agreement, which prohibited economic outages yet also adopted a shortage hour penalty structure for failure to perform which has never triggered.<sup>80</sup>

59. In finding that economic outages are not permissible under the Tariff, we reiterate that the Tariff has not allowed appropriate cost-recovery for fulfilling a Capacity Supply Obligation in all circumstances. The Commission addressed one aspect of this issue as it relates to cost recovery for resources that are dispatched in extraordinary circumstances for reliability reasons in *Dominion*, in which the Commission used its section 206 authority to direct ISO-NE to submit Tariff provisions that allow resources to submit a section 205 filing for cost-recovery, including fuel and variable operation and maintenance costs for the resource, in circumstances where for reliability reasons a resource is dispatched: (1) beyond its day-ahead schedule, where there is no opportunity to refresh the offer price to reflect current costs; or (2) after the results of the day-ahead market schedule are published, where the resource did not receive a day-ahead market schedule.<sup>81</sup> ISO-NE’s compliance filing in the *Dominion* proceeding was filed on August 13, 2013.

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<sup>80</sup> FCM Settlement Agreement at 36, Docket No. ER03-563-000, -030, and -055, (Mar. 6, 2006), accepted by the Commission in *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (FCM Order), *order on reh’g*, 117 FERC ¶ 61,133 (2006).

<sup>81</sup> *Dominion*, 143 FERC ¶ 61,233. *Dominion* provided guidance to ISO-NE on developing the required Tariff provisions, stating that they should be “sufficiently  
(continued...) ”

### 3. Enforcement Matters

60. Finally, because of the circumstances in this case, including ISO-NE's failure to enforce the performance obligations until recently and ongoing stakeholder discussions on related market design issues, the Commission will not pursue any pending enforcement referrals from the IMM that are based solely on an alleged inability to procure natural gas.

61. The Commission expects that, going forward, ISO-NE's IMM will refer suspected violations, including any capacity resource's failure to timely notify ISO-NE that the resource is not physically available,<sup>82</sup> to the Commission. The Commission will review such subsequent referrals consistent with the factors identified in the *Revised Policy Statement on Enforcement*.<sup>83</sup>

62. Determining whether a capacity resource was unable to obtain fuel and/or transportation will, of necessity, be a fact-specific inquiry. The IMM will need to make such determinations on a case-specific basis in the first instance and will refer the cases to the Commission thereafter if the IMM has reason to believe that the resource's action is a Tariff violation. Given the complexities involved in determining whether a particular resource has demonstrated that it was unable to procure fuel in order to satisfy its performance obligations, the Commission will require ISO-NE, through its IMM, to

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restrictive to discourage anticompetitive offering behavior but still allow for cost recovery in circumstances, for example, when a resource responds to a directive from ISO-NE to provide essential support to part of the system but has no reasonable opportunity to recover its costs. In other words, the tariff provision should ensure that a resource would be permitted to seek cost recovery, where, for instance, a resource submits an offer based on one fuel type but is required to run on another or cannot burn natural gas based on an Operation Flow Order restriction. These examples are not intended to be exhaustive and should not unduly limit the criteria ISO-NE develops for cost recovery under extraordinary circumstances. Our intention is for ISO-NE's tariff to provide enough flexibility to allow for cost recovery by resources that respond under extraordinary circumstances like those faced by the ISO-NE market on February 8 and 9." *Id.* P 28.

<sup>82</sup> See Tariff section III.13.6.1.1.2. ("Resources must re-declare to the ISO any changes to the offer parameters that occur in real time to reflect the known capability of the resource.").

<sup>83</sup> *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at PP 23-26 (2008) (identifying factors to determine whether there is a substantial basis to pursue an investigation).

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>84</sup> The Commission directs ISO-NE to 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, within 30 days of the date of this order.

The Commission orders:

(A) The complaint is hereby granted in part, and denied in part, as discussed in the body of this order.

(B) ISO-NE is hereby directed to submit an informational filing within thirty (30) days from the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>84</sup> The IMM must continue to make referrals during the interim period while ISO-NE develops and publishes this written explanation.

**Appendix A**

<b>Motions to Intervene</b>	
Algonquin Gas Transmission, LLC	Maritimes & Northeast Pipeline, L.L.C.
BG Energy Merchants, LLC	Massachusetts Attorney General Martha Coakley
Brookfield Energy Marketing LP	Massachusetts Municipal Wholesale Electric Co.
Calpine Corp.	Maxim Power (USA), Inc.
Capital Power Corp.	Millenium Power Partners, L.P.
Consolidated Edison Energy, Inc.	National Rural Electric Cooperative Association*
Distrigas of Massachusetts LLC*	NEPOOL Industrial Customer Coalition
Dominion Energy Resources Services, Inc.	NEPOOL Participants Committee
Dynegy Marketing and Trade, LLC	New England Local Distribution Companies
Electric Power Supply Association	New England States Committee on Electricity
Entergy Nuclear Power Marketing, LLC	NextEra Energy Resources, LLC
Exelon Corp.	Northeast Utilities Service Co.
GDF Suez Energy Marketing North America, Inc.	NRG Companies
Hess Corp.	Portland Natural Gas Transmission System
H.Q. Energy Services (U.S.) Inc.*	PSEG Companies
Independent Power Producers of New York, Inc.	Repsol Energy North America Corp.
Interstate Natural Gas Association of America	Shell Energy North America (US), L.P.
Iroquois Gas Transmission System, L.P.	Tennessee Gas Pipeline Co., L.L.C.
<b>Motions to Intervene, con't.</b>	<b>Comments</b>

TransCanada Power Marketing Ltd.	Connecticut Public Utility Regulatory Agency (Connecticut PURA)*
United Illuminating Company*	Dominion Resources Services, Inc. (Dominion)
Vitol Inc.	Electric Power Supply Association (EPSA)
	Entergy Nuclear Power Marketing, LLC (Entergy)
	Independent Power Producers of New York, Inc. (IPPNY)
	Interstate Natural Gas Association of America (INGAA)
	NEPOOL Participants Committee (NEPOOL)
	New England States Committee on Electricity (NESCOE)*
	New England Pipelines
	Northeast Utilities Services Co. (Northeast Utilities)
	PSEG Companies (PSEG)
	Shell Energy North America (US), L.P. (Shell)
	TransCanada Power Marketing Ltd. (TransCanada)
* Denotes filing made out-of-time	