

153 FERC ¶ 61,222
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New England Power Generators Association, Inc.

Docket No. EL15-25-001

v.

ISO New England Inc.

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. On January 30, 2015, the Commission issued an order¹ denying a complaint by the New England Power Generators Association (NEPGA) alleging that the Peak Energy Rent (PER) mechanism had become unjust and unreasonable (Complaint). NEPGA and Entergy Nuclear Power Marketing LLC (Entergy) each filed a request for rehearing. For the reasons discussed below, we deny NEPGA's and Entergy's requests for rehearing.

I. Background

A. The PER Adjustment Mechanism and Reserve Constraint Penalty Factors

2. As discussed in the January 30 Order, ISO New England Inc. (ISO-NE) administers the Forward Capacity Market (FCM), through which resources obtain obligations to provide capacity to New England by competing in an auction (Forward Capacity Auction or FCA) three years in advance of an associated one-year Capacity Commitment Period. A resource that obtains a Capacity Supply Obligation for a Capacity Commitment Period must offer its capacity into the day-ahead and real-time energy markets every day during that Capacity Commitment Period. As part of its

¹ *New England Power Generators Association, Inc. v. ISO New England Inc.*, 150 FERC ¶ 61,053 (2015) (January 30 Order).

Capacity Supply Obligation, a capacity resource is required to be available to operate during shortage events. At the time that NEPGA filed its complaint, ISO-NE was preparing for FCA 9, which would procure capacity for Capacity Commitment Period 9 (June 1, 2018 – May 31, 2019).

3. The FCM was developed pursuant to a settlement among stakeholders in 2006 (FCM Settlement). As relevant here, the FCM Settlement included the PER Adjustment mechanism, which was intended to help mitigate incentives to create price spikes in the energy market through economic or physical withholding by removing any profits gained from the rise in energy prices above a designated level, and to act as a hedge for load against price spikes in the energy market.² The PER Adjustment is designed to accomplish these purposes by requiring 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 through rebates made by suppliers from their capacity payments.³

4. In 2014, ISO-NE implemented a new two-settlement capacity market design intended to improve resource performance during shortage conditions. Under the two-settlement capacity market design, first, a capacity resource will receive a Capacity Base Payment in return for taking on both a physical obligation to offer its capacity into the energy market, and a financial obligation to cover its share of the system’s total energy and reserve requirements during scarcity conditions. Second, a capacity resource will receive a Capacity Performance Payment that is determined only after a scarcity condition arises, 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

² *Devon Power LLC*, 115 FERC ¶ 61,340, at PP 24, 29 (2006).

³ The PER Adjustment is designed 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, and to return those revenues to load. To develop the PER Adjustment, each day ISO-NE calculates a PER strike price that is slightly higher than the marginal running cost of the most expensive resource in New England, i.e., the hypothetical proxy peaking unit. For each hour in which the real-time Locational Marginal Price (LMP) exceeds that strike price, 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. In each month, the capacity payment each capacity supplier receives is then reduced by a rolling average of the monthly PER values for the previous 12 months. ISO-NE Transmission, Markets and Services Tariff (Tariff), sections III.13.7.2.7.1.1.1 and III.13.7.2.7.1.1.2 (38.0.0).

Scarcity Condition).⁴ A scarcity condition is triggered whenever the real-time energy price includes the Reserve Constraint Penalty Factor (a rate used within the real-time dispatch and pricing algorithm, which serves as a cap on the price that ISO-NE may pay to procure additional reserves).

5. In order to provide additional incentives for performance, the Reserve Constraint Penalty Factors were increased (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), thus increasing the price that ISO-NE may pay to procure energy and reserves in real time.⁵ In response to ISO-NE's two-settlement capacity market design proposal, parties raised concerns about the interaction between the PER Adjustment mechanism and the two-settlement capacity market design proposal. In the Two-Settlement Order, the Commission found that concerns related to the PER Adjustment mechanism were beyond the scope of the proceeding.⁶ In ruling on ISO-NE's subsequent compliance filing in the proceeding, the Commission noted that ISO-NE had determined that the PER Adjustment mechanism would potentially be impacted by the increased Reserve Constraint Penalty Factors, but that this issue was outside the scope of the compliance proceeding. Thus, the Commission concluded that reconsideration of the Peak Energy Rent mechanism would be more appropriately conducted separately from the two-settlement proceeding, for which purpose ISO-NE had already commenced a separate stakeholder process.⁷

⁴ *ISO New England Inc. and New England Power Pool*, 147 FERC ¶ 61,172 (2014) (Two-Settlement Order), *reh'g pending* (invoking authority under section 206 of the Federal Power Act (FPA) to direct ISO-NE to submit tariff revisions adopting two-settlement capacity market design, as modified, and increased Reserve Constraint Penalty Factors).

⁵ Two-Settlement Order, 147 FERC ¶ 61,172 at PP 12, 25.

⁶ The Commission further stated that “[t]he purpose of increasing the Reserve Constraint Penalty Factors is to increase performance incentives, which can be provided in the form of either rewards or penalties, depending on whether the resource has been scheduled in the day-ahead market. However, the Peak Energy Rent deduction does not affect the incremental incentives to produce energy, because a resource’s Peak Energy Rent deduction will be the same whether or not it produces energy.” Two-Settlement Order, 147 FERC ¶ 61,172 at P 110.

⁷ *ISO New England Inc.*, 149 FERC ¶ 61,009 at P 25 n.39 (2014).

B. NEPGA's Complaint

6. On December 3, 2014, NEPGA filed a complaint alleging that the current PER Adjustment mechanism is unjust and unreasonable in light of the increases in the Reserve Constraint Penalty Factors in ISO-NE's energy market put in place in 2014. NEPGA requested that the Commission require ISO-NE to increase the PER daily strike price by \$250/MWh for Capacity Commitment Periods 5 through 8 and eliminate or modify the PER Adjustment mechanism for Capacity Commitment Periods 9 and beyond.

7. NEPGA argued that the majority of resources earned most of their energy revenues based on the day-ahead energy market clearing prices, which do not include the Reserve Constraint Penalty Factors. However, the Reserve Constraint Penalty Factors had the potential to substantially increase real-time energy prices, and would therefore also increase the PER Adjustment amount that would be returned by resources to load, regardless of whether those resources actually received the real-time energy price.⁸ Thus, claimed NEPGA, increasing the Reserve Constraint Penalty Factors without adjusting or eliminating the PER Adjustment mechanism would, in effect, reduce capacity payments, but the capacity resources affected by this interaction would not realize increased revenues from Reserve Constraint Penalty Factors.

8. To support its argument that the interaction between the PER Adjustment mechanism and the new Reserve Constraint Penalty Factors would lead to unjust and unreasonable capacity prices for Capacity Commitment Periods 5 through 8, NEPGA pointed to a simulated "back-cast"⁹ conducted by ISO-NE for Capacity Commitment Periods 3 and 4 (June 2012 – May 2014), regarding the market impact from increasing the Reserve Constraint Penalty Factors. NEPGA stated that ISO-NE concluded that, with the higher Reserve Constraint Penalty Factors, reserve market revenue would have been \$25 million greater in Capacity Commitment Period 4, and real-time peak energy rents would have been \$7 million higher, but the PER Adjustment would have credited \$99 million more back to load.¹⁰

⁸ NEPGA stated that Reserve Constraint Penalty Factors are included in real-time clearing prices only during periods of scarcity, so that only the small number of resources that were not committed day-ahead are able to earn the high real-time energy price during scarcity conditions. NEPGA Complaint at 15.

⁹ The "back-cast" analysis used historical data from the 2013-2014 Capacity Commitment Period and an additional Reserves Market analysis of the 2012-2013 and 2013-2014 Capacity Commitment Periods.

¹⁰ NEPGA Complaint at 15.

9. With regard to reliability, NEPGA acknowledged that there will be no adverse reliability impacts associated with adjusting the PER strike price during Capacity Commitment Periods 5 through 8, but argued that “the reduction in FCA payments resulting from the current PER Adjustment could jeopardize reliability . . . by undermining the financial viability of a number of capacity resources in the region that rely on their FCA payments to cover costs.”¹¹ Thus, NEPGA argued that raising the PER strike price by \$250/MWh for the remainder of Capacity Commitment Periods 5 through 8 would be just and reasonable.¹²

10. Multiple parties filed comments supporting and opposing NEPGA’s complaint. One commenter, GDF SUEZ Energy Marketing (GDF SUEZ) provided a recent example of what it asserted are the consequences of the interaction of the PER Adjustment mechanism and the two-settlement capacity market design. GDF SUEZ stated that on December 4, 2014 (one day into implementation of the Commission-directed increase in Reserve Constraint Penalty Factors), approximately 95-98 percent of energy sales occurred through the day-ahead energy market, with clearing prices ranging from \$60/MWh to \$77/MWh in hours ending 1700 through 1900. On December 4, because of system problems in Quebec, there was an almost 2,500MW swing in supply needs in New England, leading to energy price increases to \$765/MWh and \$1,104/MWh for hours ending 1700 through 1900 (December 4 event). GDF SUEZ stated that the PER Adjustment would require capacity sellers to rebate PER Adjustment amounts of almost \$1,000/MW across those three hours, *i.e.*, almost five times the level of day-ahead energy payments they received.¹³ Entergy also referenced the December 4 event, and stated that it would pay an additional \$1.2 million to load for this brief period.¹⁴

C. January 30 Order

11. The Commission denied NEPGA’s Complaint, stating that NEPGA had failed to meet its burden under section 206 to demonstrate that ISO-NE’s existing tariff provisions governing the PER Adjustment are unjust and unreasonable. The Commission further

¹¹ *Id.* at 22.

¹² NEPGA stated that ISO-NE presented a proposal to the NEPOOL stakeholders to increase the daily PER Strike Price by \$250/MWh for the remainder of Capacity Commitment Periods 5 through 8, but that proposal did not pass the stakeholder process. *Id.* at 9-10.

¹³ GDF SUEZ Comments at 5-6.

¹⁴ Entergy Comments at 5-6.

noted that “[a]ccordingly, we need not address whether NEPGA’s proposed alternative is just and reasonable.”¹⁵

12. The Commission found that NEPGA had not addressed all of the revenues received by capacity resources in arguing that the capacity payments affected by the PER/Reserve Constraint Penalty Factor interaction would be unjust and unreasonable. It noted that all resources that received Capacity Supply Obligations for Capacity Commitment Periods 5 through 7 (except those in the Northeastern Massachusetts/Boston area in Capacity Commitment Period 7) received the FCA administrative floor price, which was higher than the price that would have cleared the market, thus potentially resulting in above-market capacity revenue. The Commission stated that

[t]he higher PER deduction resulting from the higher Reserve Constraint Penalty Factors could reduce the net capacity revenue received by capacity resources. But NEPGA fails to discuss 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 resources after accounting for the PER deduction would fall below market-clearing levels.¹⁶

13. Additionally, the Commission pointed out that NEPGA had not addressed the possibility that, if higher PER Adjustment payments occurred, they could be offset by higher day-ahead Locational Marginal Prices (LMPs) in hours where Reserve Constraint Penalty Factors in the real-time market and the associated PER deduction could be expected in the day-ahead time frame.

14. The Commission further disagreed with NEPGA’s position, based on a supplemental affidavit by its expert Dr. David Hunger, that real-time and day-ahead price convergence will not occur.¹⁷ The Commission stated that Dr. Hunger’s statements were directed to the possibility of price convergence specifically during the timeframes when

¹⁵ January 30 Order, 150 FERC ¶ 61,053 at P 35.

¹⁶ *Id.* P 37.

¹⁷ *Id.* P 39 (citing NEPGA Answer at 7 (citing Supplemental Affidavit of Dr. David Hunger, Attachment to Answer (Hunger Supplemental Affidavit) at ¶ 19) (“in ISO-NE there are structural impediments that prevent day-ahead prices from converging with real-time prices during the timeframes when the PER Strike Price is triggered . . . [so that] the day-ahead prices cannot converge with the real-time prices during these PER events,” footnotes omitted).

the PER strike price is triggered, *i.e.*, the hours when the real-time LMP actually exceeds the strike price, but did not address the possibility that convergence could occur on average over a longer period, “namely, the hours when, in the day-ahead time frame, there is some probability that the real-time LMP might exceed the strike price,” and “[s]ince this broader set of hours may include hours when a Reserve Constraint Penalty Factor is not actually triggered, the average real-time LMP over these hours may not exceed the \$1,000 offer cap,” contrary to Dr. Hunger’s view.¹⁸

15. With respect to the December 4, 2014 event raised by GDF SUEZ, the Commission stated that “no party has provided information as to how often such events might occur, or the magnitude of revenue impacts that might result from them.”¹⁹ The Commission then stated:

If, at a future point in time, NEPGA or any other party 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. At this point, however, the overall result of that interaction is a matter of speculation, and the Commission will not grant relief on that basis.²⁰

16. Finally, the Commission noted that it was encouraging ISO-NE’s stakeholders to consider whether changes to the PER mechanism were necessary going forward, and also pointed out that since “[a] supplier still has the obligation and the incentive to operate its resource, . . . not changing the PER strike price will not create a disincentive for suppliers to provide energy, as NEPGA suggests, and is thus unlikely to cause reliability problems of insufficient resources to meet load demand.”²¹

¹⁸ January 30 Order, 150 FERC ¶ 61,053 at P 39.

¹⁹ *Id.* P 40.

²⁰ *Id.* (footnotes omitted).

²¹ *Id.* PP 40-41 (footnotes omitted).

17. NEPGA and Entergy timely sought rehearing of the January 30 Order on March 2, 2015.²²

II. Discussion

18. NEPGA seeks rehearing of the Commission's denial of the Complaint with respect to Capacity Commitment Periods 5 through 8. NEPGA asserts that it met its section 206 burden to establish a *prima facie* case, supported by substantial evidence, that the current PER strike price formula, in combination with the new Reserve Constraint Penalty Factors, is unjust and unreasonable. NEPGA alleges that the Commission erred in; (1) ignoring, without explanation, applicable precedent related to the use of historical data; (2) requiring the consideration of suppliers' overall revenue picture in determining whether harm was inflicted on them; (3) imposing an unreasonable evidentiary burden on NEPGA that required it to perform complicated and onerous analyses in support of this Complaint or any future complaint; and (4) finding that NEPGA bears the burden to propose a just and reasonable alternative to the existing unjust and unreasonable PER Adjustment Tariff provisions.

19. Entergy adopts NEPGA's arguments, and further states that (1) the January 30 Order fails to address the record evidence showing that the projected net loss in capacity revenues resulting from the interaction between the PER Adjustment and the Reserve Constraint Penalty Factors could negatively impact reliability, and (2) the Commission mistakenly relied on a stakeholder process that was initiated by ISO-NE for reconsideration of the application of the PER Adjustment mechanism to Capacity Commitment Periods 5 through 8 to find that the tariff provisions are just and reasonable.

20. The Commission denies rehearing as to all issues raised by NEPGA and Entergy.

²² On May 5, 2015 the Commission accepted a filing by ISO-NE and NEPOOL under section 205 to eliminate the PER Adjustment on a forward basis, beginning with FCA 10, the next sequential FCA procuring capacity for Capacity Commitment Period 10 (June 1, 2019 – May 31, 2020), finding, *inter alia*, that the PER adjustment was no longer needed to address market power concerns in light of recent changes to ISO-NE's capacity markets. The Commission found that requests that it require ISO-NE to initiate a stakeholder process to consider proposed solutions to address the PER Adjustment mechanism for the Capacity Commitment Periods prior to FCA 10 were beyond the scope of this proceeding, but encouraged parties "to utilize the stakeholder process to consider whether further market rule revisions are necessary." *ISO New England Inc.*, 151 FERC ¶ 61,096 at P 11 (2015) (PER Adjustment Order).

A. Use of Historical Data

1. NEPGA's Arguments on Rehearing

21. NEPGA asserts that the Commission ignored applicable precedent and failed to consider compelling evidence insofar as it disregarded, without explanation, the “back-cast” analysis that demonstrated the impact of the interaction between the higher Reserve Constraint Penalty Factors and the existing PER Adjustment. NEPGA argues that the Commission’s position that “a backward-looking analysis cannot demonstrate with any certainty what will occur in the future”²³ contradicts a long-standing Commission practice of using historical data to analyze whether rates will be just and reasonable.²⁴ NEPGA further alleges that better data was not available at the time the Complaint was filed, since the market design change that triggered the Complaint (i.e., the increased Reserve Constraint Penalty Factors) had only recently gone into effect.

22. NEPGA states that the Commission’s rejection of the “back-cast” analysis “appears . . . to suggest that a Section 206 complaint is only ripe for Commission review after an actual harm has been incurred and documented.”²⁵ which NEPGA states is unreasonable, because under the filed rate doctrine, changes are to be made only on a

²³ NEPGA Request for Rehearing at 10 n.36 (citing January 30 Order, 150 FERC ¶ 61,053 at P 36).

²⁴ NEPGA Request for Rehearing at 10 nn.37-38 (citing *Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Pub. Utils.*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 127 (“historical data are more objective, readily available, and less subject to manipulation by sellers than future projections”), *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012) and nn. 39-41 (citing *ISO New England Inc.*, 119 FERC ¶ 61,045, at P 133 (2007) (“use of historical data is likely to be the most accurate and reliable predictor of future market conditions”); *ISO New England Inc.*, 150 FERC ¶ 61,003 (2015); *ISO New England Inc. and New England Power Pool Participants Committee*, 150 FERC ¶ 61,007 (2015)).

²⁵ NEPGA Request for Rehearing at 11 n.44 (citing January 30 Order, 150 FERC ¶ 61,053 at PP 36-40).

prospective basis. NEPGA argues that the Commission's regulations governing complaints "explicitly acknowledge the fact that a complainant may not know the precise extent of the financial injury or harm."²⁶

2. Commission Determination

23. Contrary to NEPGA's argument, the January 30 Order did not reject the use of historical data out of hand. Rather, it found that the historical data provided by NEPGA was not sufficient to show that the operation of the PER Adjustment mechanism for Capacity Commitment Periods 5 through 8 is unjust and unreasonable. The Commission stated that NEPGA was basing its arguments on "a single year of data," and had also failed "to place that information in the larger context of the overall revenue picture for capacity suppliers."²⁷ Similarly, with regard to NEPGA's reliance on the "back-cast" analysis performed by ISO-NE as to the likely effect of the interaction of the PER Adjustment mechanism and the new Reserve Constraint Penalty Factors, the Commission noted that ISO-NE's presentation only addressed events that actually occurred in Capacity Commitment Period 4 (June 1, 2013 – May 31, 2014) and had to rely on a simulation of the possible results of the interaction between the PER Adjustment mechanism and the new Reserve Constraint Penalty Factors.²⁸ The Commission stated that "NEPGA does not demonstrate why a similar result would necessarily occur in [Capacity Commitment Period]s 5 and beyond."²⁹ Thus, the Commission indeed evaluated the evidence that NEPGA provided, and found it insufficient to meet NEPGA's evidentiary burden.

B. Consideration of Overall Revenue Picture in Determining Whether Harm was Inflicted

1. NEPGA's Arguments on Rehearing

24. NEPGA further asserts that, in addition to providing the "back-cast" analysis, it also provided evidence of actual harm incurred by suppliers one day after the higher Reserve Constraint Penalty Factors went into effect. NEPGA reiterates the information

²⁶ NEPGA Request for Rehearing at 12, 12 n.46 (citing 18 C.F.R. § 385.206(b)(4) ("[A] complainant must: ...[m]ake a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction").

²⁷ January 30 Order, 150 FERC ¶ 61,053 at P 36.

²⁸ ISO-NE Answer at 6-7.

²⁹ January 30 Order, 150 FERC ¶ 61,053 at P 36.

originally provided in its Complaint regarding the December 4, 2014 event which NEPGA alleges resulted in a total PER Adjustment of \$29 million, and in some cases caused generators to lose money on real-time energy sales.³⁰ NEPGA asserts that this event demonstrates that the changes in the Tariff have caused the PER Adjustment to change into something different from its original purpose, in that, rather than merely shaving the peak energy rents that a resource can earn during scarcity events, the PER mechanism combined with the increased Reserve Constraint Penalty Factors now cause suppliers that clear day-ahead and that are performing as expected to lose substantial sums during periods of scarcity. NEPGA claims that the PER value was positive in 10 hours in calendar year 2013,³¹ which, in NEPGA's view, demonstrates the potential for a significant number of PER events going forward, particularly given the tighter supply situation in New England that has occurred between FCAs 5 and 8.

25. NEPGA challenges the Commission's view that NEPGA failed to account for the revenue effect associated with the administrative pricing rules in effect for FCAs 5 through 7 and the potential increase in day-ahead energy market revenue associated with the higher Reserve Constraint Penalty Factors.³² With regard to NEPGA's failure to demonstrate that the incremental revenue lost to the PER Adjustment is greater than the above-market revenue received due to the administrative pricing rules in effect for FCAs 5 through 7, NEPGA argues that this evidentiary burden is infeasible and illogical, in that it would have no way of constructing hypothetical dynamic delist bids that would have existed in the absence of a price floor (or with the higher Reserve Constraint Penalty Factors that are now in place). Nor, according to NEPGA, could it project how individual sellers would have changed their offers in the absence of a price floor or how game theory would have played into individual sellers' actions during the auctions.³³ Moreover, NEPGA states, the Commission's focus on the effect of administrative pricing ignores the larger objection articulated in the Complaint, namely, that the effect of the higher Reserve Constraint Penalty Factors on the PER Adjustment alters suppliers' settled expectations with respect to the overall capacity rate they would receive.

³⁰ NEPGA Request for Rehearing at 12-13 ("NEPGA . . . [noted] that a 500 MW generator that cleared in the day-ahead market would have earned an energy payment of \$102,184 for the three relevant hours, which would have been offset by a PER Adjustment of \$441,884 – for a net loss of \$339,700.51").

³¹ *Id.* at 14 n.57 (citing Complaint, Attachment B at 25).

³² NEPGA Request for Rehearing at 16 nn. 69-70 (citing January 30 Order, 150 FERC ¶ 61,053 at PP 36-38).

³³ NEPGA Request for Rehearing at 17 (footnotes omitted).

26. NEPGA asserts that Commission's analysis of price convergence establishes an unjust and unreasonable evidentiary standard. The January 30 Order concluded that NEPGA did not provide sufficient evidence regarding the "overall revenue picture" for capacity suppliers in Capacity Commitment Periods 5 through 8, or address the possibility that higher Reserve Constraint Penalty Factors will result in higher clearing prices in the day-ahead market that could offset the revenue lost as a result of the Reserve Constraint Penalty Factors' effect on the PER Adjustment.³⁴ NEPGA argues that the Commission imposed an evidentiary burden in which NEPGA would have to prove a negative, namely, that day-ahead clearing prices for both PER event hours and non-PER event hours will not converge with real-time prices on average over a longer period of time. NEPGA asserts that requiring such an evidentiary showing is arbitrary and capricious, because according to NEPGA, it has already provided evidence concerning the overall revenue picture for capacity suppliers (including the impact on real-time energy, reserves and capacity revenues), ISO-NE has stated that it would be difficult to predict the Reserve Constraint Penalty Factors' effect on day-ahead revenues, and there is no history in New England of Reserve Constraint Penalty Factors of this magnitude.³⁵ NEPGA further states that its witness Dr. Hunger demonstrated that there was no indication of convergence between day-ahead and real-time prices on December 4, 2014 and there is no evidence that convergence will occur in the future due to differences in the rules governing the real-time and day-ahead markets. This, according to NEPGA, is consistent with ISO-NE's analysis of day-ahead and real-time prices when the hourly PER Adjustment has been positive since December 2010.³⁶

27. NEPGA also argues that, even if it could perform a historical analysis on price convergence, the Commission has already rejected NEPGA's "back-cast" analysis on the basis that data from past years does not necessarily predict future outcomes. NEPGA further states that, even if the higher Reserve Constraint Penalty Factors could result in some offsetting day-ahead market revenues, no one has suggested that these revenues would completely offset the significant revenue transfer under the PER Adjustment that NEPGA detailed in the Complaint. NEPGA notes that ISO-NE's analysis indicates that of the \$99 million increase in PER Adjustments, only \$8.4 million is offset by real-time energy price increases, so NEPGA views the possibility that convergence between day-

³⁴ *Id.* at 20 nn.80-82 (citing January 30 Order, 150 FERC ¶ 61,053 at PP 36, 38-39).

³⁵ NEPGA Request for Rehearing at 20 n.84 (citing Complaint, Attachment B at 17).

³⁶ NEPGA Request for Rehearing at 21 n.85-86 (citing Complaint, Attachment B at 17).

ahead and real-time prices in non-PER hours could negate the net effect of the Reserve Constraint Penalty Factor increases as implausible.³⁷ NEPGA argues, therefore, that the only question on this issue is to what extent, if any, day-ahead energy market revenue may mitigate some of the revenue transfer from suppliers to load. NEPGA states that it has established that the current Tariff results in an unjust and unreasonable windfall for load, and the only remaining question of fact involves how to calibrate the remedy (i.e., the adjustment to the PER strike price). NEPGA states that to the extent this issue presents a substantial question of material fact, the proper procedure would have been to grant the Complaint and set the question of the proper remedy for an evidentiary hearing.

2. Commission Determination

28. NEPGA argues that the Commission erred in finding that “the overall result of the interaction between the PER Adjustment and the [Reserve Constraint Penalty Factors] was a matter of speculation.”³⁸ But in fact, NEPGA’s Complaint relied on extrapolations based on a small number of hours to make its case. Both NEPGA and Entergy reference in their requests for rehearing a single event on December 4, 2014, when, due to an emergency in Quebec, ISO-NE’s real-time prices rose for a three-hour period to a level that triggered the PER Adjustment. NEPGA uses the losses for a hypothetical 500 MW generator from this three-hour event³⁹ to project that generators will as a general matter experience significant losses due to the interaction of the PER Adjustment and the Higher Reserve Constraint Penalty Factors. However, in the rehearing petitions, which were filed on March 2, 2015, neither NEPGA nor Entergy references another specific incident

³⁷ NEPGA Request for Rehearing at 21.

³⁸ NEPGA Request for Rehearing at 7.

³⁹ See Supplemental Affidavit of Dr. David Hunger, attached to NEPGA 1/7/15 Answer, at ¶ 9 (“Based on the data published by ISO-NE, I have estimated the PER Adjustment using the \$386/MWh PER Strike Price for hours 17 through 19, i.e., the hours when [Reserve Constraint Penalty Factors] were triggered on December 4, 2014. The PER Adjustment for these three hours totals \$883/MWh (approximately \$294/MWh on average). This is the amount that will be rebated to load by capacity suppliers. During the same hours day-ahead energy prices averaged \$68.12/MWh. Thus, *for a hypothetical 500 MW generator* clearing in the day-ahead market in hours 17 through 19, the day-ahead energy payment of \$102,184 for those hours would be offset by a \$441,884 PER Adjustment, *resulting in a loss of \$339,700 (-\$226.47/MWh)* during hours in which prices spiked to over \$1,100/MWh, with individual five-minute LMP intervals exceeding \$2,700/MWh”).

in which generators would have lost money.⁴⁰ Similarly, NEPGA asserts that it has provided evidence of the frequency of events that trigger the PER Adjustment mechanism, pointing to an ISO-NE presentation stating that 10 PER hours occurred during 2013,⁴¹ but NEPGA provides no evidence as to whether this number is likely to be the same or greater or smaller in future years. Absent such further evidence, the Commission reiterates that NEPGA has not met its burden under section 206 to demonstrate that the increased Reserve Constraint Penalty Factors have rendered the PER Adjustment mechanism unjust and unreasonable.

29. Further, NEPGA fails to address the Commission's concerns that, in focusing its Complaint solely on losses that generators might incur through interaction between the PER Adjustment mechanism and the higher Reserve Constraint Penalty Factors, NEPGA failed to address other ways in which the larger revenue picture for capacity suppliers may change. For example, as the Commission noted in the January 30 Order, higher PER Adjustment payments may be offset by higher LMPs in the energy and reserves markets.⁴² NEPGA focuses solely on the "windfall" that it believes will accrue to load as a result of the interaction between the PER mechanism and the new Reserve Constraint Penalty Factors, and does not address additional possible changes to the former settled expectations of all parties that could result from changes in the FCM. Moreover, as NEPGA itself acknowledges, in the absence of sufficient evidence, any determinations as to both this overall revenue picture, and the specific interaction of the PER mechanism and the new Reserve Constraint Penalty Factors, can be no more than speculative.⁴³ NEPGA argues that the January 30 Order "suggest[s] that a Section 206 complaint is only ripe for Commission review after an actual harm has been incurred and documented."⁴⁴ We disagree. The January 30 Order reinforces the statutory requirement

⁴⁰ We further note that, in a competitive market, the Commission does not provide any guarantees as to the revenue that a supplier will earn in a given hour. Rather, as the Commission previously noted, it "is responsible only for assuring that [a supplier] is provided the *opportunity* to recover its costs." *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005) (emphasis in original).

⁴¹ NEPGA Request for Rehearing at 14 n.57 (citing Complaint, Attachment B at 25).

⁴² January 30 Order, 150 FERC ¶ 61,053 at P 38.

⁴³ NEPGA Request for Rehearing at 17.

⁴⁴ *Id.* at 11. *See also* Entergy Request for Rehearing at 8 ("Because of . . . the Commission's request for a proffer of 'specific evidence' before it is willing to consider a new complaint, the order could be interpreted to require suppliers to incur significant financial harm before bringing another complaint that challenges the reasonableness of

(continued...)

that a section 206 complainant must show that an existing rate is unjust and unreasonable, a burden that complainants here did not meet.

30. NEPGA's argument that the Commission's denial of the Complaint violates suppliers' settled expectations as to the capacity payments that they would receive⁴⁵ is premised on the notion that suppliers who are receiving capacity payments relied on established expectations after those auctions cleared with respect to the PER Adjustment and the resulting capacity revenues.⁴⁶ However, the Commission has a statutory obligation to revise jurisdictional rates when, as in the Two-Settlement Order, the Commission finds that an existing rate is unjust and unreasonable. The Commission has balanced the parties' interests and the equities involved in determining whether "the benefits [of a revised rate] outweighed any settled expectations,"⁴⁷ and it engaged in such a balancing when it adopted the Reserve Constraint Penalty Factors in the Two-Settlement Order.⁴⁸

the tariff. Any complainant would however be barred from relief from the financial harm that occurred before a complaint was filed") (footnotes omitted).

⁴⁵ NEPGA Request for Rehearing at 18.

⁴⁶ Similar reasoning underlies NEPGA's argument that, if an auction included an administratively-determined price floor, the prices resulting from that auction are automatically just and reasonable, and therefore, any payments below that price level abrogate the rights of suppliers who cleared that auction. *See id.* at 19 ("If the Commission approves a price floor as just and reasonable as it did for ISO-NE's capacity auctions, that price floor is necessarily a valid part of the resulting rate that the market produces") (footnotes omitted).

⁴⁷ *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29, 29 nn.16-18 (2014) (citing *ISO New England Inc.*, 134 FERC ¶ 61,128, at P 39 (2011); *ISO New England Inc. and New England Power Pool Participants Committee*, 132 FERC ¶ 61,136, at P 30 (2010); and *ISO New England and New England Power Pool*, 145 FERC ¶ 61,095, at PP 28, 30 (2013)).

⁴⁸ Two-Settlement Order, 147 FERC ¶ 61,172 at P 108 ("[I]ncreasing the Reserve Constraint Penalty Factors . . . [is] not intended to be a complete panacea to the region's resource performance problems, but rather part of a comprehensive solution that will enhance performance incentives in the near-term[,] and therefore, despite possible problems associated with that change, the Commission found that it is "part of a just and

(continued...)

C. Evidentiary Burden and the Burden to Propose a Just and Reasonable Alternative

1. NEPGA's Arguments on Rehearing

31. NEPGA states that it seeks to ensure that any future proceeding, should the Commission deny rehearing of the Complaint, is not prejudged by the Commission's finding with respect to the required evidentiary burden. In the January 30 Order, the Commission stated that if, at some point in the future, "NEPGA or any other party 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."⁴⁹ NEPGA is concerned that the Commission may have prejudged any further consideration of the issue based on its rationale for denying the Complaint, so that NEPGA (or any other complainant) would have to meet an evidentiary burden that is unreasonable and inconsistent with Commission precedent and applicable law. NEPGA seeks either rehearing, or in the alternative, clarification that the Commission did not intend to establish a new evidentiary burden for any future complaint.

32. NEPGA also argues that the evidentiary burden imposed by the January 30 Order is particularly unjust, given that NEPGA's primary intention in initiating the Complaint was to restore the capacity rates established in FCAs 5 through 8, which were equal to the relevant FCA clearing price less the reasonably expected PER Adjustment. NEPGA asserts that the increase in Reserve Constraint Penalty Factors directed by the Commission under FPA Section 206, without any corresponding adjustment to the PER strike price, substantially altered these rates, and such a substantial change to settled rates undermines the purpose of a forward capacity market to provide the revenue certainty and stability required to support investment. NEPGA states that by requiring several analyses that are highly burdensome and of questionable probative value, the Commission imposed an unreasonably heightened evidentiary standard given that NEPGA is simply trying to restore the approved rates for FCAs 5 through 8.

reasonable solution, given the urgency of the reliability concerns facing the New England region and the incremental nature of the increases to the Reserve Constraint Penalty Factors").

⁴⁹ January 30 Order, 150 FERC ¶ 61,053 at P 40.

33. Additionally, NEPGA states that the Commission found that NEPGA carries the burden to propose a just and reasonable alternative to the existing PER Adjustment Tariff provisions,⁵⁰ and seeks rehearing on that issue. NEPGA points to the Commission's statement in the January 30 Order that NEPGA had not adequately supported its proposed alternative to the existing PER Adjustment tariff provisions.⁵¹ NEPGA states that a complainant under section 206 has no obligation to establish a just and reasonable remedy or replacement for an unjust and unreasonable provision of the tariff, but need only show the existing tariff is unjust and unreasonable. NEPGA further states that, contrary to the Commission's dictum, NEPGA addressed in the Complaint why its proposed remedy (changing the PER tariff provisions to raise the PER strike price by \$250/MWh) was a just and reasonable replacement rate, and showed that, based on an empirical analysis performed by ISO-NE, raising the strike price by \$250/MWh would result in a PER Adjustment that is "more consistent with the historic PER Adjustments that were reflected in all of the de-list offers in FCAs 5-8" and that it would "maintain the *status quo* with respect to the PER Adjustment and would restore the settled expectations of all market participants."⁵² NEPGA states that, by thus seeking to maintain the *status quo*, its proposed solution would address goals of the PER Adjustment to the same extent that those goals were addressed prior to the increase in the Reserve Constraint Penalty Factors.

2. Commission Determination

34. The Commission did not, as NEPGA alleges, require NEPGA to provide "all of the analyses discussed in paragraphs 37 – 40"⁵³ of the January 30 Order to demonstrate that the PER Adjustment mechanism has become unjust and unreasonable. Rather, the issues raised by these analyses demonstrated that NEPGA had failed to consider the overall revenue picture for capacity suppliers and thus failed to carry its burden of establishing that the existing tariff provisions are unjust and unreasonable. As the January 30 Order made clear, "[i]f, at a future point in time, NEPGA or any other party 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

⁵⁰ NEPGA Request for Rehearing at 8, 15 (citing January 30 Order, 150 FERC ¶ 61,053 at P 35 n.48).

⁵¹ NEPGA Request for Rehearing at 15 n.61 (citing January 30 Order, 150 FERC ¶ 61,053 at P 35 n.48).

⁵² NEPGA Request for Rehearing at 16 n.68 (citing Answer at 9-10 and Complaint at 24-25).

⁵³ NEPGA Request for Rehearing at 8.

rates for Capacity Commitment Periods 5 through 8 unjust and unreasonable, the Commission will consider any such complaints at that time.”⁵⁴ We cannot speculate at this time what might constitute such specific evidence. However, section 206 places that burden on a complainant, and NEPGA has not met that burden.

35. As to NEPGA’s argument that the Commission mistakenly ruled that NEPGA carries the burden to propose a just and reasonable alternative to the existing PER Adjustment Tariff provisions, NEPGA misinterprets the Commission’s statements. In the January 30 Order, the Commission stated, “NEPGA has failed to meet its burden under section 206 to demonstrate that ISO-NE’s existing tariff provisions governing the PER Adjustment are unjust and unreasonable. Accordingly, we need not address whether NEPGA’s proposed alternative is just and reasonable[.]”⁵⁵ If NEPGA had met its section 206 burden to show that the existing tariff provisions were unjust and unreasonable, the Commission would then have determined a just and reasonable replacement rate, whether by accepting NEPGA’s proposal, if supported by record evidence, or implementing its own solution.

D. Reliability

1. Entergy’s Arguments on Rehearing

36. Entergy argues that, in denying the Complaint, the Commission relied on ISO-NE’s statement that denial of the Complaint would not impact reliability because the PER Adjustment does not impact a supplier’s incentive to operate its resource during real-time and the PER Adjustment does not create a disincentive for suppliers to provide energy from their capacity resources. According to Entergy, by relying on the argument that operational incentives to perform in the short term would preserve reliability,⁵⁶ the Commission failed to address Entergy’s and NEPGA’s arguments that, outside of the real-time market and over the longer term, the reduction in capacity payments could jeopardize reliability by undermining the financial viability of capacity resources.

⁵⁴ January 30 Order, 150 FERC ¶ 61,053 at P 40.

⁵⁵ *Id.* P 35.

⁵⁶ *See id.* P 41 (“the PER Adjustment is unrelated to capacity suppliers’ incentive to perform in real-time, and the revenue transfer is unrelated to economic efficiency and reliability, but simply involves a transfer of revenues among market participants. A supplier still has the obligation and the incentive to operate its resource, and therefore not changing the PER strike price will not create a disincentive for suppliers to provide energy, as NEPGA suggests, and is thus unlikely to cause reliability problems of insufficient resources to meet load demand”).

37. Entergy asserts that the Commission did not address arguments on longer-term reliability and resource adequacy concerns driven by the increases in Reserve Constraint Penalty Factors. Entergy states that the Commission's decision to increase Reserve Constraint Penalty Factors without making corresponding changes to the PER Adjustment mechanism harmed resources like Entergy's Pilgrim Nuclear Power Station (Pilgrim) and Rhode Island State Energy Center that are fully committed in the day-ahead market, by reducing their capacity revenues without providing any corresponding opportunity to earn additional revenues from real-time market prices associated with increased Reserve Constraint Penalty Factors.⁵⁷ While Entergy recognizes that the PER Adjustment does not affect resources' incentives to meet their operational schedules in real-time, it nonetheless argues that over the longer term, the change to Reserve Constraint Penalty Factors and the corresponding decrease in capacity revenues on account of PER Adjustments may deprive resources of the ability to maintain their current level of operations or make new investments in fuel assurance, and could also provide suppliers with incentives to shed their capacity supply obligations and exit the market.⁵⁸ Thus, Entergy argues, the January 30 Order has the potential to exacerbate reliability and resource adequacy harms in ISO-NE's markets.

38. Similarly to NEPGA, Entergy is concerned that the January 30 Order could be interpreted to require suppliers to incur significant financial harm before bringing another complaint, but any complainant would however be barred from relief from the financial harm that occurred before that second complaint was filed. Entergy argues that this holding, in addition to the Commission's requirement of "specific evidence" before it

⁵⁷ Entergy asserts that the three-hour emergency on December 4, 2014 caused by the loss of transmission lines outside of the ISO-NE grid reduced Entergy's capacity revenues by \$1.2 million, and that amount was not offset by any real-time energy market revenues during those three hours. Entergy argues that its Pilgrim and Rhode Island State Energy Center units offered into the day-ahead market, received day-ahead schedules from ISO-NE, and very closely followed those schedules; yet, Entergy was charged \$1.2 million not because of a performance deficiency, but because of transmission outages in Quebec that were outside of Entergy's control and impossible to forecast, and for which suppliers cannot recoup any significant peak energy rents. Entergy Request for Rehearing at 6.

⁵⁸ Entergy argues that ISO-NE already faces reliability challenges in the near term due to the premature retirement of existing resources, including Entergy's Vermont Yankee Nuclear Station, and the PER Adjustment was an example of one of the many market design flaws – causing artificially low energy and capacity prices – that contributed to Vermont Yankee's retirement. *Id.* at 7-8.

will be willing to consider another complaint,⁵⁹ puts suppliers in an untenable situation that makes it more likely they will exit the market prematurely when the interaction between the increased Reserve Constraint Penalty Factors and the existing PER Adjustment mechanism reduces their revenues, rather than seek a prospective remedy with the Commission.

2. Commission Determination

39. With regard to Entergy's argument that the Commission has not considered the financial burden on suppliers from the PER mechanism and the potential long-term effect on reliability from its decision, the Commission noted that it was precisely this concern that motivated approval of the two-settlement capacity market design (which will provide suppliers with the opportunity to earn revenue commensurate with actual performance under scarcity conditions).⁶⁰ As to Energy's claim that the January 30 Order requires actual harm before granting a complaint, as noted above, we disagree. As stated above, the January 30 Order found that complainants failed to meet their evidentiary burden of showing the existing Tariff is unjust and unreasonable; NEPGA's and Entergy's interpretation of that finding as requiring a showing of actual harm is inaccurate.

E. Reliance on Stakeholder Process

1. Entergy's Arguments on Rehearing

40. Entergy further states that, in denying the Complaint, the Commission relied on an upcoming stakeholder process to consider the applicability of the PER Adjustment mechanism during Capacity Commitment Periods 5 to 8.⁶¹ Entergy argues that the Commission's reliance on this stakeholder proceeding as a reason to deny the Complaint is "unreasonable and unwarranted."

⁵⁹ January 30 Order, 150 FERC ¶ 61,053 at P 40.

⁶⁰ Two-Settlement Order, 147 FERC ¶ 61,172 at PP 23, 25 ("we find that ISO-NE's existing Tariff is unjust and unreasonable, because it fails to provide adequate incentives for resource performance, thereby threatening reliable operation of the system and forcing consumers to pay for capacity without receiving commensurate reliability benefits" and "we find that most of the provisions in ISO-NE's proposal . . . together with increases to the Reserve Constraint Penalty Factors . . . provide a just and reasonable incentive structure that will help ensure reliability").

⁶¹ Entergy states that that stakeholder process took place, but the proposed changes did not result in sufficient support for NEPOOL approval, and ISO-NE therefore did not file the PER revisions with the Commission. Entergy Request for Rehearing at 9-10.

2. Commission Determination

41. The reference to the January 30 Order on which Entergy relies does not suggest that the Commission anticipated that stakeholders would address that specific issue in the stakeholder process. Rather, the Commission was simply noting that “the Commission has previously encouraged ISO-NE’s stakeholders to consider whether changes to the PER mechanism are necessary *going forward*, and that process is ongoing.”⁶² Thus, the Commission was addressing the possibility of changes in the PER mechanism on a going-forward basis, not for Capacity Commitment Periods 5 through 8. We therefore deny rehearing on this issue.

The Commission orders:

NEPGA’s and Entergy’s requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶² January 30 Order, 150 FERC ¶ 61,053 at P 40 (footnotes omitted, emphasis added).