158 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

New England Power Generators Association, Inc. Docket No. EL16-120-000

v.

ISO New England Inc.

ORDER GRANTING COMPLAINT IN PART
AND SETTING COMPLAINT FOR HEARING
AND SETTLEMENT JUDGE PROCEDURES IN PART

(Issued January 19, 2017)

1. On September 30, 2016, the New England Power Generators Association (NEPGA) filed a complaint against ISO New England Inc. (ISO-NE) under section 206 of the Federal Power Act (FPA),[1] asking the Commission to find that the Peak Energy Rent (PER) Adjustment provisions of the ISO-NE Transmission, Markets and Service Tariff (Tariff) governing ISO-NE's Forward Capacity Market (FCM) have become unjust and unreasonable, and to require ISO-NE to revise those provisions. In this order, we grant the complaint in part and set it for hearing and settlement judge procedures in part. We also establish a refund effective date of September 30, 2016.

I. **Background**

A. **FCM and PER Adjustment**

2. ISO-NE operates the FCM to procure capacity.[2] Every year, ISO-NE holds a Forward Capacity Auction (FCA), in which capacity suppliers compete to provide

[1] 16 U.S.C. § 824e (2012).

[2] *See generally Devon Power LLC*, 115 FERC ¶ 61,340 (FCM Settlement Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006), *aff'd in relevant part sub nom. Maine Public*

(continued …)

capacity to the New England region on a three-year forward basis. The capacity suppliers that clear the FCA receive Capacity Supply Obligations that commit them to provide capacity for a year-long delivery period (the Capacity Commitment Period) that runs from June 1, three years after the FCA, through the following May 31. A resource whose capacity clears the FCA receives monthly capacity payments (during the relevant Capacity Commitment Period), in return for which it must offer its capacity into the day-ahead and real-time energy markets every day.[3]

3. The FCM was developed pursuant to a settlement among stakeholders in 2006 (FCM Settlement). The FCM Settlement provided for the PER Adjustment, which was intended to act as a hedge for load against price spikes in the energy market and to help mitigate incentives for capacity suppliers to create price spikes in the real-time energy market through economic or physical withholding.[4] To accomplish these objectives, the PER Adjustment requires capacity suppliers to return Peak Energy Rents (i.e., those revenues earned when real-time clearing prices exceed an administratively-determined strike price) earned in the energy market to load, by means of rebates (or credits) against capacity suppliers' capacity payments.

4. The PER Adjustment first seeks to approximate the additional revenues that a hypothetical proxy peaking unit would earn in the real-time energy market during the highest-priced hours reflecting scarcity. To develop the PER Adjustment, each day ISO-NE calculates a PER strike price that is designed to be slightly higher than the marginal running cost of the most expensive resource in New England (i.e., the hypothetical proxy peaking unit) for that day.[5] For each hour in which the real-time Locational Marginal Price (LMP) exceeds that day's PER strike price (i.e., a PER event), ISO-NE calculates an hourly PER value equal to the difference between the real-time LMP and the PER strike price, adjusted by a scaling factor and an availability factor. ISO-NE sums these hourly PER values for the month, averages them out over a rolling 12-month period and

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Utilities Comm'n v. FERC, 520 F.3d 464 (D.C. Cir. 2008), *order on remand*, *Devon Power LLC*, 126 FERC ¶ 61,027 (2009).

[3] Currently ISO-NE is in the middle of Capacity Commitment Period 7 (June 1, 2016 – May 31, 2017), for which capacity was procured in FCA 7.

[4] FCM Settlement Order, 115 FERC ¶ 61,340 at PP 24, 29.

[5] The PER strike price is the heat rate times the fuel cost of the PER proxy unit. That heat rate is currently 22,000 Btu/kWh. ISO-NE Tariff, § III.13.7.2.7.1.1.1(b)(iii) (46.0.0).

then deducts them from capacity suppliers' monthly capacity payments.[6] The PER Adjustment applies to all suppliers with a capacity supply obligation and is based on the suppliers' entire obligation, not just to the portion of energy market offers of suppliers with a capacity supply obligation that clear in the real-time energy market.

B. Relevant Proceedings

1. Pay-for-Performance Capacity Market Design (Docket No. ER14-1050)

5. In 2014, the Commission largely adopted ISO-NE's proposal to implement a two-settlement capacity market design, often referred to as Pay-for-Performance, which is intended to incent capacity suppliers to provide energy during scarcity conditions.[7] A scarcity condition is triggered whenever the real-time energy price includes a Reserve Constraint Penalty Factor, a rate that serves as a cap on the price that ISO-NE may pay to procure additional reserves. In the same order, the Commission also adopted the New England Power Pool Participants Committee's (NEPOOL) proposal to increase the Reserve Constraint Penalty Factors (from $500/MWh to $1,000/MWh for 30-Minute Operating Reserves and from $850/MWh to $1,500/MWh for 10-Minute Non-Spinning Reserves) in order to provide additional incentives for performance during scarcity conditions, thus increasing the price that ISO-NE may pay to procure energy and reserves in real-time. In the Pay-for-Performance Order, the Commission accepted both ISO-NE's Pay-for-Performance proposal and NEPOOL's proposal to increase the Reserve Constraint Penalty Factors. The Pay-for-Performance mechanism will be implemented beginning with the Capacity Commitment Period for FCA 9 (June 1, 2018 through May 31, 2019), while the Reserve Constraint Penalty Factor increases became effective

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[6] ISO-NE Tariff, §§ III.13.7.2.7.1.1.1 and III.13.7.2.7.1.1.2 (46.0.0).

[7] *ISO New England Inc.*, 147 FERC ¶ 61,172, at PP 5-6 (2014) (Pay-for-Performance Order), *reh'g denied*, 153 FERC ¶ 61,223 (2015), *appeal pending sub nom. NEPGA v. FERC*, No. 16-1023 (D.C. Cir. filed January 19, 2016). As detailed in the Pay-for-Performance Order, the Pay-for-Performance mechanism involves two settlements. Under the first settlement, resources that take on a Capacity Supply Obligation will receive a Capacity Base Payment, which is determined for each resource by multiplying the amount of MW associated with its Capacity Supply Obligation by the FCA clearing price. The second settlement entails a Capacity Performance Payment, determined for each resource by measuring its performance against its forward position (i.e., its share of the system's requirements at the time of each Capacity Scarcity Condition).[8] 2014 Complaint, *New England Power Generators Association v. ISO New England Inc.*, Docket No. EL15-25-000 (December 3, 2014).

on December 3, 2014.

2. First NEPGA Complaint (2014 Complaint)

6. On December 3, 2014, NEPGA filed a complaint (2014 Complaint) asserting that the PER Adjustment had become unjust and unreasonable. NEPGA asked the Commission to direct ISO-NE to modify the PER provisions of the Tariff for Capacity Commitment Periods 5 through 8 and to eliminate the PER Adjustment for Capacity Commitment Period 9 and beyond.[8] NEPGA alleged that the increased Reserve Constraint Penalty Factors had the potential to substantially increase real-time energy prices and would therefore also increase the PER Adjustment. Thus, NEPGA argued, the application of higher Reserve Constraint Penalty Factors to real-time energy prices would reduce capacity payments significantly from the amounts originally contemplated at the time the parties entered into the FCM Settlement.

7. NEPGA stated that the interaction of the increased Reserve Constraint Penalty Factors with the existing PER Adjustment created a "lopsided and inequitable obligation" for capacity suppliers to rebate annually over $100 million to load, despite capacity suppliers' prior expectations that the PER Adjustment would remain small.[9] NEPGA argued that, at the time that capacity suppliers submitted their de-list bids into FCAs 5 through 8, they could not have anticipated that the Commission would change the market rules so as to change the impact of the PER Adjustment mechanism.[10] NEPGA further argued that since most load and supply clears in the day-ahead market – at day-ahead prices that do not reflect Reserve Constraint Penalty Factors – only a small portion of load pays, and a small portion of resources are paid, the real-time energy price. Thus, NEPGA alleged, the PER Adjustment mechanism did not reflect actual revenues either received by generators or paid by load.

8. The Commission denied the 2014 Complaint, finding that NEPGA had not met its burden under FPA section 206 to show that ISO-NE's existing Tariff provisions governing the PER Adjustment are unjust and unreasonable.[11] It found that NEPGA

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[8] 2014 Complaint, *New England Power Generators Association v. ISO New England Inc.*, Docket No. EL15-25-000 (December 3, 2014).

[9] 2014 Complaint, Docket No. EL15-25-000 at 12.

[10] *Id.* (citing *ISO New England Inc*., 134 FERC ¶ 61,128 (2011)).

[11] *New England Power Generators Association v. ISO New England Inc.*, 150 FERC ¶ 61,053 (2014 Complaint Order), *reh'g denied*, 153 FERC ¶ 61,222 (2015).

based its contention that the existing PER Adjustment mechanism will result in unjust and unreasonable results for Capacity Commitment Periods 5 through 8 on a single year of data, and failed to place that information in the larger context of the overall revenue picture for capacity suppliers for those four Capacity Commitment Periods. The Commission first pointed out that most resources that cleared FCAs 5 through 7 received a floor price[12] that was higher than the price that would have otherwise resulted, potentially resulting in above-market capacity revenues. The Commission found that, although the higher PER Adjustment in Capacity Commitment Periods 5 through 7 could potentially reduce the net capacity revenue that capacity resources receive, NEPGA had failed to address whether the reductions in net capacity revenue resulting from the higher PER Adjustment would exceed the above-market revenues that capacity resources received as a result of the price floor—and thus whether the net capacity revenues that capacity resources receive, after accounting for the PER Adjustment, would fall below market-clearing levels.[13]

9. Further, the Commission found that NEPGA did not address the possibility that, if higher PER Adjustments occurred, they might be offset by higher day-ahead LMPs in those hours in which a PER event could be expected. The Commission noted that resource owners and virtual bidders might reflect the possibility of high real-time LMPs in their day-ahead offers for such hours, and those higher offers could increase day-ahead LMPs across a number of hours, not just during hours when Reserve Constraint Penalty Factors are actually triggered. Thus, resource offers into the day-ahead markets during Capacity Commitment Periods 5 through 8 (and the resulting day-ahead clearing prices) might rise to take into account the potential for higher real-time prices. The Commission found that both the higher day-ahead offers from resources and the participation of virtual bidders could reduce the gap between the day-ahead and real-time market clearing prices, on average, and eliminate the basis for NEPGA's concern.[14]

10. The Commission rejected NEPGA's argument that real-time and day-ahead price convergence would not occur, finding that NEPGA focused only on whether price convergence would occur during particular timeframes when the PER Adjustment was triggered, while failing to address the possibility that price convergence could occur on average over a longer period. The Commission further noted that no party had provided

[12] All resources selected in those auctions, except those in the Northeastern Massachusetts/Boston area in FCA 7, received the floor price. 2014 Complaint Order, 150 FERC ¶ 61,053 at P 37.

[13] *Id*. P 38.

[14] *Id*.

information as to how often significant PER events might occur or the magnitude of revenue impacts that might result from them. The Commission stated that "[i]f, at a future point in time, NEPGA . . . is able to provide specific evidence that the interaction between the new Reserve Constraint Penalty Factors and the existing PER Adjustment mechanism has rendered the capacity rates for Capacity Commitment Periods 5 through 8 unjust and unreasonable, the Commission will consider any such complaints at that time."[15] Absent such specific evidence, however, the Commission considered NEPGA's claims regarding the effects of that interaction to be speculative.[16]

11. On rehearing, the Commission again rejected NEPGA's claims for relief, finding that NEPGA's Complaint had relied on extrapolations based on a small number of hours to make its case. The Commission reiterated that, in focusing solely on losses that generators might incur through interaction between the PER Adjustment and the higher Reserve Constraint Penalty Factors, NEPGA failed to address other ways in which the larger revenue picture for capacity suppliers might change, such as the possibility that higher PER Adjustment payments could be offset by higher LMPs in the energy and reserves markets.[17] NEPGA filed a petition for review of the Commission's orders on the 2014 Complaint, which is currently pending before the U.S. Court of Appeals for the D.C. Circuit.[18]

3. <u>Elimination of the PER Adjustment</u>

12. Subsequently, the Commission accepted ISO-NE's revisions to the FCM market rules that eliminate the PER Adjustment as of June 1, 2019 (the beginning of Capacity Commitment Period 10).[19] In filing to eliminate the PER Adjustment, ISO-NE and NEPOOL asserted that the PER Adjustment would no longer be required to address market power concerns because, combined with the Independent Market Monitor's and

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[15] *Id*. P 40.

[16] In addition to rejecting NEPGA's request for relief for Capacity Commitment Periods 5 through 8 on these grounds, the Commission also denied relief for Capacity Commitment Periods 9 and beyond on other grounds. *Id*. PP 42-43.

[17] *New England Power Generators Association v. ISO New England Inc.*, 153 FERC ¶ 61,222, at PP 25-30 (2015).

[18] *New England Power Generators Association v. FERC,* No. 16-1024 (D.C. Cir. filed January 19, 2016).[19] Letter Order, Docket No. ER15-1184 (May 5, 2015).

[19] Letter Order, Docket No. ER15-1184 (May 5, 2015).

the Commission's authority to investigate and sanction economic withholding, changes to the New England region's electricity market have reduced concerns about the exercise of market power.

II. The Instant Complaint

13. On September 30, 2016, NEPGA submitted the instant complaint. NEPGA again states that the increase in the Reserve Constraint Penalty Factors, effective December 3, 2014, renders the current PER Adjustment Tariff provisions unjust and unreasonable. NEPGA seeks relief from the PER Adjustment for a portion of Capacity Commitment Period 7 and all of Capacity Commitment Period 8. NEPGA seeks refunds as of the date of the Complaint, September 30, 2016. Capacity Commitment Period 7 began on June 1, 2016 and will run through May 31, 2017; Capacity Commitment Period 8 will run from June 1, 2017 through May 31, 2018.

14. NEPGA asserts that, while Reserve Constraint Penalty Factors are applied to the prices that suppliers receive for every MW they supply in the real-time energy market, capacity suppliers clear most of their supply in the day-ahead market and thus earn most of their energy revenues based on the day-ahead energy market clearing prices, which do not include Reserve Constraint Penalty Factors. According to NEPGA, the PER Adjustment that is deducted from a capacity resource's monthly capacity payments is based on capacity suppliers' total capacity supply obligations and the difference between the real-time energy price and the PER strike price[20] – i.e., not just on MWs that clear in the real-time energy market.[21] In other words, according to NEPGA, the PER Adjustment payments do not reflect actual revenues earned by capacity suppliers in the energy markets since only a small fraction of supply clears in the real-time energy market – the vast majority of supply clears in the day-ahead energy market, and thus is paid the day-ahead rather than the real-time energy price. NEPGA further states that on August 11, 2016, unforeseen circumstances triggered operating reserve deficiencies for a cumulative six hours, resulting in a PER Adjustment of over $100 million for this period, compared to $18 million in total day-ahead and real-time energy payments, as estimated by NEPGA.[22] NEPGA alleges that in the 20 months since the Reserve Constraint Penalty

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[20] The scaling factor is, generally, the ratio of the actual hourly load value to the 50/50 peak load forecast, such that high load hours will have a higher weighting than low load hours. The availability factor is set to 95 percent. *See* ISO-NE Tariff Section III.13.7.2.7.1.1.1.

[21] Complaint at 6-8.

[22] *Id*. at 18 ("[l]oad paid a total of $18.5 million for energy during these hours, and only about $5.5 million in the real-time energy market, yet it will receive a [PER

(continued …)

Factors were increased, the PER Adjustment has been triggered in 37 hours, resulting in $193 million in total PER Adjustment charges; NEPGA argues that the changes are "an increase of more than $100 million from what the [PER Adjustment] should have been."[23]

15. NEPGA alleges that the PER Adjustment is unjust and unreasonable, as it no longer achieves its original objectives of discouraging economic withholding behavior and acting as a hedge for load against price spikes in the energy market.[24]

16. With respect to the first objective, NEPGA argues that the Tariff contains numerous mitigation measures and other protections that guard against the exercise of market power.[25] NEPGA further argues that if discouraging withholding is the primary purpose of the PER Adjustment, there is no rational explanation for why all capacity suppliers (regardless of whether they receive the real-time clearing price and would thus be motivated to engage in withholding) should be subject to the PER Adjustment.[26]

17. NEPGA also alleges that the PER Adjustment fails with respect to the second objective – acting as a hedge for load against price spikes in the energy market. NEPGA asserts that load, like supply, clears overwhelmingly in the day-ahead energy market, thereby reducing load serving entities' exposure to prices in the real-time market– the same exposure that the PER Adjustment is supposed to hedge.[27] NEPGA states that, in theory, load purchases the hedge that the PER Adjustment purports to provide through slightly higher capacity market prices, since the marginal unit's offer may include an expected PER Adjustment value. NEPGA states, however, that during FCA 5 through 8, resources could not anticipate a future increase in Reserve Constraint

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payment] of over $100 million") (citing to *id.* at 3 n.11).

[23] *Id.* at 15.

[24] *Id.* at 15-16 (citing FCM Settlement Order, 115 FERC ¶ 61,340 at PP 24, 29).

[25] Complaint at 16.

[26] *Id.* at 18.

[27] NEPGA alleges that, for example, on August 11, 2016, between 3.4 percent and 6.3 percent of load was exposed to the real-time clearing prices during the six hours of the PER event. It also states that load paid a total of $18.5 million for energy during these hours, and only about $5.5 million in the real-time energy market, yet it will receive a PER Adjustment of over $100 million. *Id.*

Penalty Factors, and accordingly, were unable to reflect a corresponding increase in their offers.

18. NEPGA also states that the imposition of higher Reserve Constraint Penalty Factors without any conforming change to the PER Adjustment formula causes generators that perform as expected to suffer significant net losses during hours in which Reserve Constraint Penalty Factors are triggered. NEPGA argues that as a result, resources are paying load at times when energy and reserves are valued the most, which NEPGA asserts does not comport with fundamental economic or ratemaking principles. NEPGA argues that the reduced compensation for capacity resources that occurs during PER events, regardless of how capacity suppliers perform during times of system stress, fails to properly value the service capacity suppliers are providing—an outcome that is inconsistent with the Commission's policy objectives to price and value energy appropriately, especially during periods of scarcity.[28] NEPGA also argues that the PER Adjustment, in its current form, is unjust and unreasonable as a matter of equity and that suppliers' capacity payments should not be substantially reduced due to a larger PER Adjustment than suppliers anticipated when the FCAs were conducted.

19. Reciting the Commission's statement in the 2014 Complaint Order that the PER Adjustment must be considered in the context of capacity suppliers' "overall revenue picture,"[29] NEPGA argues that 20 months of experience since implementation of the higher Reserve Constraint Penalty Factors demonstrates that capacity suppliers have not and will not receive other market revenues to offset the increased PER Adjustment.[30] NEPGA argues that because, as noted above, the majority of capacity supplier megawatts clear in the day-ahead energy market (due to the must-offer requirement) and do not receive the real-time clearing price, capacity suppliers impacted by the PER Adjustment receive *de minimis* incremental revenues in the real-time energy market when compared to the rebate, as a result of the higher Reserve Constraint Penalty Factors.[31]

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[28] *Id*. at 23-26 (citing *Price Formation in Energy & Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Docket No. AD14-14-000 (2014)).

[29] Complaint at 11 (citing 2014 Complaint Order, 150 FERC ¶ 61,053 at PP 36-39).

[30] Complaint at 27.

[31] As an illustration, NEPGA points to Calpine's experience during the August 11-14 PER events, during which Calpine's three units earned only $67,096.27 in total real-time and reserve revenues during those event hours, compared to a $7 million PER

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20. In response to the Commission's concerns in the 2014 Complaint Order as to whether the PER Adjustment may be offset by increases in the day-ahead market over time as the result of price convergence (which might result from both higher day-ahead offers from capacity suppliers and the participation of virtual bidders),[32] NEPGA cites supporting testimony by Dr. David Hunger, attached to the current complaint. Dr. Hunger states that it is unlikely that suppliers would try to anticipate PER event hours and offer higher prices in the day-ahead market, as the resource would then risk failing to clear in either the day-ahead or real-time market.[33] Moreover, he argues that the mitigation measures in the ISO-NE Tariff would likely impede such a strategy. Dr. Hunger also disputes the likelihood of price convergence as the result of virtual trading, noting that the amount of virtual trading in ISO-NE's markets is minimal in comparison with other regions. Overall, Dr. Hunger observes "a clear trend of decreasing convergence during the highest load hours."[34]

21. NEPGA also argues that the PER Adjustment is not offset by above-market revenues from auctions that cleared at an administrative price floor. In addition, NEPGA notes that the Commission approved the price floor to address a concern about buyer-side market power that had a price-suppressive effect on clearing prices.[35] NEPGA asserts that other market revenues earned by capacity suppliers are irrelevant to the question of whether a particular mechanism in a market construct is unjust and unreasonable. It states that competitive markets produce just and reasonable rates when they produce competitive market outcomes and efficient price signals, not when they produce a precise level of revenue. Additionally, NEPGA contends that the Commission found an increase in Reserve Constraint Penalty Factors necessary to provide capacity suppliers with a higher economic incentive and accordingly, to produce a just and reasonable outcome; thus, the Commission cannot now reasonably conclude that these revenues, or other

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Adjustment. *Id.* at 31 (citing Attachment B to Complaint, Affidavit of Seth Berend at 10).

[32] 2014 Complaint Order, 150 FERC ¶ 61,053 at P 38.

[33] Complaint at 32 (citing Attachment A to Complaint, Affidavit of Dr. David Hunger (Hunger Testimony) at ¶ 25).

[34] Complaint at 32-33 (citing Hunger Testimony at ¶ 36).

[35] Complaint at 28 (citing *ISO New England Inc.*, 135 FERC ¶ 61,029, at PP21-22 (2011)).

revenues produced by the day-ahead market, may offset the harm caused by a separate aspect of the market.[36]

22. For the reasons above, NEPGA requests that the Commission grant its complaint, establish a refund date as of the date of its complaint, and direct ISO-NE to file revisions to the provisions of the ISO-NE Tariff governing the PER Adjustment, "effective at the earliest lawful date through and including the 2017-2018 Capacity Commitment Period associated with the eighth Forward Capacity Auction."[37] Specifically, NEPGA requests that the Commission direct ISO-NE to develop and file revisions so that the PER Adjustment more closely reflects the original intent of the PER Adjustment and the expectations of both load and capacity suppliers.

23. If the Commission grants the complaint, NEPGA proposes two possible ways to revise the PER Adjustment provisions in the ISO-NE Tariff. As one possibility, NEPGA proposes that ISO-NE calculate an aggregate PER Adjustment value for each hour based on what capacity suppliers in the aggregate actually earn in the real-time energy market. Alternatively, NEPGA proposes that the Commission direct ISO-NE to increase the PER strike price such that the PER Adjustment risk to suppliers is comparable to what it was during FCAs 5-8. NEPGA provides an analysis by Dr. Hunger that, it claims, demonstrates what the PER Adjustment value would have been if the PER Adjustment mechanism been revised to increase the PER strike price by $250 per MWh, a value that ISO-NE developed in its 2014 stakeholder process.[38]

III. Notice of the Filing and Responsive Pleadings

24. Notice of the Complaint was published in the *Federal Register*, 81 Fed. Reg. 70,405-01 (2016), with interventions, comments, and protests due on or before October 20, 2016.

25. Timely motions to intervene were filed by the New England States Committee on Electricity (NESCOE), NEPOOL, Consolidated Edison Energy, Exelon Corporation, the PSEG Companies, H.Q. Energy Services (U.S.) Inc., NRG Power Marketing LLC and GenOn Energy Management LLC, Verso Corporation (Verso), Eversource Energy Service Company, National Grid, NextEra Energy Resources, LLC (NextEra), the Retail

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[36] Complaint at 28 (citing *ISO New England Inc.*, 147 FERC ¶ 61,172, a PP 23, 107 (2014)).

[37] Complaint at 34.

[38] *Id*. at 36 (citing Hunger Testimony at ¶ 19).

Energy Supply Association (RESA), Entergy Nuclear Power Marketing (Entergy) and Dominion Resources Services. Calpine Corporation filed a motion to intervene out of time.

26. ISO-NE filed a timely answer. Timely comments and protests were filed by Verso, Entergy, NESCOE, RESA and NEPOOL. NextEra filed comments one day out of time. NEPGA filed an answer to the protests, and NESCOE filed an answer to NEPGA's answer.

A. Answers, Protests and Comments

1. ISO-NE's Answer and NEPOOL's Comments

27. ISO-NE states that it takes no position as to whether NEPGA should receive the relief that it requests, since NEPGA has not alleged any violation of the Tariff, and the desired relief involves only questions of cost allocation among market participants.[39] It further notes that stakeholders have considered this issue multiple times, without resolution, and urges the Commission to resolve this issue.

28. ISO-NE also states, however, that if the Commission grants relief to NEPGA, it should reject NEPGA's proposal to require ISO-NE to calculate an aggregate PER Adjustment value for each hour based on what capacity suppliers in the aggregate actually earn in the real-time energy market. ISO-NE states that this proposal is "undeveloped, unsupported, and contrary to sound market design," because it would skew suppliers' bidding incentives in the energy markets, and thereby adversely impact energy market price formation.[40] If the Commission determines that relief is warranted, ISO-NE urges the Commission to increase the PER strike price through May 31, 2018, a solution that ISO-NE states it has already determined to be feasible without energy market distortions.

29. NEPOOL urges the Commission to require that a remedy to NEPGA's concern be pursued through the stakeholder process, noting that the second alternative remedy proposed by NEPGA (increasing the PER strike price by $250 per MWh) received only a 47.14 percent favorable vote at the October 3, 2014 Participants Committee meeting. NEPOOL states that ISO-NE informed stakeholders at the time that it would not submit an FPA section 205 filing increasing the PER strike price without a 60 percent or greater vote in favor.[41]

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[39] ISO-NE Answer at 2.

[40] *Id*.

[41] NEPOOL Comments at 6.

30. With respect to the first alternative remedy proposed by NEPGA (tying the PER Adjustment to the actual revenues earned by capacity suppliers in the energy market during shortage event hours), NEPOOL states that such revisions to the Tariff should be considered first through the NEPOOL stakeholder process, rather than being implemented immediately by the Commission.

2. Protests Opposing the Complaint

31. NESCOE states that NEPGA failed to meet its FPA section 206 burden of demonstrating that the PER Adjustment is unjust and unreasonable.[42] NESCOE states that NEPGA's argument only focuses on the financial harms to capacity suppliers, and fails to acknowledge that consumers would have paid for the increased value of the PER Adjustment in the form of increased capacity market prices.[43] NESCOE acknowledges that NEPGA provides new information regarding PER events and payments but argues that for FCAs 5 through 8, capacity suppliers were able to include a premium in their bid into each FCA. NESCOE further argues that NEPGA does not address the additional revenues that capacity suppliers may have earned due to the reflection of PER Adjustment premiums in their offers. NESCOE states that Net Cost Of New Entry (CONE) was reduced for FCA 10 and 11 by $0.43/kW-month to reflect the elimination of the PER Adjustment.[44] NESCOE further contends that the data that NEPGA uses in the Complaint is flawed, as it is based on the premise that FCM revenues come from a snapshot in time.[45] Specifically, NESCOE argues that NEPGA's claim that two years of higher Reserve Constraint Penalty Factors is clear evidence of unjust and unreasonable rates is inconsistent with the long-term view of FCM revenues.[46]

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[42] NESCOE Comments at 12

[43] *Id*. at 10

[44] *Id*. at 10, 13; *see also* ISO-NE Tariff, § III.13.2.4 (39.0.0). NESCOE contends that the $193 million in PER rebates, when annualized, comes out to $0.279/kW-month which is less than the PER premium cost of $0.43/kW-month, thus suppliers still come out ahead by $0.151/kW-month or $59.7 million. NESCOE Comments at 12-13 (citing Transmittal, *ISO New England Inc. and NEPOOL,* Docket No. ER15-1184 (Mar. 6, 2015) at 5).

[45] NESCOE Comments at 14.

[46] *Id*. at 3.

32. NESCOE asserts that NEPGA's claim that the $193 million in PER Adjustment payments is excessive relies on a straw man argument. NESCOE states that NEPGA compares the $193 million in PER Adjustment payments to what the PER Adjustment payments would have been under an earlier proposal to increase the PER strike price that was rejected in the ISO-NE stakeholder process, and which the Commission also rejected in the 2014 Complaint Order.

33. NESCOE states that, if the Commission grants the Complaint, it should direct ISO-NE to carry out a stakeholder process to find a remedy that is equitable for both consumers and market participants, including any tariff revisions necessary to implement such remedy.[47]

34. RESA states that its members, which are load-serving entities (LSEs), offer fixed price contracts to retail customers, reflected their expectations as to future PER Adjustments in the rates that they offered under those fixed price contracts, and a sudden change or elimination in the PER Adjustment would have significant negative impacts on these fixed price contracts.[48]

35. RESA states that NEPGA has not demonstrated the PER Adjustment is unjust and unreasonable, because it cannot demonstrate that FCAs 7 and 8 would have cleared differently had capacity suppliers known about the higher Reserve Constraint Penalty Factors, and it is speculative to conclude that FCA capacity clearing prices were not sufficient to compensate for any additional losses resulting from higher Reserve Constraint Penalty Factors since these FCAs cleared at the price floor.[49] RESA argues all participants in applicable FCAs knew they were at risk to pay a PER Adjustment, and that risk should have been included in their offers.

36. RESA states that amounts collected through the PER Adjustment are credited over a rolling 12-month basis, and terminating the PER Adjustment effective September 30, 2016, would prematurely terminate the collection of amounts that are included in the rolling 12-month credit. RESA argues that granting NEPGA's request for relief would prevent inclusion of the $100 million PER Adjustment (from August 2016) from being collected, giving capacity suppliers a windfall at the expense of load.[50] RESA states it

[47] NESCOE October 10 Comments at 21-22.

[48] RESA Protest at 3-5, 8.

[49] *Id*. at 8. RESA notes that all FCAs except FCA 8 cleared at the applicable price floor. FCA 8 cleared at $15 and existing resources outside NEMA were capped at $7.025.

[50] *Id.* at 9.

has reasonably relied on the PER Adjustment to estimate future values of credits from the adjustment to price services offered to customers in fixed price contracts.

37. RESA further argues that the Complaint is a collateral attack on prior Commission Orders, as NEPGA has already sought these changes in stakeholder processes in which the changes did not receive enough stakeholder support, and the issues raised in the 2014 Complaint are the same issues that have been considered in earlier proceedings.[51] RESA further states that, in the stakeholder processes that resulted from the 2014 Complaint, all parties understood that the PER adjustment would be phased out by June 1, 2019. Thus, RESA asserts, all parties similarly understood that the capacity prices would continue to reflect the PER Adjustment until the PER mechanism was phased out.[52] RESA argues that modifying or eliminating the PER Adjustment would thus violate the filed rate doctrine, which "prohibits the Commission from imposing a rate different from one on file at the time service is made available [and] . . . allows purchasers . . . to know in advance the consequence of purchasing decisions they make."[53] Therefore, RESA argues, the Commission should not upset the rate to which its members are entitled, which are the PER Adjustment credits that will be received over a rolling 12-month period.[54]

3. Comments Supporting the Complaint

38. Three capacity suppliers – Verso, Entergy and NextEra – provide specific details of the way in which the interaction of the new Reserve Constraint Penalty Factors and the PER Adjustment have affected them.

39. Verso states that PER Adjustments have increased by over 200 percent in 2015, 260 percent in 2016, and are projected to increase by over 280 percent in 2017 relative to the PER Adjustments in calendar year 2014. Verso asserts that in either all or in the vast

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[51] *Id*. at 10-11 (citing the 2014 Complaint Order and *ISO New England Inc.*, 134 FERC ¶ 61,128 (2011) (Commission rejected request to modify the use of a rolling 12-month average to collect the PER Adjustment from a 12-month average to a 6-month average, on the basis that RESA's member LSEs had relied on the 12-month rolling average).

[52] RESA Protest at 11-12.

[53] *Id*. at 12 (citing *Transwestern Pipeline Company v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990).

[54] RESA Protest at 12.

majority of the PER Adjustment hours, Verso's resource did not receive the hourly real-time energy price upon which the PER Adjustment is based, but rather, like other capacity suppliers, met its capacity obligation in those hours by selling all, or the vast majority, of its capacity into the day-ahead energy market.[55] Entergy states that its Pilgrim resource will suffer a 10 percent reduction (about $2.6 million) in its total annual capacity payment due to the PER hours on August 11, 12 and 14 of 2016. Entergy states that, because Pilgrim is almost 100 percent committed in the day-ahead energy market, Pilgrim's net revenue from the real-time energy prices during those hours was only $277.00, Pilgrim did not receive any revenues from ancillary service markets during this time, and Pilgrim's total gross day-ahead energy market revenues for those same hours is estimated at $783,639.10.[56] NextEra states that the PER rebate resulting from the high real-time energy market prices on August 11 through August 14, 2016, caused annual capacity rates to be reduced by 11.7 percent in the Rest-of-Pool zone for Capacity Commitment Period 7.[57]

40. NextEra states that the Commission noted in the 2014 Complaint Order that the price floor in FCAs 5 through 7 potentially resulted in a price higher than what would have otherwise cleared the market. NextEra adds that the Commission stated that NEPGA failed to show that FCAs 5 through 7 would have cleared at a price above the price floor if capacity resources had been able to adjust their capacity supply offers to reflect larger PER Adjustments due to the increase in the Reserve Constraint Penalty Factors.[58] However, NextEra asserts that the reason the Commission previously extended the price floor for FCA 7 was out of concern as to the ongoing effect of buyer-side market power from the first three FCAs.[59] NextEra states that since FCA clearing prices would have been higher absent the buyer-side market power that caused the Commission to retain the price floor, it is speculative whether the increase in the PER Adjustment due

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[55] Verso Comments at 3.

[56] Entergy Comments at 4.

[57] NextEra Comments at 3. NextEra's witness, Mr. Cashman, also provides a comparison of how the PER Adjustment would have differed had the Commission granted the 2014 Complaint. Mr. Cashman concludes that the PER Adjustment was approximately 85 percent greater in the Rest-of-Pool zone than it would have been under the proposed $250 PER strike price adjustment. *Id*. at 3-4.

[58] NextEra Comments at 5 (citing 2014 Complaint Order, 150 FERC ¶ 61,053 at P 37).

[59] NextEra Comments at 5 (citing *ISO New England Inc*., 135 FERC ¶ 61,029, at PP 21-22 (2011)).[60] NEPGA Answer at 4-6.

to higher Reserve Constraint Penalty Factors would be greater than the amount of above-market revenues due to the price floor.

B. **Further Answers**

41. NEPGA filed an answer to the NESCOE and RESA protests. In response to arguments that capacity suppliers have received a $0.43/kW-month premium annually in FCAs 5 through 8 for the expected PER Adjustment, NEPGA argues that this number comes from auction parameters relevant to FCAs 9 through 11 and bears no relationship to any premium that capacity suppliers may have received in the capacity market for FCA 5 through 8. NEPGA argues that protestors offer no evidence that the $0.43/kW-month value has any relation to the level of PER Adjustment risk anticipated during FCAs 5 through 8.[60]

42. NEPGA also disagrees with RESA's argument that the PER Adjustment mechanisms should not be changed because members' fixed-price contracts reflect expectations of the PER Adjustment at the current level. It states that RESA's argument ignores that capacity suppliers had their own reasonable expectations about the PER Adjustment before the Commission increased the Reserve Constraint Penalty Factors, and RESA does not explain why its members' later reliance on an inadvertent windfall should trump the reasonable reliance capacity suppliers had that their capacity revenues would not be significantly diminished by a larger PER Adjustment. NEPGA further disagrees with RESA's argument that any relief granted by the Commission which would prevent collection of PER Adjustment amounts already calculated to be credited over the next 12 months would violate the filed rate doctrine and the rule against retroactive ratemaking. NEPGA argues that it does not propose to increase any rates that customers have already paid, and that those charges associated with a PER Adjustment are not paid until an LSE pays the relevant capacity invoice in future months. NEPGA asserts that while RESA may have certain expectations about what the future PER Adjustment will be, revising the PER Adjustment formula for capacity payments made subsequent to the refund effective date does not violate the filed rate doctrine or the prohibition against retroactive ratemaking.[61]

43. NESCOE filed an answer to NEPGA's answer. With regard to NEPGA's assertion that NESCOE "claims that capacity suppliers received a $0.43/kW-month premium annually in" FCAs 5 through 8 "for the value of the expected Rebate,"[62]

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[60] NEPGA Answer at 4-6.

[61] *Id*. at 8-9.

[62] NESCOE Answer at 3 (citing NEPGA Answer at 4).

NESCOE states that it has no way of knowing how each company would have assessed the risk resulting from the PER Adjustment in assuming a Capacity Supply Obligation. NESCOE states, however, that in the absence of any information provided in the Complaint, NESCOE used the $0.43/kW-month figure as an approximation for the premium capacity suppliers would have required for the prior FCAs to account for the PER Adjustment. NESCOE states that it did not view the PER Adjustment premium as an explicit line-item in CONE for those prior auctions. Rather, NESCOE had stated in its protest that capacity suppliers were able to reflect in their offers a premium to reflect potential PER Adjustments.

44. Furthermore, NESCOE notes that NEPGA appears to argue that the floor price does not account for the risk of the PER Adjustment. NESCOE disagrees, and states that accepting this price is indicative that capacity suppliers viewed this price as sufficient to offset potential PER Adjustments. NESCOE asserts that NEPGA's sole focus on payments made by capacity suppliers and dismissal of PER premiums included in capacity supply offers fails to satisfy NEPGA's burden of proof under section 206. NESCOE also contends that NEPGA ignores the Commission's previous ruling that NEPGA failed to address "whether the increased PER deduction would be greater than the amount of above-market revenues due to the price floor, and thus whether the net revenues received by capacity suppliers after accounting for the PER deduction would fall below market-clearing levels."[63]

IV. Discussion

A. Procedural Issues

45. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely-filed unopposed motions to intervene serve to make the entities filing them parties to this proceeding.

46. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2016), we will grant Calpine's motion to intervene out of time, given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay. We will also accept NextEra's late-filed comments.

47. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by NEPGA and NESCOE because they have provided information that assisted us in our decision-making process.

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[63] NESCOE Answer at 5 (citing 2014 Complaint Order, 150 FERC ¶ 61,053 at PP 37-38).

B. Substantive Issues

48. We grant NEPGA's complaint in part and set it for hearing and settlement judge procedures in part. We find that NEPGA has shown that, for the period at issue in NEPGA's complaint (September 30, 2016 – May 31, 2018), the PER mechanism has become unjust and unreasonable as a result of the interaction between the PER mechanism and the higher Reserve Constraint Penalty Factors.

49. As noted above, in the 2014 Complaint, the Commission found that no party had provided information as to how often significant PER events might occur or the magnitude of revenue impacts that might result from them. The Commission stated that, if NEPGA is able to provide in the future specific evidence that the interaction between the new Reserve Constraint Penalty Factors and the existing PER Adjustment mechanism renders the capacity rates unjust and unreasonable, then the Commission will consider any such complaints at that time.[64] Absent such specific evidence, however, the Commission considered NEPGA's claims regarding the effects of that interaction to be speculative. In the instant complaint, NEPGA has provided evidence on this question.

50. NEPGA states that, for a six-hour period on August 11, 2016, the total cost of energy paid by load was approximately $18 million, but generators were required to make PER payments of over $100 million, stemming, in part, from the increase in the Reserve Constraint Penalty Factors.[65] NEPGA has further shown that, between December 2014 (when the higher Reserve Constraint Penalty Factors were implemented) and August 2016, there were PER events in 37 hours resulting in PER adjustments of $193 million.[66] In the Commission's orders on the 2014 Complaint, the Commission found that NEPGA had failed to demonstrate that other revenues received by generators (including those resulting from the possibility of the convergence of real-time and day-ahead energy prices) would not offset the higher PER Adjustments caused by the new Reserve Constraint Penalty Factors;[67] absent such evidence, the Commission found that

[64] 2014 Complaint Order, 150 FERC ¶ 61,053 at P 40.

[65] Complaint at 3 & notes 10,11 (citing Vamsi Chadalavada, ISO-NE, *NEPOOL Participants Committee Report* 19 (2016), https://www.iso-ne.com/static-assets/documents/2016/09/september-2016-coo-report.pdf and noting that this amount represents the "total" cost of energy to load).

[66] Hunger Testimony at ¶¶ 17-19.

[67] 2014 Complaint Order, 150 FERC ¶ 61,053 at P 39; *see also* 153 FERC ¶ 61,222 at P 29.

NEPGA had not met its burden of showing that the PER Adjustment had become unjust and unreasonable. In the instant complaint, to respond to that concern, NEPGA states that "twenty months of experience since the [Reserve Constraint Penalty Factors] were increased demonstrates that capacity suppliers have not and will not receive other market revenues to offset" the increased PER Adjustment payments,[68] and its consultant Dr. Hunger provided testimony to support this position.[69] No party has provided a challenge to NEPGA's assertion in this regard.

51. NEPGA has demonstrated that, as a result of the new Reserve Constraint Penalty Factors, the relationship between the amount of compensation that suppliers receive for energy in scarcity periods, and the amount that suppliers must rebate as a result of the operation of the PER mechanism, has rendered the existing PER mechanism unjust and unreasonable. We agree with NEPGA that for the time period in question, capacity resources were unable to anticipate a future increase in Reserve Constraint Penalty Factors, and accordingly, were unable to reflect a corresponding increase in their capacity offers. We additionally find that, as NEPGA has suggested,[70] this problem can be remedied by raising the PER Strike Price. Doing so would return the PER rebate to an amount that more closely reflects the expectations of the parties at the time of FCAs 7 and 8.

52. We are not persuaded by the arguments of protesters NESCOE and RESA. Contrary to NESCOE's and RESA's assertions in their protest, suppliers could not have included a premium in their offers into FCAs 7 and 8 (which took place on February 4, 2013, and February 3, 2014, respectively) specifically to compensate for the higher Reserve Constraint Penalty Factors, since the higher Reserve Constraint Penalty Factors were not directed by the Commission until May 30, 2014.[71] We additionally reject NESCOE's argument that NEPGA's evidence regarding PER payments during the September 30, 2016 – May 31, 2018 period is inconsistent with a long-term evaluation of FCM revenues. NEPGA has shown that specific PER events during this period have

[68] Complaint at 27.

[69] Hunger Affidavit at ¶¶ 23-29, 40-44.

[70] Complaint at 36.

[71] *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 107 (2014).

resulted in the payment of unjust and unreasonable PER Adjustments, and we grant relief on that basis.[72]

53. With respect to NESCOE's argument that ISO-NE's previous adjustment of Net CONE in FCAs 10 and 11 by $0.43/kW-month is a reasonable approximation of the premium capacity suppliers received in FCAs 5 through 8 to account for the risk of PER Adjustments, we agree with NEPGA that this previous adjustment of Net CONE by ISO-NE has no relationship to any premium that capacity suppliers may have received in the capacity market for FCA 5 through 8.[73] As Dr. Hunger explains, this adjustment relies on the CONE value established for FCA 9 and does not take into consideration how CONE was calculated for FCAs 5 through 8. Although capacity suppliers in FCAs 5 through 7 received the FCM price floor, which was based on CONE, this value was established in the FCM Settlement and explicitly did not account for PER Adjustments. Similarly, in FCA 8, a majority of capacity suppliers received an administrative price which also did not account for PER Adjustments. Accordingly, we do not agree with NESCOE that ISO-NE's $0.43/kW-month adjustment is a reasonable approximation of a PER Adjustment risk premium capacity suppliers may have received in FCAs 5 through 8, and therefore we do not find it appropriate for purposes of determining whether the PER Adjustment has become unjust and unreasonable.

54. As to NESCOE's assertion that it is inappropriate to consider $193 million in total PER rebate charges as excessive when compared to a PER value that was not fully supported in ISO-NE's stakeholder process, we suggest that NESCOE raise those concerns in the hearing and settlement judge procedures we are ordering below.

55. We are not persuaded by RESA's arguments that the Commission should not grant the complaint given that a sudden change or elimination in the PER Adjustment would have significant negative impacts on LSEs given that LSEs have entered into fixed price contracts that reflected their exceptions as regarding future PER Adjustments. We note that both capacity suppliers and load, at the time of FCAs 7 and 8, had reasonable expectations about the PER Adjustment prior to the increase in the Reserve Constraint

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[72] Although NEPGA primarily points to the PER event of August 11, 2016, as demonstrating that the PER mechanism has become unjust and unreasonable, under the ISO-NE settlement cycle, a PER event in one month only begins to affect capacity suppliers' bills in the month after it occurs. *See* ISO-NE Tariff section III.13.7.2.7.1.1.2 ("[t]he ISO shall . . . calculate the Average Monthly PER . . . equal to the average of the Monthly PER values for the 12 months *prior to* the Obligation Month," emphasis added).

[73] *See* NEPGA Answer at 5-6.

Penalty Factors, and we find that the PER Adjustments have since deviated from these expectations such that they are no longer just and reasonable.

56. We also disagree with RESA that the complaint is a collateral attack on prior Commission Orders, and that granting relief would violate the filed rate doctrine. In the 2014 Complaint Order, the Commission noted that it would reconsider the justness and reasonableness of the PER Adjustment if parties were able to provide specific evidence that the interaction between the new Reserve Constraint Penalty Factors and the existing PER Adjustment mechanism rendered the capacity rates for Capacity Commitment Periods 5 through 8 unjust and unreasonable.[74] In light of the additional evidence presented by NEPGA, we do not find the instant complaint to be a collateral attack on a definitive Commission ruling.

57. We will, therefore, require ISO-NE to revise the method by which it calculates the PER Strike Price as set forth in ISO-NE Tariff section III.13.7.2.7.1.1.1. However, we find that, as to the proper revised method of calculating the PER Strike Price, NEPGA's complaint raises issues of material fact that cannot be resolved based upon the record before us and that are more appropriately addressed in the hearing and settlement judge procedures we order below. NEPGA requests that PER Strike Price be increased by $250 per MWh – the same incremental change proposed by ISO-NE to stakeholders in 2014. We note that, while ISO-NE may have found this to be a reasonable increase previously, recent market developments may justify a different increase. Accordingly, we set the question of the appropriate method of calculating the PER Strike Price for hearing and settlement judge procedures under section 206 of the FPA.

58. While we are setting a portion of NEPGA's complaint for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[75] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.[76]

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[74] 2014 Complaint Order, 150 FERC ¶ 61,053 at P 40.

[75] 18 C.F.R. § 385.603 (2016).

[76] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges available

(continued …)

The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

59. If settlement judge procedures fail and the case proceeds to hearing, the administrative law judge (ALJ) must determine how ISO-NE should calculate the PER Strike Price so as to reestablish consistency between the expectations market participants had at the time of the relevant FCA and actual market outcomes for the period for which NEPGA's complaint seeks relief – a portion of Capacity Commitment Period 7 and Capacity Commitment Period 8. However, the ALJ will not determine what refunds might be appropriate. The Commission will determine refunds, if any.

60. In cases where, as here, the Commission institutes an investigation on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint was filed, but no later than five months after the filing date. Section 206(b) permits the Commission to order refunds for a 15-month refund period following the refund effective date. Consistent with our general policy, if refunds are ordered, the Commission hereby establishes a refund effective date at the earliest date possible, i.e., September 30, 2016, the date of the complaint, as requested.

61. Although the parties seem to dispute the impact of a September 30, 2016 refund effective date, we note that the question that we are placing before the ALJ concerns how the PER Strike Price is calculated pursuant to ISO-NE Tariff section III.13.7.2.7.1.1.1, and not the monthly application of the PER Adjustment for settlement purposes as governed by ISO-NE Tariff section III.13.7.2.7.1.1.2. Accordingly, any changes to the calculation of the PER Strike Price under ISO-NE Tariff section III.13.7.2.7.1.1.1 would be prospective only from September 30, 2016, as required by FPA section 206, and would not impact the application of any PER Adjustment occurring before September 30, 2016.

62. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonable expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge

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for settlement proceedings and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

should be able to render a decision within twelve months of the commencement of hearing procedures, or January 30, 2018. Thus, we estimate that, absent settlement, we would be able to issue our decision within approximately eight months of the filing of briefs on and opposing exceptions, or November 30, 2018.

The Commission orders:

(A) The Commission hereby grants NEPGA's complaint in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL16-120-000 concerning the method by which ISO-NE calculates the PER Strike Price as set forth in ISO-NE Tariff section III.13.7.2.7.1.1.1 for the relevant portion of Capacity Commitment Period 7 and all of Capacity Commitment Period 8, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2016), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the date of this order, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The refund effective date in Docket No. EL16-120-000, established pursuant to section 206(b) of the FPA, is September 30, 2016.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.