UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	**Docket No. EL16-120-000**
	)	
ISO New England, Inc.,	)	
	)	
Respondent.	)	

ANSWER OF THE RETAIL ENERGY SUPPLY ASSOCIATION TO THE REQUEST FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING OF NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission's") Rules of Practice and Procedure, 18 C.F.R. § 385.213, the Retail Energy Supply Association ("RESA")[1] hereby files this Answer to the Request for Clarification or, in the Alternative, Rehearing ("NEPGA Request") filed on February 15, 2017, by the New England Power Generators Association, Inc. ("NEPGA") in the above-referenced proceeding. NEPGA seeks "clarification" that it may collect, as refunds, rates assessed from periods prior to the refund effective date established by the Commission in its January 19, 2017 Order.[2] RESA objects to NEPGA's request. NEPGA's request is not only a request for relief that NEPGA did not request

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

[2] *New England Power Generators Association, Inc. v. ISO New England, Inc.*, 158 FERC ¶ 61,034 (2017) ("January 19 Order").

in its underlying Complaint, but: (1) the relief requested would constitute retroactive ratemaking in clear violation of the Federal Power Act ("FPA"); (2) is inconsistent with the Commission's January 19 Order; and (3) would require modifications to the ISO New England, Inc. ("ISO-NE") Transmission, Markets and Service Tariff ("Tariff") that the Commission expressly stated was not to be modified as a result of its January 19 Order. Under no circumstances can FERC modify the PER Adjustment to modify a rate that arose prior to September 30, 2016. NEPGA's Request must be denied. In support of RESA's response, RESA submits as follows:

I.
BACKGROUND

On September 30, 2016, NEPGA filed its FPA Section 206 Complaint against ISO-NE. In it, NEPGA asked the Commission to find that the Peak Energy Rent ("PER") Adjustment provision of the ISO-NE Tariff is unjust and unreasonable because of the effect on the PER Adjustment mechanism caused by the increase in the Reserve Constraint Penalty Factors ("RCPF"). NEPGA sought either one of two remedies from the Commission under FPA Section 206: (1) increase the Strike Price by $250 per MWh;[3] or (2) "calculate an aggregate Rebate value for each hour based on what capacity suppliers in the aggregate actually earned in the real-time market."[4] In short, NEPGA's proposed remedies were solely limited to revising ISO-NE Tariff Section III.13.7.2.7.1.1.1.

RESA filed a Protest of NEPGA's Complaint, disagreeing that the PER Adjustment is unjust and unreasonable. RESA showed that the NEPGA Complaint was a collateral attack

[3] NEPGA Complaint at 36.

[4] "Rebate" is defined by NEPGA to mean the PER Adjustment which reduces capacity suppliers' monthly capacity payments by an amount that approximates the "peak energy rents" earned by a hypothetical proxy generator in the real-time energy market. NEPGA Complaint at 5.

against prior Commission orders and that RESA members and retail ratepayers relied on the PER Adjustment mechanism for its remaining term. Finally, RESA requested that if the Commission were to modify the Tariff to address NEPGA's concerns, that the Commission ensure that whatever changes ordered by the Commission be made prospectively and not alter the Average Monthly PER calculation that is made on a rolling twelve month basis, found in ISO-NE Tariff Section III.13.7.2.7.1.1.2.

In its January 19 Order, the Commission granted NEPGA's Complaint. With respect to the remedy, the Commission required 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." January 19 Order at P.57. The Commission set for hearing and settlement judge procedures under FPA Section 206 the question "of the appropriate method of calculating the PER Strike Price." *Id.* The Commission established a refund effective date of September 30, 2016 – the date NEPGA filed its Complaint.

As directly relevant here, the Commission stated,

> 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 (emphasis added). January 19 Order at P.61.

On February 15, 2017, NEPGA filed its Request for Clarification and in the Alternative, Rehearing. Relying on a statement in the January 19 Order (at P.59) that the Commission "will determine refunds, if any," NEPGA suggests that once the PER Strike Price is determined and applied prospectively from September 30, 2016, the Commission should refund to Suppliers "the

difference between (i) the PER Adjustment payments charged to capacity suppliers after the September 30, 2016 refund effective date, and (ii) the PER Adjustment payments that would have been charged to capacity suppliers if the PER Adjustment were calculated using a just and reasonable PER Strike Price." NEPGA Request at p.2. Essentially, NEPGA's "clarification" is inconsistent with the January 19 Order and would constitute retroactive ratemaking. NEPGA simply cannot, under any theory, revise rates assessed prior to the September 30, 2016 refund effective date, including the rates generated by the August 2016 PER event. The NEPGA Request must be rejected.

II.
ARGUMENT

A. The Filed Rate Doctrine Prohibits The Relief NEPGA Seeks

In its January 19 Order, the Commission granted NEPGA's Complaint, setting one issue for hearing and settlement judge procedures – the proper PER Strike Price, effective September 30, 2016. NEPGA now seeks "clarification" that this prospective remedy should include refunds of charges arising before the refund effective date. NEPGA would accomplish this by modifying the PER Strike Price prior to the refund effective date and modifying the way the PER is calculated under ISO-NE Tariff sections III.13.7.2.7.1.1.1 and III.13.7.2.7.1.1.2. The Commission in its January 19 Order ordered *prospective* modification of the PER Strike Price effective September 30, 2016 pursuant to section III.13.7.2.7.1.1.1, not retroactive relief for August 2016 or any other prior month. NEPGA's request constitutes retroactive ratemaking in violation of the filed rate doctrine and must be rejected.[5]

[5] NEPGA is not seeking a billing adjustment, which would correct a mistake in a bill to make it consistent with the rate in the Tariff thereby enforcing the filed rate. *See e.g. New York State Elec. & Gas Corp.*, 142 FERC ¶ 61,151, at P 26 (2013). Instead, NEPGA seeks to modify the tariffed rate itself - a clear violation of the filed rate doctrine.

The filed rate doctrine "forbids a regulated entity to charge rates for its service other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). The rule against retroactive ratemaking "bars . . . the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979). In addition, "[i]t is, of course, a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle." *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975). The Courts have characterized the prohibition against retroactive ratemaking under FPA Section 206 to prohibit "adjusting current rates to make up for a utility's over-or undercollection in prior periods." *Towns of Concord Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992).

NEPGA proposes a refund remedy that would clearly run afoul of long-standing precedent. NEPGA would have the Commission address a NEPGA-claimed "mismatch" by recalculating the Monthly PER for August 2016 that prior to the refund effective date had been calculated in accordance with section III.13.7.2.7.1.1.2, and then using that new value in the Average Monthly PER mechanism for "all PER event hours" included in invoices issued after the September 30, 2016 refund effective date.[6] Such a recalculation would require the Commission to "adjust[] current rates to make up for a utility's over-or undercollection in prior periods." *Towns of Concord*, 955 F.2d at 71 n.2.

The Commission expressly established the refund effective date of September 30, 2016.

[6] Logically, NEPGA's request for a modification to the strike price for all PER event hours included in invoices issued after September 30, 2016 would have to include the other PER events that occurred during the 12 months prior to September 2016; this would include PER events that occurred in November and December 2015 and January 2016, many months before the August event. This illustrates even more clearly how NEPGA's request violates the filed rate doctrine.

In the January 19 Order, the Commission required ISO-NE to prospectively modify the PER Strike Price as set forth in ISO-NE Tariff section III.13.7.2.7.1.1.1. Consistent with FPA Section 206, the Commission limited the prospective changes in this proceeding only to adjusting the PER Strike Price for PER events, if any, occurring after September 30, 2016. *See*, January 19 Order at P.57. Refunds under this reasoning would take into account any prospective changes to the PER Adjustment resulting from the difference between the PER Strike Price in place for a PER event occurring after September 30, 2016 (if any) and the PER Strike Price that results from the hearing or settlement process.

It is possible that PER events could occur after September 30, 2016 requiring refunds or adjustments that flow through the Average Monthly PER mechanism calculated pursuant to ISO-NE Tariff section III.13.7.2.7.1.1.2. However, those refunds will be the result of the *prospective* change to the PER Strike Price, and will not have anything to do with events that occurred prior to September 30, 2016.

B. The Monthly PER Application Mechanism Is Not Affected By the Commission's Order

In addition to running afoul of the prohibition against retroactive ratemaking, NEPGA's proposed "clarification" would require modification of ISO-NE's Tariff language governing the calculation of the Average Monthly PER, which was not ordered modified in the January 19 Order.

In the January 19 Order, the Commission expressly stated that it was not ordering changes to the Average Monthly PER provision of ISO-NE Tariff section III.13.7.2.7.1.1.2. January 19 Order at P.61. In order to grant the relief NEPGA seeks and which RESA vigorously opposes, however, the Commission would have to retroactively revise section III.13.7.2.7.1.1.2.

Under this Average Monthly PER provision, ISO-NE is directed to sum the Hourly PER for each calendar month to determine the total PER for that month (the "Monthly PER"). ISO-NE then calculates the Average Monthly PER earned by the proxy unit. The Average Monthly PER is equal to the average of the Monthly PER values for the 12 months prior to the Obligation Month. *See* ISO-NE Tariff, section III.13.7.2.7.1.1.2. Thus, under the ordinary operation of the ISO-NE Tariff, the August 2016 PER events were summed and incorporated into the Monthly PER mechanism *prior to* the refund effective date of September 30, 2016. In order to do what NEPGA now suggests, the Commission would have to modify this existing Tariff mechanism to retroactively change how the Average Monthly PER is calculated in order to reflect the 11 months of refunds that NEPGA improperly claims is due. The Commission cannot order this result under FPA Section 206 and did not order this result in its January 19 Order.

NEPGA attempts to cure its incurable position by asserting that it is permissible under FPA Section 206(b) to receive refunds of "amounts paid" in excess of what the just and reasonable rate should have been. According to NEPGA, the invoices received after September 30, 2016 have been calculated using the unlawful PER Strike Price and thus, the invoices are to be updated using the post September 30, 2016 PER Strike Price. NEPGA Request at 10. Not only would NEPGA's theory require a change to the August PER Hourly amounts – but it would also require a change in the PER Strike Price prior to September 30, 2016.

NEPGA misinterprets FPA Section 206(b). As the Court stated in *City of Anaheim v. FERC*, 558 F.3d 521 (D.C. Cir. 2009), Section 206(b) applies "in cases where the complainant is a *purchaser* alleging that the rates it paid were too high. That provision permits FERC-ordered refunds '*of any amounts paid . . . in excess of*' those which would have been paid under the just and reasonable rate." *City of Anaheim*, 558 F.3d at 524. Here, as in *City of Anaheim*, the

complainant is a seller alleging "that the rates it received were too low." *Id*. Section 206(b) is not applicable and provides no support for NEPGA's position.

NEPGA is simply incorrect that the Commission can retroactively modify the PER Adjustment for August 2016 because retroactively modifying the PER Adjustment for August 2016 is akin to modifying a formula rate component. According to NEPGA, it is permissible to "apply a revised formula rate to historical data inputs." NEPGA Request at 11. However, the Commission ordered modification of the PER Strike Price prospectively from September 30, 2016. Thus, the "formula," if NEPGA wishes to call it that, will be modified for any Hourly PER occurring after September 30, 2016 under ISO-NE section III.13.7.2.7.1.1.1. In order to effectuate a change to the Average Monthly PER methodology, which is necessary in order to adjust amounts *invoiced*, the Commission would have to retroactively modify the Hourly PER events that are used in calculating the Monthly PER for August 2016, all of which occurred prior to the refund effective date. That move would constitute retroactive ratemaking. NEPGA would have the Commission revise the historical data inputs themselves, clearly not permitted under FPA Section 206.

NEPGA's final argument is no more persuasive. NEPGA argues that if the Commission can remove the PER Adjustment from the Tariff entirely, it has the "authority to approve a refund methodology that applies the newly-established PER Strike Price to historical real-time energy prices. . . ." NEPGA Response at 12. As noted in Part A above, the Commission has the authority under FPA Section 206 to prospectively modify a rate that has become unjust and unreasonable. That is what the Commission did in the January 19 Order. While RESA does not support that finding, prospective application of the remedy is permissible under the Federal Power Act. However, any retroactive adjustment of a rate for prior service clearly is not

permissible.

C. NEPGA Seeks Relief That is Unavailable to It

NEPGA seeks a remedy that is unavailable to it – refunds for the period prior to the date that it filed its Complaint – September 30, 2016. It is important to note that NEPGA in its Complaint did not seek this relief. It sought a remedy and an alternative remedy, neither of which involved any changes to the Average Monthly PER methodology specified in III.13.7.2.7.1.1.2. NEPGA sought modification of ISO-NE Tariff section III.13.7.2.7.1.1.1 involving the calculation of the PER Strike Price as a remedy for the harm it alleged was caused by the operation of the PER Adjustment (which NEPGA referred to as the "Rebate") and the increased RCPF. The Commission addressed the remedy requested and set for hearing and settlement judge proceedings the appropriate level of the PER Strike Price to apply prospectively from September 30, 2016. NEPGA cannot, on clarification or rehearing, seek to modify the remedy it seeks after the Commission has issued a substantive order that directly addresses the remedies it requested

III. CONCLUSION

NEPGA seeks "clarification" from the Commission that it can receive refunds for PER events that arose prior to the refund effective date of September 30, 2016. This clarification, and the rehearing that NEPGA pleads in the alternative, must be rejected. What NEPGA seeks would constitute retroactive ratemaking in violation of the filed rate doctrine. The Commission required changes only to how ISO-NE calculates the PER Strike Price and expressly did not modify 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." January 19 Order at 23. The relief NEPGA seeks would require modification of the monthly adjustment that the Commission did not order

modified and of which NEPGA did not request modification in its Complaint.

WHEREFORE, RESA respectfully requests that its Answer be accepted and that NEPGA's Request for Clarification and, in the Alternative, Rehearing be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person listed on the Official Service list compiled by the Secretary in this proceeding.

Dated in Washington, DC this 2nd day of March, 2017.

Elizabeth W. Whittle
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