

MEMORANDUM

TO: NEPOOL Participants Committee Members and Alternates
FROM: NEPOOL Counsel
DATE: May 30, 2018
RE: Summary of Responsive Pleadings in ISO-NE Waiver Proceeding (ER18-1509)

This memorandum provides a brief summary of the pleadings submitted in response to ISO New England's (the ISO) May 1, 2018 request for waiver of certain of its Tariff provisions (the Waiver Request) submitted in Federal Energy Regulatory Commission (FERC) Docket No. ER18-1509-000. The Waiver Request seeks FERC approval in order to permit the ISO to retain two of the generating units at the Mystic Generating Station (Mystic 8 & 9) to provide fuel security for the 2022-23 and 2023-24 Capacity Commitment Periods (CCPs associated with FCAs 13 and 14).

Without taking any substantive position on the Waiver Request, NEPOOL submitted on May 17, 2018 limited comments: (1) to report on the ISO's engagement with regional stakeholders prior to the Waiver Request filing; and (2) to emphasize the importance that any future changes to the Tariff or Market Rules to address system reliability issues be explored through the long-standing, FERC-approved NEPOOL Participant Processes, which will minimize the need for subsequent waivers of the filed rate for that purpose.¹

For purposes of organization, the remaining pleadings are grouped and summarized in one of the three following sections: (1) pleadings protesting or offering comments against the Waiver Request, (2) pleadings offering conditional support or not opposing the Waiver Request, and (3) pleadings providing additional information.²

NEPOOL Counsel is still in the process of reviewing these pleadings and will work with your Officers to determine if any further responsive pleading from NEPOOL may be warranted. If Participants have any questions regarding the pending ISO Waiver Request proceeding (or related proceedings), please let us know.

PLEADING SUMMARIES

1) Parties Protesting and/or Offering Comments Against the Waiver Request:

Public Interest Organizations³ – Public Interest Organizations' joint protest argues, in part, that fuel security concerns are not appropriate for waiver and that granting the "Waiver Request

¹ NEPOOL's comments are available at <https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14922549>.

² Links to all pleadings are available on the NEPOOL website: http://nepool.com/Litigation_Reports.php.

³ "Public Interest Organizations" are the Sierra Club, Natural Resources Defense Council, and Sustainable FERC Project.

would create a troubling precedent for the use of non-market measures.” The Public Interest Organizations further argue that the Waiver Request does not meet the FERC’s waiver standard, that the ISO has not sufficiently justified the Waiver Request, and the ISO has sufficient time to develop market-based mechanisms that would not “threaten the transparency and efficiency of the competitive market.”

NEPGA - conditional protest by the New England Power Generators Association, Inc. (NEPGA) argues that the ISO’s requested waiver will cause “significant harm to capacity suppliers and displace otherwise economic resources” in the Forward Capacity Market by suppressing capacity prices in FCA 13 and FCA 14. NEPGA further asserts that the Tariff does not allow or require the ISO to re-price Mystic 8 & 9 retained for reliability as price takers. For relief, NEPGA asks that the FERC adopt a proposal included as part of a separate complaint filed by NEPGA pursuant to Section 206 of the Federal Power Act (FPA).⁴

FirstLight Power Resources, Inc. (FirstLight) – FirstLight’s conditional protest argues that, depending on how it is interpreted, the Waiver Request may not satisfy the conditions for waiver because it will harm third party sellers of capacity in FCA 13 and FCA 14. FirstLight posits that if the FERC adopts the NEPGA Proposal so as to mitigate harm to third parties through FCM price suppression, FirstLight would not oppose the Waiver Request.

NextEra Energy Resources, LLC and New Hampshire Transmission, LLC (NextEra) – NextEra protests the Waiver Request, asking the FERC to deny the requested waivers and direct the parties to enter into a one-year cost-of-service agreement, which may be renewed annually until such time as a solution is found to address the fuel security concern. NextEra further raises concerns related to Exelon’s affiliate, Constellation LNG, asserting unfair advantage over third parties, and asks the FERC to consider potential means of mitigating such harm. NextEra also expresses support for the NEPGA Proposal, or another Tariff-based solution that would address potential price suppression.

Eastern New England Consumer-Owned Systems (ENECOS) – In their protest, ENECOS argue that the Waiver Request does not satisfy the FERC’s standards for waiver and that, were the Waiver Request granted, it may set a precedent such that other generators similarly seek to retire in order to secure revenues. ENECOS also take issue with the lack of meaningful opportunity for stakeholder discussion or FERC deliberation regarding the ISO’s basis for the Waiver Request. ENECOS urge the FERC, however, to grant waiver of those Tariff provisions that would delay the deadline by which a capacity seller must select unconditional retirement to allow for a “more reasoned” evaluation of the appropriate response to the Mystic 8 & 9 retirement.

LS Power Associates, L.P. (LS Power) – LS Power’s comments argue that the Waiver Request is premature and that the fuel security issues and reliability concerns are not yet ripe for a waiver

⁴ See Docket No. EL18-154. The proposal put forth in NEPGA’s concurrently filed complaint seeks to require the ISO to implement an approach in the FCM that accounts for the capacity of fuel security resources in a way that simultaneously prevents potential price suppression related to the retention of Mystic 8 & 9 (NEPGA Proposal).

or other action by the FERC, and that, in any event, the Waiver Request does not satisfy the FERC's standard for waiver. LS Power avers, instead, that Mystic 8 & 9 should be allowed to delist so that other resources could receive appropriate price signals from the capacity market, including from the soon to be implemented Pay-for Performance construct (PFP).

NRG Companies (NRG) – NRG argues that the FERC should deny the waiver in favor of a market-based solution to address fuel security issues, which should be developed instead of an out-of-market solution. NRG includes an affidavit from David R. Hill, a senior advisor at NRG and former official at the U.S. Department of Energy, which explains that Section 202(c) of the FPA allows the Secretary of Energy to take extraordinary measures to protect system reliability. Therefore, NRG states, the FERC should allow the markets to function and rely on Section 202(c) to serve as a last resort should a market-based alternative not meet the region's fuel security concerns, and further asks that the FERC establish the principle that "emergency efforts to meet . . . regional fuel security needs should not be allowed to undermine the competitive markets." NRG also argues that the market implications of retaining a unit for "fuel security" is different than retaining a unit for "local reliability," and that the FERC should require the ISO to follow the cost of service compensation rules set forth by the tariff.

Vistra Energy Corp. and Dynegy Marketing and Trade (Vistra) – In its protest, Vistra argues that the ISO's Waiver Request does not satisfy the waiver standard and that the ISO should instead be directed to work on market solutions to address fuel security risks. Vistra states that the Waiver Request is therefore not narrowly tailored to address an immediate reliability need. Vistra also raises concerns that the Waiver Request is premature given that the likely reliability and/or fuel security issues will not arise for more than four years, and urges that the ISO, instead, should allow the market to work to address any potential gap.

Vitol Inc. (Vitol) – Vitol's protest contends that the Waiver Request fails to meet the FERC's waiver standard, and instead the ISO must instead allow its markets to work. Rather than proceed with the ISO's proposed three-chapter approach, Vitol would like to see the ISO proceed quickly and directly to Tariff amendments to effectuate additional market solutions, as well as identifying how PFP and other market design features could better address reliability challenges.

Maine Governor's Energy Office (MGEO) – In its protest, the MGEO argues that the ISO failed to justify the need for the Waiver Request, that the proposed cost-of-service contract is not the appropriate solution to the fuel security problem in New England, and that an out-of-market temporary solution may have long-term implications on the health of the market. Alternatively, if the FERC grants the Waiver Request, the MGEO argues that Maine should not share in the cost of the cost-of-service contract because Maine has taken steps to bring additional natural gas into the region while other states have blocked access to natural gas infrastructure.

Maine Public Utilities Commission (MPUC) – The MPUC protests the Waiver Request and argues that the ISO should allow PFP to function as planned, which would likely result in price signals that would attract new entry where it is needed. MPUC also argues that fuel security is a local problem, and the benefit of retaining the Mystic units would not be enjoyed by northern New England consumers. Continuing, MPUC suggests that Maine has actively worked to address fuel security concerns only to have its efforts stymied by other states' policies. For these

reasons, the MPUC argues, the costs of any cost-of-service agreement should not be spread region-wide. The MPUC also argues that, given the critical Market Rule provisions involved, the request for waiver is inappropriate and is contrary to FERC precedent regarding waivers. The MPUC claims also that further analysis is required to determine the nature and extent of the fuel security concern at the heart of ISO's waiver request, asserting the ISO's Mystic retirement analysis contains many of the same significant analytical flaws affecting the ISO's Operational Fuel-Security Analysis.

Electric Power Supply Association (EPSA) – EPSA submitted a protest arguing that the Waiver Request is not justified as proposed, and that the ISO should first be required to explore other options that would be more consistent with its Tariff and that will cause less distortion to the market or harm to other resources. EPSA further argues that, should the FERC approve any kind of cost-of-service agreement for Mystic 8 & 9 or another resource, the FERC should require the ISO to address pricing issues in advance of FCA 13 to mitigate the impact/distortions caused by FCM participation and the harm inflicted on third parties.

New Hampshire Public Utilities Commission (NH PUC) and New Hampshire Office of the Consumer Advocate (NH OCA) – The NH PUC submitted comments arguing that fuel security is not a concrete problem that justifies the granting of Tariff waivers on an urgent basis. Instead, the NH PUC posits, the PFP rules should be a sufficient market-based solution to mitigate the fuel security risks. If state environmental laws render PFP ineffective, then those states that impose the environmental regulations should be responsible for the costs of any cost-of-service agreement for Mystic 8 & 9. NH PUC also questions whether the costs associated with the liquefied natural gas (LNG) facility can be recovered through an FPA electric tariff. The NH OCA filed brief comments incorporating by reference the comments of the NH PUC.

Repsol Energy North America Corporation (Repsol) – Repsol notes that the Waiver Request will benefit one LNG supplier, the Distrigas Terminal, to the possible detriment of other competitors seeking to supply natural gas to New England. Because the Waiver Request does not address, or require ISO to develop, market rules that create the proper incentives to enable all generators to secure LNG supplies from any supplier, Repsol further opines that the Waiver Request as it relates to LNG may lead to unjust and unreasonable rates.

Industrial Energy Consumer Group (IECG)⁵ – IECG argues that the ISO has repeatedly failed to put forth market changes that would promote the construction of needed pipeline facilities and has instead relied on short-term, out-of-market solutions to address ongoing issues. IECG argues that the Waiver Request fails to meet the FERC's waiver standard. IECG further avers that if the circumstances warrant granting some level of support to Mystic 8 & 9, the FERC should reject the ISO's proposal and instead direct the ISO to either enter into a two-year agreement under the Tariff's existing provisions addressing maintaining units in transmission constrained areas, or to reinstate the ISO's Winter Reliability Program.

⁵ IECG represents the interests of industrial energy consumers before regulatory and legislative bodies in New England. Many of IECG's members have significant manufacturing and other commercial operations, including purchases of energy and capacity, in the markets managed by the ISO.

[Clean Energy Industry Associations](#)⁶ – The Clean Energy Industry Associations protest the Waiver Request, arguing that it does not meet the FERC’s standard for granting waiver requests, and that it is counter to FERC precedent because out-of-market actions should only be used as a last resort. The Clean Energy Industry Association assert that the same application could instead be made in 2021 when reliability concerns are more easily assessed. Clean Energy Industry Associations also argue that the ISO conflates “fuel security” with “reliability” and asks that the ISO ensure that reliability solutions are designed on a technology-neutral basis.

[Verso Corporation \(Verso\)](#) – Verso urges the FERC to deny the Waiver Request, which Verso argues is too broad. Verso asserts that PFP or transmission upgrades might obviate the need to retain the Mystic units. If the FERC does grant the Waiver Request, Verso urged the FERC to (i) open a proceeding to facilitate the development of additional pipeline capacity into the region, (ii) require Mystic in any subsequent capacity market auction to bid in at the Minimum Offer Price Rule rate (or forego auction participation and participate in the market as an energy only supplier), and (iii) defer action on cost allocation pending a further ISO filing proposing an allocation and an opportunity to comment on that filing.

2) Comments Offering Conditional Support or Not Opposing the Waiver Request:

[Exelon Corporation \(Exelon\)](#) – Exelon’s comments in support of the Waiver Request state that while stakeholders and the ISO will address fuel security issues in the long-term, in the short-term the FERC should approve the waiver request prior to the time when retirement decisions need to be made.⁷ Exelon further argues a two-year agreement will ensure reliability of the system until the ISO and its stakeholders can develop a market-based fuel security solution for the region. Exelon also disagrees with the ISO’s statement in the Waiver Request that “comments on the effects of the cost of service contract for Mystic 8 & 9 should be considered in the separate docket in which Exelon will file that agreement.”

[Potomac Economics \(the EMM\)](#) – The EMM supports the finding that fuel security issues present a risk to reliability in New England and recommends that that the FERC accept the Waiver Request. The EMM provides its analysis of the role that oil and LNG play in ensuring fuel adequacy in the winter. The EMM notes, however, that while a cost-of-service contract for Mystic 8 & 9 may be necessary in the short-term, it is essential that the ISO work with stakeholders to develop a long-term solution. The EMM recommends that the FERC require the ISO to file a market-based solution by a deadline established by the FERC to provide an “additional impetus” for stakeholders to work together on a market solution.

[Massachusetts Department of Public Utilities \(MA DPU\)](#) – The comments of the MA DPU comments state that, given the specific reliability risks, the Waiver Request is acceptable as a limited, short-term, and time-sensitive reliability measure.

⁶ “Clean Energy Industry Associations” are the American Council on Renewable Energy, American Wind Energy Association, Energy Storage Association, RENEW Northeast, and Solar Energy Industries Association.

⁷ Exelon submitted its related cost-of-service proceeding on May 16, 2018, in Docket No. ER18-1639 (Cost-of-Service Proceeding).

New England Local Distribution Companies (New England LDCs) – The New England LDCs’ comments in support of the Waiver Request argue that the Distrigas LNG facility is an important component of fuel security in the region and its multi-faceted supply and operational role in the region must be maintained. Because the operation of Distrigas itself may depend in large part on the continued operation of Mystic 8 & 9, and the possible retirement of Mystic 8 & 9 place the continued operation of Distrigas in jeopardy, the New England LDCs urge the FERC to grant the Waiver Request.

Natural Gas Supply Association (NGSA) – NGSA expresses concern that out-of-market, short-term solutions could harm the long-term health of the markets. NGSA further argues that this issue should not be characterized as a fuel security issue because it is the loss of power, not fuel, that would potentially create a system reliability problem. NGSA states that, should the FERC grant the Waiver Request, it should be limited to no longer than the proposed two-year period, with no option to extend the cost-of-service agreement beyond that time. NGSA urges the FERC to closely scrutinize the contract filed in the Cost-of-Service Proceeding.

3) Other Pleadings:

Massachusetts Attorney General (MA AG) – The comments of the MA AG acknowledge the need to maintain reliability, but raise three concerns with the Waiver Request: (1) issues regarding the legality of using the waiver process for fuel security, a term not defined in the FPA, (2) the breadth of the Waiver Request with respect to one generator, and (3) the lack of sufficient information from the ISO to support FERC action at this time. The MA AG therefore requests that the FERC first order the ISO to conduct additional analyses regarding (a) a probabilistic analysis of the alleged fuel security risks inherent in the retirement of Mystic 8 & 9 and the Everett LNG facility; (b) a re-run of the ISO’s deterministic Mystic 8 & 9 scenarios using assumptions outlined in a letter dated February 15, 2018 (attached to the MA AG’s pleading); (c) an analysis of the impact of the Waiver Request on other FERC-approved programs such as CASPR and PFP; and (d) an exploration and presentation of options that the ISO or the FERC could take to mitigate the impact of the Waiver Request.

New England States Committee on Electricity (NESCOE) – NESCOE does not take a position on the Waiver Request, but instead raises a number of issues for the FERC to consider, including (1) the need to limit the waiver to the immediate need, (2) that nothing in the Waiver Request proceeding should limit the opportunity for interested parties to review and respond and/or effect the outcome of the Exelon Cost-of-Service proceeding, and (3) that the FERC be mindful of the representation made in the Waiver Request regarding Mystic 8 & 9 entering the FCM as price takers.

Eversource Energy Service Company (Eversource) – In its comments, Eversource states that it reluctantly does not oppose granting the Waiver Request but is concerned that it (as well as the related cost-of-service agreement) is a short-term solution to the problems facing the region and is not the most cost-effective option for solving New England’s fuel security challenge. Eversource therefore conditions its lack of opposition on the ISO outlining a long-term solution to the region’s fuel security problem that results in selection of resource(s) that are consistent with the region’s environmental goals and are the most cost effective in the long-run.

Connecticut Public Utilities Regulatory Authority (CT PURA) and the **Connecticut Department of Energy and Environmental Protection (CT DEEP)** – The joint comments and protest of CT PURA and CT DEEP explain that the CT state agencies do not oppose the Waiver Request. CT PURA and CT DEEP, however, submit a limited protest, urging the FERC to condition any approval of the Waiver Request on Mystic 8 & 9 being entered into the relevant FCAs as price takers without administrative adjustments to the market clearing price to negate the effect of the units’ presence in the auctions.

Environmental Defense Fund (EDF) – EDF’s comments highlight the unique situation the Waiver Request presents. EDF argues that the FERC should (1) require the ISO file a long-term market-based solution to fuel security issues by the second quarter of 2019; (2) require sufficient accountability and transparency around services and pricing—for both Mystic 8 & 9 and the Distrigas facility—to ensure there is no undue discrimination, and (3) ensure that any approval of the Waiver Request is conditioned such that the risks and rewards related to the operation and costs for both Mystic 8 & 9 and Distrigas are effectively balanced.

Calpine Corporation (Calpine) – Calpine does not oppose the Waiver Request, but emphasizes that the Waiver Request is a symptom of broader price formation issues that are preventing the ISO-NE Forward Capacity Market from achieving its objective of attracting sufficient investment in new and existing resources to maintain reliability. Calpine takes issue with certain underlying price formation issues affecting the FCM, including the requirement that generators lock-in prices, that generators retained for reliability issues be offered in as price takers, the exemption from the Minimum Offer Price Rule for Renewable Technology Resources, the reduction in the Installed Capacity Requirement, and the reduction in the Net Cost-of-New-Entry. Calpine therefore argues that the FCM requires significant holistic changes and urges FERC to approve the NEPGA Proposal.

Northeast Gas Association (NGA) – NGA’s comments highlight the importance of LNG to the New England natural gas and electricity markets, and urge the FERC to consider importance of maintaining the regional LNG access.

Algonquin Gas Transmission, LLC (Algonquin) – Algonquin’s comments acknowledge the fuel security risk identified by the ISO, but note that the Waiver Request is a short-term solution that does not address the region’s problems. Algonquin therefore stresses the need for long-term solutions, included possible additional natural gas pipeline infrastructure development.