

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

New England Power Generators )  
Association, Inc. )  
 )  
v. )  
 )  
ISO New England, Inc. )

EL21-26-000

**COMMENTS OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),<sup>1</sup> the Electric Power Supply Association (“EPSA”)<sup>2</sup> hereby submits these comments supporting the complaint submitted by the New England Power Generators Association (“NEPGA”) against ISO New England, Inc. (“ISO-NE” or “the ISO”). EPSA requests that the Commission grant NEPGA’s complaint and order the ISO to apply its current Net Cost of New Entry (“Net CONE”) methodology as it is prescribed in its Tariff as approved by the Commission.<sup>3</sup>

**I. Comments**

NEPGA’s complaint raises concerns of general applicability that warrant the Commission’s careful consideration. The complaint demonstrates that ISO-NE has violated its Tariff and the filed-rate doctrine in applying a changed methodology to

---

<sup>1</sup> 18 C.F.R. §§ 385.211.

<sup>2</sup> EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA intervened in this proceeding on December 15, 2020.

<sup>3</sup> All references to the Tariff in this Complaint are to ISO-NE’s Transmission, Markets and Services Tariff on file with the Commission.

calculating Net CONE without seeking Commission approval of that methodology. As NEPGA points out, ISO-NE's existing Tariff is unambiguous in how Net CONE must be recalculated, yet the ISO has opted to apply a new method that is inconsistent with the currently approved Tariff.

While usurping the Commission's authority is troubling in the instant case, EPSC is more broadly concerned about the precedent that would be set by the ISO-NE's actions if the Commission were to deny the Complaint. The Commission would be signaling to ISOs/RTOs generally that it may turn a blind eye to the unilateral adjustment of practices even where such practices are inconsistent with the Tariff. Once such a door is opened, one can envision many situations where other ISOs/RTOs might find circumstances for which practices or rules that deviate from the language of their Tariffs are preferred, and therefore might decide that it would be more expedient to undertake those preferred options rather than taking the steps necessary to seek Commission approval of Tariff changes. The illegality of this situation is not ameliorated by an assumption that the changes *would be* accepted by the Commission at a later time.

At an extreme, one could imagine ISO-NE deciding, in the midst of running a Forward Capacity Auction, that the capacity market demand curves are not functioning as desired and therefore need to change. In that instance, the ISO-NE could submit tariff provisions that support the demand curve change, along with any companion waiver request that may be necessary, at the same time they file the capacity market results based on new demand curves. This approach would allow ISO-NE to argue that the tariff changes are prospective because the capacity market results had not yet been

finalized. Should the Commission deny NEPGA's Complaint, the door will be open for ISOs/RTOs to cite the decision in the instant matter as justification for deviations they may make from the language of their existing Tariffs without or before seeking FERC approval.

NEPGA has demonstrated that ISO-NE's actions represent a clear Tariff violation. In considering whether a Tariff violation has occurred, the Commission looks to the plain meaning of the Tariff language under question,<sup>4</sup> as do the courts.<sup>5</sup> ISO-NE violated its currently approved Tariff, an act which is not corrected by the ISO's upcoming filing of a proposed revision to the relevant tariff provision after the violation occurred. As NEPGA shows, ISO-NE has already applied the methodology defined in the proposed tariff provision to recalculate the Net CONE value that will be filed at the Commission this month – i.e., while the proposed tariff provision has yet to be filed with Commission, but is the practice currently in use by the market operator. ISO-NE was obligated to seek Commission approval before applying a revised tariff provision, and such application would only be lawful prospectively. Yet here, ISO-NE will now be effectively seeking approval of a proposed tariff revision that it has previously unlawfully applied. In the event the Commission ultimately approves ISO-NE's proposed tariff provision—and there are sound economic and policy reasons the Commission should reject ISO-NE's expected proposal—ISO-NE's application of a proposed tariff revision at this stage in the process constitutes retroactive ratemaking and a violation of the filed rate doctrine.

---

<sup>4</sup> *NEPGA v. ISO-NE, Order on Complaint*, 144 FERC ¶ 61,157, PP 49, 53-54 (2013).

<sup>5</sup> *Con. Ed. v. FERC*, 347 F.3d 964, 972-973 (D.C. Cir. 2003).

ISO-NE's Tariff requires that the ISO periodically recalculate Net CONE and review the results of that recalculation with NEPOOL stakeholders, prior to filing it with the Commission. ISO-NE's Tariff provides that:

CONE and Net CONE shall be recalculated for the Capacity Commitment Period beginning on June 1, 2025 and no less often than once every three years thereafter. Whenever these values are recalculated, the ISO will review the results of the recalculation with stakeholders *and the new values will be filed with the Commission prior to the Forward Capacity Auction in which the new value is to apply.*<sup>6</sup>

A reasonable reading of this language would find no ambiguity in how the ISO is required to conduct this process. While ISO-NE conducted a review with stakeholders, it opted to calculate Net CONE using a changed methodology that is wholly inconsistent with its Commission-approved Tariff. As NEPGA's complaint outlines, ISO-NE asserted that these changes are necessary "clarifications" to the definition of Net CONE that "more accurately [describe] the Net CONE calculation."<sup>7</sup> ISO-NE provided redlined Tariff language to stakeholders in at the September 10, 2020 NEPOOL Markets Committee meeting.<sup>8</sup> While ISO-NE has stated that it *intends* to file these changes with the Commission, it cannot apply them without Commission acceptance. To do so would represent a departure from its existing Tariff and violates the filed-rate doctrine which forbids a regulated entity to charge rates for its services other than those properly on file with the appropriate federal regulatory authority.<sup>9</sup>

---

<sup>6</sup> ISO-NE Tariff § III.13.2.4 – Forward Capacity Market, *available at*: [https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect\\_3/mr1\\_sec\\_13\\_14.pdf](https://www.iso-ne.com/static-assets/documents/regulatory/tariff/sect_3/mr1_sec_13_14.pdf) (Emphasis Added).

<sup>7</sup> NEPGA complaint at p. 10 citing NEPOOL Markets Committee Presentation, Agenda Item # 6(A)(i), Cost of New Entry & Offer Review Trigger Prices: Estimated revenue offsets association with Energy Security Improvements REVISION 1, at 17, *available at*: [https://www.iso-ne.com/static-assets/documents/2020/09/a6\\_a\\_i\\_tariff\\_redlines\\_with\\_esi\\_as\\_filed\\_by\\_nepool\\_and\\_frm\\_sunset.docx](https://www.iso-ne.com/static-assets/documents/2020/09/a6_a_i_tariff_redlines_with_esi_as_filed_by_nepool_and_frm_sunset.docx)

<sup>8</sup> *Id.*

<sup>9</sup> *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Montana- Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

It is also worth examining the logical incongruity of ISO-NE's approach to these modifications. Fundamentally, if the methodology under consideration is a just and reasonable interpretation under the ISO-NE Tariff on file, accordingly, a clarification should not be necessary. Additionally, if the ISO's redlines do not materially change the provisions of the Tariff—as ISO-NE purports—then there should be no need to make clarifications as the ISO's existing tariff is not ambiguous as to how Net CONE should be calculated.

While Tariff changes are often necessary, the procedures and orders of operations established for making such changes exist for important reasons and the Commission should ensure that they are followed. There is well-established policy and precedent on this process. The Commission must grant this complaint to ensure that ISO-NE is required to follow these rules and procedures based on administrative law in the application of its Tariff.



**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington DC, this 31<sup>st</sup> day of December 2020.

/s/ Bill Zuretti  
Bill Zuretti