UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.	)	**Docket No. ER21-787-___**
New England Power Generators Association, Inc.	)	
v.	)	**Docket No. EL21-26-___**
ISO New England Inc.	)	
		(Not consolidated)

REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the Electric Power Supply Association ("EPSA")[3] and the New England Power Generators Association, Inc. ("NEPGA"[4] and together with EPSA,

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1 16 U.S.C. § 825*l*(a) (2018).

2 18 C.F.R. § 385.713 (2020).

3 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.

4 NEPGA is the trade association representing competitive power generators in New England. NEPGA's member companies represent approximately 26,000 megawatts, or nearly 90 percent of the installed capacity in New England. NEPGA's mission is to support competitive wholesale electricity markets in New England. NEPGA believes that open markets guided by stable public policies are the best means to provide reliable and competitively-priced electricity for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region. NEPGA's member companies are responsible for generating and supplying electric power for sale within the New England bulk power system. The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

"Petitioners") respectfully request rehearing of the Commission's May 28, 2021 orders in the above-captioned proceedings relating to the recalculated Cost of New Entry ("CONE"),[5] Net CONE and Capacity Performance Payment Rate values used in ISO-NE's Forward Capacity Market ("FCM").[6] As discussed in greater detail below, allowing ISO-NE to perform this recalculation using a definition of "Net CONE" that only took effect after the fact was contrary to law in that it violated the filed rate doctrine. In addition, the Section 205 Order was arbitrary and capricious and not supported by substantial evidence, because it failed to respond to serious objections raised by NEPGA and others, ignored substantial evidence contrary to its conclusions while accepting proposals based on little more than ISO-NE's say-so, departed from Commission precedent without adequate explanation, and otherwise failed to satisfy the requirements of reasoned decision-making.

I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[7] Petitioners hereby identify the issues on which they seek rehearing of the May 28 Orders and provide representative precedent in support of their position on such issues:

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[5] This and other capitalized terms used and not otherwise defined herein have the meanings given them in the ISO New England Inc. ("ISO-NE") Transmission, Markets and Services Tariff (the "Tariff").

[6] *See ISO New England Inc.*, 175 FERC ¶ 61,172 (2021) (the "Section 205 Order"); *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, 175 FERC ¶ 61,177 (2021) (the "Complaint Order" and together with the Section 205 Order, the "May 28 Orders").

[7] 18 C.F.R. § 385.713(c)(2) (2020).

1. The Commission's denial of NEPGA's complaint[8] challenging ISO-NE's application of a new definition of "Net CONE" prior to its effective date in the Complaint Order and its acceptance of a Net CONE value recalculated using that definition in the Section 205 Order were not in accordance with law in that they violated the filed rate doctrine, which requires "strict adherence" to the terms of the Tariff as then in effect, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132 (1990) ("*Maislin*"), and bars "[r]etroactive changes in rates," *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 941 (D.C. Cir. 1988) ("*East Tennessee*"). *See also, e.g.*, *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("*Arkla*"); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018) ("*ODEC*"); *Louisiana Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 556 (D.C. Cir. 2014) ("*Louisiana PSC*"); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 700 (D.C. Cir. 1995) ("*OXY*").

2. The denial of the NEPGA Complaint in the Complaint Order and acceptance of a Net CONE value recalculated using the new definition of "Net CONE" prior to its effective date in the Section 205 Order were arbitrary and capricious in that they represented an unacknowledged and unexplained departure from established Commission precedent requiring that regional transmission organizations ("RTOs") and independent system operators ("ISOs") comply with the terms of their tariffs and other filed rates. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("*West Deptford*"). *See also Radford's Run Wind Farm, LLC v. PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,121 at P 23 (2018) ("*Radford's Run*"); *Caithness Long Island II, LLC v. New York Indep. Sys. Operator, Inc.*, 152 FERC ¶ 61,246 at P 54 (2015) ("*Caithness*"), *on reh'g*, 154 FERC ¶ 61,218 (2016); *Southwest Power Pool, Inc.*, 150 FERC ¶ 61,005 at n.36 (2015) ("*SPP*").

3. To the extent the Commission denied the Complaint or accepted the effective application of a new definition of "Net CONE" based on some unexpressed finding that the new definition merely clarified the old definition, the May 28 Orders were arbitrary and capricious in that the Commission provided no response, much less a meaningful response, to serious objections raised by NEPGA and others and otherwise failed to engage in reasoned decision-making. *See, e.g.*, *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 44 (1983) ("*State Farm*"); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) ("*KN Energy*"); *City of Vernon v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988) ("*Vernon*").

4. The Commission's finding that natural gas pipeline upgrades would not be required to allow the reference unit to operate as modeled by ISO-NE was

[8] Complaint and Request for Fast-Track Processing of the New England Power Generators Association, Inc., Docket No. EL21-26-000 (filed Dec. 11, 2021) (the "NEPGA Complaint").

arbitrary and capricious because the Commission assessed the evidence under the wrong legal standard and failed to require ISO-NE to demonstrate the validity of its assumptions with a preponderance of evidence. *See, e.g.*, 5 U.S.C. § 706(2)(A) (2018); *General Land Office v. U.S. Dept. of the Interior*, 947 F.3d 309, 321 (5th Cir. 2020) ("*Land Office*"); *Dana Container, Inc. v. Secretary of Labor*, 847 F.3d 495, 499 (7th Cir. 2017) ("*Dana Container*"); *Panda Stonewall LLC*, 174 FERC ¶ 61,266 at P 30 (2021) ("*Panda Stonewall*").

5. The Commission's determination with respect to the reference unit's ability to obtain natural gas also failed to reflect reasoned decision-making and was not supported by substantial evidence, as it relied on unsubstantiated assertions by ISO-NE. *See, e.g.*, 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825*l*(b) (2018); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("*ICC*"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ("*PG&E*").

6. In concluding that no gas pipeline upgrades were required, the Commission arbitrarily and capriciously failed to respond meaningfully to concerns raised by NEPGA and its experts. *See, e.g., Public Utilis. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) ("*CPUC*"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*").

7. The Commission's acceptance of ISO-NE's assumption that the reference unit would incur Network Upgrade costs of zero represented a departure from precedent requiring that Network Upgrade costs be reflected in Net CONE. *See New York Indep. Sys. Operator, Inc.*, 134 FERC ¶ 61,058 at P 53 ("*NYISO*"), *on reh'g*, 135 FERC ¶ 61,170 (2011), *aff'd sub nom. TC Ravenswood, LLC v. FERC*, 741 F.3d 112 (D.C. Cir. 2013). The Section 205 Order arbitrarily and capriciously failed to acknowledge, much less justify, that departure. *See Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

8. In accepting ISO-NE's assumption of zero Network Upgrade costs, the Commission arbitrarily and capriciously failed to provide a meaningful response to NEPGA's serious objections. *See, e.g., PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303; *Vernon*, 845 F.2d at 1048.

9. In accepting ISO-NE assumption of zero Network Upgrade costs, the Commission arbitrarily and capriciously assessed the evidence under the wrong legal standard and failed to require ISO-NE to demonstrate the validity of its assumptions with a preponderance of evidence. *See, e.g.*, 5 U.S.C. § 706(2)(A) (2018); *Land Office*, 947 F.3d at 321; *Dana Container*, 847 F.3d at 499; *Panda Stonewall*, 174 FERC ¶ 61,266 at P 30.

10. The Commission's determination that it was reasonable for ISO-NE to assume that the reference unit would always run on natural gas was arbitrary and capricious because it was illogical and internally inconsistent

to assume that the reference unit could potentially run on oil, without considering the costs of such oil and while also stating that the reference unit would choose to save its oil for non-normal conditions that are not considered in ISO-NE's dispatch model. *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*"); *IRS v. FLRA*, 963 F.2d 429, 439 (D.C. Cir.1992) ("*IRS*").

11. The Commission's decision to accept ISO-NE's cost estimates for gas interconnection facilities was arbitrary and capricious, because the Commission failed to provide a meaningful response to arguments by NEPGA, CPV Towantic, LLC ("CPV Towantic") and others that ISO-NE's estimates were significantly understated and were four to five times lower than for recent projects in the relevant area. *See, e.g.*, *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198.

12. The Commission's acceptance of ISO-NE's gas interconnection cost estimates was not supported by substantial evidence. *See, e.g.*, 5 U.S.C. § 706(2)(A) (2018); *Land Office*, 947 F.3d at 321. The Commission also acted arbitrarily and capriciously by simply ignoring the evidence proffered by NEPGA, CPV Towantic and others showing ISO-NE's estimates to be understated. *See, e.g.*, *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311 (D.C. Cir. 2018) ("*Genuine Parts*"); *Tenneco Gas v. FERC*, 969 F2d 1187, 1214 (D.C. Cir. 1992) ("*Tenneco*").

13. The Commission's acceptance of estimated energy and ancillary services ("EAS") revenues that were determined without including the reference unit deemed to receive such revenues in the EAS markets was arbitrary and capricious in that it rendered the Section 205 Order "internally inconsistent," *ANR Storage Co. v. FERC*, 904 F.3d at 1020, 1028 (D.C. Cir. 2018) ("*ANR*"), and "illogical on its own terms," *GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 148 (D.C. Cir. 2013) ("*GameFly*") (citation omitted). *See also State Farm*, 463 U.S. at 44.

14. In accepting estimated EAS revenues determined without including the reference unit in the EAS markets, the Section 205 Order represents an unexplained departure from Commission precedent concerning the purpose of Net CONE in a forward capacity market. *See Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

15. The Commission's acceptance of estimated EAS revenues that were determined without including the reference unit deemed to receive such revenues in the EAS markets was arbitrary and capricious, because the Commission failed to respond to serious objections raised by NEPGA and others. *See, e.g.*, *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("*NorAm*"); *KN Energy*, 968 F.2d at 1303; *Vernon*, 845 F.2d at 1048.

16. The Commission's acceptance in the Section 205 Order of EAS revenue estimates calculated assuming an unrealistically high number of scarcity hours was arbitrary and capricious, because the Commission failed to respond to serious objections raised by NEPGA. *See, e.g.*, *NorAm*, 148 F.3d at 1165; *KN Energy*, 968 F.2d at 1303; *Vernon*, 845 F.2d at 1048. It was inconsistent with the Commission's recognition elsewhere in the Section 205 Order regarding the importance of making realistic assumptions, *see* Section 205 Order, 175 FERC ¶ 61,172 at P 63, which also renders the order arbitrary and capricious, *see, e.g.*, *GameFly*, 704 F.3d at 148.

17. The Commission's acceptance in the Section 205 Order of EAS revenue estimates calculated assuming an unrealistically high number of scarcity hours was not supported by substantial evidence. *See* 16 U.S.C. § 825*l*(b) (2018). *See also, e.g.*, *Tenneco*, 969 F2d at 1214.

II. BACKGROUND

These proceedings relate to the triennial review of CONE and Net CONE values required by Section III.13.2.4 of the Tariff, which provides, in relevant part, that:

> CONE and Net CONE shall be recalculated no less often than once every three years thereafter. Whenever these values are recalculated, [ISO-NE] 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.[9]

The Section 205 Order accepted, in part, a December 31, 2020 ISO-NE filing pursuant to Section 205 of the FPA[10] proposing recalculated CONE and Net CONE values to be applied beginning with the Forward Capacity Auction ("FCA") for the 2025/2026 Capacity Commitment Period.[11] The Section 205 Order also accepted a revised definition of "Net CONE," effective on May 29, 2021 (*i.e.*, one day after the issuance of the Section 205

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[9] Tariff, § III.13.2.4.

[10] 16 U.S.C. § 824d (2018).

[11] Updates to CONE, Net CONE, and Capacity Performance Payment Rate, Docket No. ER21-787-000 (filed Dec. 31, 2021) (the "December 31 Filing").

Order).[12] The Complaint Order denied the NEPGA Complaint, which challenged ISO-NE's use of that revised definition prior to its becoming effective.[13]

III. REQUEST FOR REHEARING

As discussed below in Section III.A, the Commission's denial of the NEPGA Complaint in the Complaint Order and its acceptance of a Net CONE value recalculated using the new definition of "Net CONE," rather than the definition in effect when the value was recalculated, violated the filed rate doctrine and departed without explanation from Commission precedent requiring that RTOs and ISOs, such as ISO-NE, comply with their tariffs and other filed rates. In addition, as discussed below in Section III.B, the Section 205 Order was arbitrary and capricious and not supported by substantial evidence in that it failed to respond to serious objections raised by NEPGA and others, ignored substantial evidence contrary to its conclusions while accepting proposals not supported by substantial evidence, departed from Commission precedent without adequate explanation, and otherwise failed to satisfy the requirements of reasoned decision-making.

A. Retroactive Application of the New "Net CONE" Definition Violated the Filed Rate Doctrine

As noted, Section III.13.2.4 of the Tariff requires that, at least triennially, ISO-NE recalculate CONE and Net CONE, review the results of the recalculation with stakeholders, and file recalculated CONE and Net CONE values with the Commission.[14]

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12 *See* Section 205 Order, 175 FERC ¶ 61,172 at Ordering para. (A).

13 *See generally* Complaint Order, 175 FERC ¶ 61,177.

14 *See* Tariff, § III.13.2.4.

All of these actions occurred ***before*** May 29, 2021, when the new definition of "Net CONE" took effect. At the time these actions occurred, the Tariff defined "Net CONE" as:

> an estimate of the Cost of New Entry, net of the first-year non-capacity market revenues, for a reference technology resource type and is intended to equal the amount of capacity revenue the reference technology resource would require, in its first year of operation, to be economically viable given reasonable expectations of the first year energy and ancillary services revenues, and projected revenue for subsequent years.[15]

Under the new definition that took effect on May 29, 2021, "Net CONE" is now defined as:

> Net CONE is an estimate of the Cost of New Entry, net of non-capacity market revenues, for a reference technology resource type and is intended to equal the amount of capacity revenue the reference technology resource would require to be economically viable given reasonable expectations of the energy and ancillary services revenues ***under long-term equilibrium conditions***.[16]

At the outset, Petitioners note that, in the May 28 Orders, the Commission did not embrace ISO-NE's argument that the changes to this critical definition were merely "clarifying"[17] a definition that was "not as well worded as it could be."[18] While a footnote to the Section 205 Order suggests that the Commission did make such a finding in the Complaint Order,[19] it, in fact, did no such thing. To the contrary, in the Complaint Order, the Commission held that ISO-NE was "entitled to file a revised Net CONE definition

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15 *See* Complaint at 7 (footnote omitted) (quoting Tariff, § 1.2.2 as then in effect).

16 Tariff, § 1.2.2 (emphasis added).

17 December 31 Filing, Transmittal Letter at 35.

18 *Id.* at 34.

19 *See* Section 205 Order, 175 FERC ¶ 61,172 at n.213 ("In its ruling on the complaint in Docket No. EL21-26-000, being issued concurrently with this order, the Commission finds that the existing definition of 'Net CONE' allows for ISO-NE's proposal to estimate net EAS revenues under the assumption of long-term equilibrium. *NEPGA v. ISO-NE*, 175 FERC ¶ 61,177 (2021).").

pursuant to FPA section 205 and, as such, it was appropriate for ISO-NE to have performed its Net CONE calculations for the next FCA consistent with the definition it intended to file and have in effect in advance of that FCA."[20] Even assuming *arguendo* that there were some phrase in the Complaint Order into which one could read a finding that the new definition is the same as the old definition – and, tellingly, the footnote in question does not cite to any specific paragraph of the Complaint Order in which such a finding might be imagined to be buried[21] – the Commission did not provide any explanation for this alleged finding, much less a meaningful response to the contrary arguments of NEPGA and others, which would clearly be arbitrary and capricious.[22]

In the May 28 Orders, the Commission claimed that the "***existing*** definition of 'Net CONE'"[23] – *i.e.*, the definition in effect when ISO-NE "performed its Net CONE calculations"[24] and, indeed, still in effect when the Commission issued its order accepting those calculations – was not "relevant here."[25] To be sure, this gets it exactly right where ISO-NE's right to file modifications to its Tariff is concerned. But where the recalculation of Net CONE in this triennial review is concerned, the Commission's dismissal of the pre-

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[20] Complaint Order, 175 FERC ¶ 61,177 at P 53. *See also* Section 205 Order, 175 FERC ¶ 61,172 at P 16 (finding "ISO-NE's proposed method for estimating net energy and ancillary services (EAS) revenues is just and reasonable and consistent with the proposed definition of 'Net CONE'").

[21] Section 205 Order, 175 FERC ¶ 61,172 at n.213. This footnote includes only a general citation to the Complaint Order and no pinpoint cite.

[22] *See, e.g.*, *State Farm*, 463 U.S. at 44; *NorAm*, 148 F.3d at 1165; *KN Energy*, 968 F.2d at 1303; *Vernon*, 845 F.2d at 1048.

[23] Section 205 Order, 175 FERC ¶ 61,172 at P 125.

[24] Complaint Order, 175 FERC ¶ 61,177 at P 53.

[25] Section 205 Order, 175 FERC ¶ 61,172 at P 125.

May 29, 2021 definition as irrelevant gets it exactly wrong: It is the new definition, which was not in effect when Net CONE was recalculated and filed, that is "not relevant here."[26]

In fact, it is hard to imagine a more clear-cut violation of the filed rate doctrine than ignoring the terms of the Tariff in effect when ISO-NE undertook the actions at issue and giving retroactive effect to a provision of the Tariff that only took effect after those actions were completed. The courts have made clear that, under the filed rate doctrine, the Commission "has no power to alter a rate retroactively,"[27] and the Commission itself has recognized that the filed rate doctrine precludes the application of a methodology that "is not consistent with the Tariff in effect at the time" of the relevant actions.[28] Yet that is

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[26] *Id.*

[27] *Arkla*, 453 U.S. at 578. *See also ODEC*, 892 F.3d at 1232 (finding a petitioner's requested relief would "retroactively rewrite the terms of the filed rate" and holding that "[t]he filed rate doctrine and rule against retroactive rulemaking flatly forbid such a result"); *Louisiana PSC*, 761 F.3d at 556 (stating that "the absence of retroactive relief is a function of the filed-rate doctrine"); *OXY*, 64 F.3d at 700 (holding that a new methodology for valuing petroleum shipments "could not have been imposed retroactively without violating the filed rate doctrine"); *East Tennessee*, 863 F.2d at 941 (stating that "[r]etroactive changes in rates violate the filed rate doctrine, by allowing the collection of rates other than the ones that were on file at the time of purchase"); *Public Serv. Co. of N.H. v. FERC*, 600 F.2d 944, 958 (D.C. Cir. 1979) (stating that "only prospective ratemaking is allowed").

[28] *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,101 at P 40 (2015), *on reh'g*, 155 FERC ¶ 61,174 (2016), *aff'd sub nom. MISO Transmission Owners v. FERC*, 860 F.3d 837 (6th Cir. 2017). *Cf. also, e.g.*, *AEP Appalachian Transmission Co.*, 164 FERC ¶ 61,180 at P 18 (2018) (finding "that retroactive approval of the formula rate change results in a violation of the filed rate doctrine and the prohibition against retroactive ratemaking"); *Haviland Holdings, Inc. v. Pub. Serv. Co. of N.M.*, 107 FERC ¶ 61,034 at P 17 (2004) (finding that "the events subject to [a] complaint occurred prior to the . . . effective date of [a final rule]" and that procedures required by that rule "are not relevant to the Commission's determination on the issues in this proceeding"); *Texas E. Transmission Corp.*, 72 FERC ¶ 61,152 at 61,766-67 (1995) ("Under the filed rate doctrine, final rates approved by the Commission cannot be changed retroactively."), *aff'd sub nom. Texas E. Transmission Corp. v. FERC*, 102 F.3d 174 (5th Cir. 1996); *Tennessee Gas Pipeline Co.*, 54 FERC ¶ 61,204 at 61,603 (1991) ("The filed rate doctrine prohibits the Commission from imposing a rate different from that on file at the time gas is sold or service is made available."). *Cf. also Pennsylvania R.R. Co. v. Int'l Coal Mining Co.*, 230 U.S. 184, 197 (1913) (stating that a "tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike").

precisely what the Commission did by giving effect to the new definition of "Net CONE" with respect to actions that all occurred prior to the May 29, 2021 effective date.

Not only was retroactive application of the new definition a blatant violation of the filed rate doctrine; the Commission's reliance on its prospective approval of a new definition of "Net CONE" was arbitrary and capricious and not the product of reasoned decision-making in that it responded to serious objections raised by NEPGA and others "with a non sequitur."[29] The justness and reasonableness of the definition in effect after the relevant actions were taken is beside the point. Indeed, "[i]t is as if the [Commission] in response to [these] claim[s] had said 'We reject [them] because it is Tuesday rather than Wednesday.'"[30] Moreover, the Commission's failure to enforce the filed rate doctrine represented an abrupt departure from precedent in which the Commission has required that RTOs and ISOs comply with the terms of their tariffs.[31] The Commission's failure to

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29 *Vernon*, 845 F.2d at 1048. *See also, e.g.*, *NorAm*, 148 F.3d at 1165 (reversing order in which the Commission "not only failed to provide an adequate response to [petitioner's] argument, it failed to take seriously its responsibility to respond at all"); *KN Energy*, 968 F.2d at 1303 (stating that an agency must "engage the arguments raised before it – that it conduct a process of *reasoned* decisionmaking" (emphasis in original)).

30 *Vernon*, 845 F.2d at 1048.

31 *See, e.g.*, *Radford's Run*, 165 FERC ¶ 61,121 at P 23 (granting complaint where "PJM did not comply with its Tariff"); *Caithness*, 152 FERC ¶ 61,246 at P 54 (granting complaint against RTO/ISO for actions that "violate[d] [applicable] Tariff provisions"); *SPP*, 150 FERC ¶ 61,005 at n.36 (2015) (reminding an ISO "that it must adhere to the terms and conditions of its Tariff or face possible sanctions by the Commission"); *BJ Energy LLC*, 127 FERC ¶ 61,006 at P 22 (granting complaint alleging that an RTO/ISO had violated its tariff and "ignore[d] the express language of the tariff"), *on reh'g*, 129 FERC ¶ 61,010, *on reh'g*, 129 FERC ¶ 61,265 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,212 at P 90 (2007) (stating the Commission's expectation that an "ISO [will] rely on the filed rate" and its further expectation that "transmission providers and market participants to know what is in a tariff and to follow its rates, terms and conditions"); *Wisconsin Elec. Power Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,005 at P 24 (2006) (granting complaint where an RTO/ISO "violated its filed rate"); *Williams Power Co., Inc. v. California Indep. Sys. Operator Corp.*, 110 FERC ¶ 61,231 at P 18 (2005) (stating that an RTO/ISO "must operate in conformance with its approved tariff" and if it

acknowledge, much less justify, this departure from precedent was arbitrary and capricious.[32]

The Commission's legal error is underscored and compounded by its curious declaration that, even if it were to find that ISO-NE violated the Tariff, it would "decline to require the relief requested by NEPGA" on the theory that using "Net CONE values calculated using the old methodology" would be a "drastic remedy . . . [not] appropriate or necessary to address the alleged filed rate doctrine violation."[33] Like the new definition of "Net CONE," however, concerns that enforcing the filed rate doctrine might be "drastic"[34] are beside the point. Even assuming *arguendo* that continuing to apply a rate previously accepted as just and reasonable could legitimately be described as "drastic,"[35] the courts have long recognized that the filed rate doctrine can have "harsh effects," and have nonetheless insisted that it be "strictly applied and consistently adhered to . . . ."[36]

"believes that additional tariff provisions are necessary . . . , it must request prior Commission authorization of the proposed tariff changes").

[32] *See, e.g.*, *Fox*, 556 U.S. 502 at 515 (stating that an agency departing from its own precedent must "display awareness that it is changing position" and "show that there are good reasons for the new policy"); *West Deptford*, 766 F.3d at 20 ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,' . . . and Commission cases are no exception . . . ." (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995))); *Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) ("As we have repeatedly reminded FERC, if it wishes to depart from its prior policies, it must explain the reasons for its departure." (citations omitted)).

[33] Complaint Order, 175 FERC ¶ 61,177 at P 55.

[34] *Id.*

[35] *Id.*

[36] *Maislin*, 497 U.S. at 117. *See also, e.g.*, *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (recognizing that "the filed rate doctrine may seem harsh in some circumstances" but insisting on its "strict application"); *Simon v. KeySpan Corp.*, 694 F.3d 196, 205 (2d Cir. 2012) ("When the filed rate doctrine applies, it is rigid and unforgiving."); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998) (stating that "[a]pplication of the filed rate doctrine in any particular case is not determined by . . . the possibility of inequitable results" (citations omitted)); *Overland Express, Inc. v. ICC*, 996 F.2d 356, 361 (D.C. Cir. 1993) (explaining that the

To be clear, there are no exceptions to the filed rate doctrine that can rescue the Commission's May 28 Orders on this issue. The courts have "recognized only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively."[37] First, there was nothing in the pre-May 29, 2021 definition of "Net CONE" or any other provision of the Tariff that even arguably made this definition "tentative" or put stakeholders on notice that it might be "later adjusted with retroactive effect . . . ."[38] ISO-NE's December 31 Filing certainly did not provide any such notice, because it requested an effective date subsequent to the filing date[39] – in other words, an effective date after all of the actions required by Section III.13.2.4 of the Tariff were completed. That can hardly be said to put stakeholders on notice that revisions to the definition could be given effect during periods prior to the filing date.[40] Second, there was plainly no agreement among the affected

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Supreme Court has noted the doctrine's "often harsh results" but maintained "an unyielding insistence that the rate on file is the lawful rate").

37 *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

38 *Id. See also ODEC*, 892 F.3d at 1231 (explaining that the notice exception applies where "the very terms of the filed rate warn customers . . . that the price charged will fluctuate based on an identified formula with specified cost drivers" and that, under such circumstances, "the rate changes are foreordained, not retroactive" (citations omitted)).

39 The December 31 Filing was, of course, filed on December 31, 2020, and, in that filing, ISO-NE proposed an effective date of March 2, 2021. *See* December 31 Filing, Transmittal Letter at 1. In its response to a Commission deficiency letter, ISO-NE requested that its revised values be accepted "effective on or before May 29, 2021 . . . ." Response to Commission Deficiency Notice and Revised CONE, Net CONE, and Capacity Performance Payment Rate Values, Transmittal Letter at 14, Docket No. ER21-787-001 (filed Mar. 30, 2021) (the "March 30 Filing").

40 *Cf. ISO New England Inc.*, 172 FERC ¶ 61,251 at P 18 (2020) (holding, with respect to a provision of the Tariff establishing a cost recovery mechanism for certain critical infrastructure protection facilities, that "ISO-NE's request for a particular effective date for a proposed tariff

parties that would allow the new definition to be made effective retroactively. To the contrary, NEPGA and others strongly disagreed with ISO-NE on this issue.[41]

With no exceptions available, the filed rate doctrine mandates "strict adherence" to the filed rate[42] in effect when ISO-NE took the relevant actions required under Section III.13.4.2 of the Tariff: namely, recalculating Net CONE, reviewing the recalculated value with stakeholders, and filing a recalculated value with the Commission.[43] The doctrine "leave[s] the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."[44] That being the case, the Commission's denial of the NEPGA Complaint and its acceptance of Net CONE values recalculated using a definition of "Net CONE" not in effect at the time were contrary to law and must be reversed.

B. The Section 205 Order was Arbitrary and Capricious and Not Supported by Substantial Evidence

Separate and apart from the retroactive and unlawful application of the new "Net CONE" definition, the Section 205 Order was arbitrary and capricious and not supported by substantial evidence.

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provision, in this case March 6, 2020, provided notice only of a potential change to be proposed in potential future filings" (citing *ODEC*, 892 F.3d at 1231-32).

41 *See* December 31 Filing, Transmittal Letter at 24-36.

42 *Maislin*, 497 U.S. at 132.

43 *See* Tariff, § III.13.4.2.

44 *ODEC*, 892 F.3d at 1230 (citation omitted).

As an initial matter, it is well established that, as the party filing a proposed rate under Section 205 of the FPA,[45] ISO-NE bore the burden of proof with respect to its proposed CONE and Net CONE values.[46] Moreover, as the Commission has explained, in a Section 205 proceeding:

> [T]he applicant must establish a prima facie case. The test for prima facie evidence is "whether there are facts in evidence which if unanswered would justify [persons] of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." The burden of going forward then shifts to the opposing parties. But the ultimate burden of persuasion remains with the proponent, who will prevail only if the preponderance of the evidence supports its position.[47]

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45 16 U.S.C. § 824d (2018).

46 *See, e.g.*, 16 U.S.C. § 824d(e) (2018); *ISO New England Inc.*, 166 FERC ¶ 61,060 at P 19 (2019) (stating that, "as the proponent of the 205 filing, ISO-NE will bear the burden of proof"); *Indicated SPP Transmission Owners v. Southwest Power Pool, Inc.*, 165 FERC ¶ 61,005 at P 10 (2018) (finding that the proponent of a rate change under Section 205 of the FPA "has the burden of proof to demonstrate that the rate is just and reasonable, and must ensure that there is a sufficient evidentiary record for the Commission to make a reasoned decision"); *NorthWestern Corp.*, 155 FERC ¶ 61,158 at P 29 (2016) (affirming finding that "since NorthWestern was the utility filing for revised rates under section 205 of the [FPA], NorthWestern clearly had the burden of proof to show its proposed rate was just and reasonable" (footnote omitted)).

47 *Panda Stonewall*, 174 FERC ¶ 61,266 at P 30 (footnotes omitted). As the Commission has further recognized:

> [T]he Supreme Court explained that the burden of proof under the Administrative Procedure Act [(the "APA")] refers to a party's burden of persuasion, or the ultimate obligation to persuade the trier of fact as to the truth of the matter, and falls on the proponent of a rule or order. The Supreme Court explained that when a party has the burden of persuasion, it will lose "if the evidence is evenly balanced." The party with the burden of proof bears the burden of production, or the need to provide sufficient evidence to establish a prima facie case. Once it meets that burden, however, the burden of going forward shifts to the opposing party, although the ultimate burden of persuasion remains with the proponent. The party bearing the burden of proof will prevail only if the preponderance of evidence supports its position.

San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs., 149 FERC ¶ 61,116 at P 45 (2014) (footnotes omitted).

As explained herein, the Commission failed to properly apply this standard to ISO-NE's proposed CONE and Net CONE calculations. The Commission accepted a series of illogical and unsupported assumptions by ISO-NE while ignoring substantial contrary arguments and evidence submitted by NEPGA and others.

As the record demonstrates, the errors described below, individually and collectively, significantly skewed the CONE and Net CONE values downward,[48] with the result that Net CONE substantially understates the capacity revenue a feasible new entrant would need to be viable. As the Commission has acknowledged, however, the Tariff "provides that the Net CONE value be set equal to the amount of capacity revenue needed by the reference technology to be economically viable . . . ."[49] Consistent with analogous requirements in other markets, the Commission has rejected RTO/ISO Net CONE values that ignored real-world costs that the reference unit would incur "in order to participate in the [RTO/ISO] capacity market and be 'economically viable.'"[50] Moreover, while it is true enough that, as repeatedly emphasized in the Section 205 Order, the reference unit is "hypothetical,"[51] it is equally true that the reference unit must be "representative."[52] Consequently, while ISO-NE was not required to "identify a specific

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48 *See* Protest of the New England Power Generators, Inc. at 40, Docket No. ER21-787-000 (filed Jan. 21, 2021) (the "January 21 NEPGA Protest").

49 Section 205 Order, 175 FERC ¶ 61,172 at P 63 (citing Tariff, § 1.2.2).

50 *NYISO*, 134 FERC ¶ 61,058 at P 53. *See also PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,062 at P 41 (establishing hearing procedures with respect to questions of whether an RTO/ISO had "failed to include accurate electrical and gas interconnection costs, property tax estimates, location-specific adjustments, and costs for material, labor and equipment").

51 Section 205 Order, 175 FERC ¶ 61,172 at PP 64, 66, 68, 129.

52 *Id.* at P 68 ("The hypothetical reference unit is a representative unit . . . .").

site for the hypothetical reference unit"[53] or to make "particular assumptions about the reference unit's business operations,"[54] it was required to ensure that ISO-NE's assumptions, including potential sites and associated costs, are representative of a feasible new entrant and thereby reflect the capacity revenues needed to be viable. Put differently, the fact that the reference unit is hypothetical does not justify demand curves developed using what Chairman Glick has described as "the cost attributes of a mythical power plant."[55] The Commission appeared to grasp this principle when it properly rejected ISO-NE's assumption that the reference unit would not require on-site gas compression when "ISO-NE is unable to identify a single natural gas facility in New England that lacks on-site compression,"[56] but it nevertheless went on to allow ISO-NE to make a collection of other equally unrealistic and illogical assumptions on other key points.

1. The Commission's Determination that No Pipeline Capacity Upgrades Would be Needed to Supply the Reference Unit was Arbitrary and Capricious and Not Supported by Substantial Evidence

In response to the December 31 and March 30 Filings, NEPGA made a number of filings, and provided supporting testimony from experts on natural gas pipeline matters, Sara Wilmer and Richard Levitan of Levitan & Associates, Inc., showing that the proposed CONE value was significantly understated as a result of ISO-NE's failure to account for

53 *Id.* at P 66.

54 *Id.* at P 72.

55 *New York Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,012, Glick Dissenting Statement at P 2 (2021) (Glick, Chairman, dissenting in part).

56 Section 205 Order, 175 FERC ¶ 61,172 at P 63.

the costs of pipeline capacity upgrades that would be needed to supply the reference unit. As NEPGA explained:

> Without these necessary compression and pipeline upgrades, the Reference Unit simply cannot earn the energy market, Pay for Performance, or [Forward Reserve Market] revenues ISO-NE forecasts for the Reference Unit. Thus, the revenue and cost assumptions chosen by ISO-NE in developing Net CONE fail to reflect a feasible unit that operates as contemplated by ISO-NE's own models.[57]

As NEPGA further explained after ISO-NE relocated the reference unit, Ms. Wilmer and Mr. Levitan performed an analysis demonstrating that "there is insufficient pipeline capacity to deliver the necessary quantities of gas to the Reference Unit in 83.5% of the dispatch model hours at the revised location, downstream of the [Algonquin Gas Transmission ("Algonquin")] Cromwell station."[58]

ISO-NE's March 30 Filing acknowledged that, "[i]n addition to the need for sufficient operating pressure on the gas transmission pipeline for the unit to run at capacity, gas must also be available in sufficient quantities to permit the reference unit to run as modeled."[59] Nonetheless, ISO-NE and its advisors apparently conducted no

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[57] January 21 NEPGA Protest at 9. *See also id.* at 18-22; *id.*, Attachment A, Affidavit of Sara Wilmer and Richard Levitan on Behalf of the New England Power Generators Association, Inc., ¶¶ 41-48 (the "LAI Initial Affidavit").

[58] Protest and Answer of the New England Power Generators Association, Inc. at 23, Docket Nos. ER21-787-000, *et al.* (filed Apr. 20, 2021) (the "April 20 NEPGA Protest") (citing LAI Initial Affidavit, ¶ 44, Table 13). *See also id. at 5* (explaining that the LAI Initial Affidavit had also shown that "[t]he Reference Unit gas demand to meet its dispatch schedule exceeded interstate pipeline capacity regardless of the location of the Reference Unit" (citing LAI Initial Affidavit, ¶¶ 44-45)).

[59] March 30 Filing, Transmittal Letter at 20. *See also id.*, *ISO-NE Net CONE and ORTP Analysis: An Evaluation of the Net Cost of New Entry Parameter to be Used In the Forward Capacity Auction FCA-16 and Forward – Addendum – Cone/Net Cone*, at 10 (Mar. 2021) ("CEA Report Addendum") (same).

analysis to confirm that natural gas would, in fact, be available. Instead, ISO-NE stated that:

> The modeling assumption inherent in the dispatch model is that the observed natural gas price for delivery on the Algonquin main transmission line reflects the availability of gas at that location each day, and at this prevailing market price for gas, there is a willing seller from whom gas can be procured for delivery (on the Algonquin gas transmission mainline).[60]

ISO-NE further argued that "when the reference unit is dispatched, it would *reduce* the dispatch of another competing (existing) generator in the system (and by approximately the same MW)," and that it was therefore reasonable to assume that the reference unit would not create new demand for gas, but would instead use gas that would previously have been used by another unit.[61]

The April 20 NEPGA Protest rebutted ISO-NE's arguments with supplemental expert testimony from Ms. Wilmer and Mr. Levitan.[62] As they explained, ISO-NE's assumption was unfounded because there are numerous days when Algonquin has "seal[ed] nominations at a designated checkpoint on the system," meaning that "no increases in nominations would be accepted except for primary firm no-notice service, which is only held by local distribution companies."[63] Consequently, without pipeline

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60 March 30 Filing, Transmittal Letter at 20. *See also* CEA Report Addendum at 10 (same).

61 March 30 Filing, Transmittal Letter at 21 (emphasis in original). *See also* CEA Report Addendum at 10-11 (same).

62 April 20 NEPGA Protest, Attachment A, Supplemental Affidavit of Sara Wilmer and Richard Levitan on Behalf of the New England Power Generators Association, Inc. (the "LAI Supplemental Affidavit").

63 *Id.*, ¶ 46.

capacity upgrades, there will continue to be many times when the reference unit will be unable to procure natural gas at any price.[64]

Ms. Wilmer and Mr. Levitan also addressed ISO-NE's "substitution" theory, explaining that, contrary to ISO-NE's speculation, their "analysis of hourly data from ISO-NE identifying the fuel type for the marginal unit does not support this conclusion."[65] Instead, they found that in most of the hours when the reference unit was dispatched, it would displace a unit that was ***not*** running on natural gas.[66] Consequently, Ms. Wilmer and Mr. Levitan testified, "[i]n these hours, the Reference Unit gas demand would be additive to the Algonquin system, and thus, in our judgment, potentially unable to be served."[67]

It is clear that the Commission's finding that ISO-NE was not required to include costs for expanded gas pipeline capacity was "unsupported by substantial evidence" in violation of the APA[68] and the FPA,[69] and that the Commission applied the wrong standard by simply accepting ISO-NE's unsubstantiated assertions. In particular, the Commission simply bought ISO-NE's story that "buyers and sellers negotiate bilaterally or transact on non-jurisdictional venues to set the daily price for natural gas," even though ISO-NE

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64 April 20 NEPGA Protest at 24.

65 LAI Supplemental Affidavit, ¶ 9.

66 *Id.*, ¶ 42.

67 *Id.*

68 5 U.S.C. § 706(2)(E) (2018).

69 16 U.S.C. § 825*l*(b) (2018). *See also ICC*, 576 F.3d at 477 (explaining that a reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"); *PG&E*, 373 F.3d at 1319 (the Commission's orders must be "based upon substantial evidence in the record" (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)).

provided no evidence that natural gas would actually be available[70] and NEPGA submitted evidence demonstrating that it would not be.[71] Similarly, the Commission suggested that the reference unit would be able to purchase natural gas merely because ISO-NE's dispatch model included "a seasonal intra-day premium applied to the day-ahead price,"[72] without pointing to any evidence demonstrating the assumption underlying that model was warranted – *i.e.*, that such a premium would be sufficient to overcome the constraints identified by Ms. Wilmer and Mr. Levitan. Finally, in response to the testimony of Ms. Wilmer and Mr. Levitan that gas nominations were not permitted at any price on the many days when Algonquin issued a critical notice, the Section 205 Order found that ISO-NE "provides evidence that this is not necessarily true,"[73] apparently relying on ISO-NE's argument pointing to the availability of gas on just ***one*** of the days when a critical notice had been issued.[74]

On each of the issues above, the Commission ignored the fact that the burden of proof was on ISO-NE in this proceeding.[75] Rather than requiring ISO-NE to provide evidence demonstrating that its underlying assumptions were valid in the first instance, the Commission appears to have accepted all of those assumptions unless intervenors like NEPGA could definitively prove them to be incorrect under all conditions. Nowhere

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70 Section 205 Order, 175 FERC ¶ 61,172 at P 69.

71 *See* LAI Supplemental Affidavit, ¶ 42.

72 Section 205 Order, 175 FERC ¶ 61,172 at P 69.

73 *Id.*

74 *See id.* at P 61 (pointing to ISO-NE's statement that "although NEPGA shows that critical notices were published on January 14, 2019, gas transportation was being sold (for January 15, 2019) by at least one local distribution company for various locations on the Algonquin pipeline" (footnote omitted)).

75 *See supra* note 46.

in the Section 205 Order did the Commission recognize that the burden falls on ISO-NE to demonstrate, through a "preponderance of the evidence,"[76] that it was reasonable to assume that natural gas would be available. Instead, the Commission took the position that ISO-NE had carried that burden simply by claiming that NEPGA's arguments are "not necessarily true,"[77] ignoring the fact that the onus falls on ***ISO-NE*** to prove its case that gas is in fact available in all of the hours that the reference unit is dispatched, not just on one day.[78]

While ISO-NE claimed only that "[i]t is reasonable to conclude that the reference units' gas demand would commonly compete (that is, substitute) for the gas demand of another unit, not add to gas demand, during ***at least some of the hours*** when the reference unit is dispatched for energy,"[79] the Commission apparently saw this as sufficient to prove that it was reasonable to assume that gas would ***always*** be available. Similarly, rather than requiring ISO-NE to show that substitution ***would*** occur when the reference unit was dispatched, the Commission effectively shifted the burden onto NEPGA to prove that substitution ***would never*** occur.[80] Specifically, in stating that the

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76 *Panda Stonewall*, 174 FERC ¶ 61,266 at P 30.

77 Section 205 Order, 175 FERC ¶ 61,172 at P 69.

78 *See* 5 U.S.C. § 706(2)(A) (2018) (providing for agency decisions to be set aside if they are "not in accordance with law"); *Land Office*, 947 F.3d at 321 (5th Cir. 2020) (vacating decision that was based "on an incorrect legal standard"); *Dana Container*, 847 F.3d at 499 (in order for its decision to be upheld, an agency must have "considered relevant data under the correct legal standards").

79 March 30 Filing, Transmittal Letter at 21 (emphasis added).

80 In particular, the Section 205 Order improperly shifted the burden onto NEPGA when it claimed:

> NEPGA states that Mr. Levitan and Ms. Wilmer determined that in 58% of hours in which the reference unit runs and the Algonquin system is constrained, the reference unit displaces a marginal unit that, for all or part of the hour, is not operating on natural gas.

analysis performed by Ms. Wilmer and Mr. Levitan "does not account for times when the reference unit substitutes for another natural-gas-fired generator,"[81] the Commission ignored the fact that ISO-NE did not conduct any modeling whatsoever to show that such a substitution would in fact occur. Again, this improperly flipped the burden of proof in the proceeding onto intervenors, rather than ISO-NE, and is therefore contrary to the regulatory scheme established under Section 205 and arbitrary and capricious.[82]

ISO-NE conceded, in fact, that its "CONE and Net CONE analysis does not drill down into specific dispatch scenarios (*i.e.,* which marginal generator would be displaced when the reference unit is dispatched) . . . ."[83] Given this lack of analysis, ISO-NE could only hypothesize that "***[i]f*** that other marginal unit is gas-fired and on the same Algonquin pipeline system in particular, the dispatch of the reference unit substitutes for, rather than

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> However, this figure is also misleading because Mr. Levitan and Ms. Wilmer's own analysis suggests that the 58% percent of hours could translate to as few as 13% of 5 minute pricing intervals.

Section 205 Order, 175 FERC ¶ 61,172 at P 70 (footnote omitted). Even assuming that the Commission's critique was correct, it failed to explain why LAI's demonstration that natural gas was not available 13% of the time was insufficient to rebut ISO-NE's assumption that natural gas would always be available, particularly given that ISO-NE had provided no evidence to support its assumption. Significantly, the Commission's characterization of the 58 percent figure as "misleading," id., was not correct and was, in fact, itself misleading. As Ms. Wilmer and Mr. Levitan explained, under ISO-NE's dispatch model, "the Reference Unit is always dispatched for the full hour," which is consistent with energy re-offers for the [real-time] market being in one-hour increments and ISO[-]NE's hourly unit commitments." LAI Supplemental Affidavit, ¶ 40. The reference unit will, therefore, put an incremental demand on pipeline capacity whenever it displaces a resource operating on a fuel other than gas for even part of an hour. *See id.* That, of course, was precisely what the 58 percent figure represented.

81 Section 205 Order, 175 FERC ¶ 61,172 at P 70.

82 *Cf. Environmental Def. Fund v. FERC*, No. 20-1016, slip op. at 29 (D.C. Cir. June 22, 2021) ("*EDF*") (addressing the Commission's reliance on precedent agreements and stating that "there is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient*" (emphasis in original)).

83 March 30 Filing, Transmittal Letter at 21

adds to, the gas drawn from the Algonquin system."[84] The best that ISO-NE could do was claim that substitution could be expected "during at least ***some of the hours*** when the reference unit is dispatched for energy."[85] In light of ISO-NE's statements, there is no reasoned basis for the Commission to find that ***no*** costs associated with additional gas pipeline capacity were required. At a minimum, in light of the evidence proffered by NEPGA and ISO-NE's failure to provide any evidence showing that substitution would always occur, "a reasonable solution based on the record here would be for ISO-NE to account for the constraints in its dispatch model."[86] The Commission's failure to require such an adjustment therefore was incomprehensible in light of the evidence in the record[87] and did not satisfy the requirements of reasoned decision-making.[88]

Even aside from the Commission's failure to apply the correct burden of proof and identify sufficient evidence to back up its findings, the Section 205 Order fails to satisfy the Commission's obligations under the APA. The Commission simply brushed aside Ms. Wilmer's and Mr. Levitan's explanations that the dispatch model did not adequately account for the premiums required to obtain natural gas with the assertion that, "[e]ven if the dispatch model does not account for these premiums, we again have no reason to believe that ISO-NE must account for these premiums to produce a reasonably accurate estimate of net EAS revenues."[89] This response makes absolutely no sense in a process

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84 *Id.* (emphasis added).

85 *Id.* (emphasis added).

86 Section 205 Order, 175 FERC ¶ 61,172 at P 71.

87 *See* 5 U.S.C. § 706(2)(E) (2018); *ICC*, 576 F.3d at 477; *PG&E*, 373 F.3d at 1319.

88 *See EDF*, slip op. at 20 ("When the Commission's explanation for a contested action is lacking or inadequate, it will not survive judicial review . . . .").

89 Section 205 Order, 175 FERC ¶ 61,172 at P 72.

that is supposed to identify the costs incurred by the reference unit. Similarly, the Commission's assertion that it is "reasonable" to "avoid[] particular assumptions about the reference unit's business operations"[90] is nonsensical in a process that involves building a hypothetical unit from the ground up. The Commission therefore failed to satisfy its obligation to provide a "reasoned response" to the concerns raised by NEPGA.[91]

2. Allowing ISO-NE to Assume Away Network Upgrade Costs Was Arbitrary and Capricious

In its protest to ISO-NE's December 31 Filing, NEPGA challenged ISO-NE's assumption that the reference unit would not be required to fund Network Upgrades, explaining that, as a capacity unit, the reference unit would be responsible for Network Upgrades necessary to satisfy both the Network Resource Integration Service and Capacity Network Resource Integration Service levels of interconnection[92] and noting that the Commission has elsewhere required that an RTO/ISO account for Network Upgrade costs.[93] The Commission dismissed these concerns, stating that:

> NEPGA incorrectly equates total electrical interconnection costs and costs for network upgrades beyond the point of interconnection. In its prior Net CONE recalculation in 2017, ISO-NE estimated $27 million in total electrical interconnection costs but did not specify whether any of those costs reflected the need for network upgrades. ISO-NE now

90 *Id.*

91 *CPUC*, 462 F.3d at 1051. *See also, e.g., PPL Wallingford*, 419 F.3d at 1198 (requiring the Commission to "respond meaningfully" to concerns raised by parties); *K N Energy*, 968 F.2d at 1303 (stating that an agency must "engage the arguments raised before it – that it conduct a process of *reasoned* decisionmaking" (emphasis in original)).

92 *See* January 21 NEPGA Protest at 29-30.

93 *See id.* at 30 (citing *NYISO*, 134 FERC ¶ 61,058 at P 53). The term used in *NYISO* was "System Deliverability Upgrades." In the New York Independent System Operator, Inc. ("NYISO") market, System Deliverability Upgrades represent a category of Network Upgrades. *See, e.g.*, *New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,046 at P 39, *on reh'g*, 127 FERC ¶ 61,318 (2009).

> assumes the same total electrical interconnection costs but specifies that this estimate does not include network upgrades. Further, NEPGA has not demonstrated that the reference unit would be likely to incur network upgrade costs. Thus, we find that ISO-NE's use of the same assumption regarding electrical interconnection upgrade costs is just and reasonable.[94]

Accordingly, the Commission concluded that "ISO-NE's assumption of no network upgrade costs is just and reasonable."[95]

As it did with respect to pipeline capacity upgrades, the Commission improperly shifts the burden from ISO-NE to NEPGA and, ignoring its own precedent, allows ISO-NE to simply assume away a whole cost category without evidentiary support. The Commission has previously recognized that Network Upgrades "are a required cost of investment for interconnection customers in order to participate in [an RTO/ISO] capacity market and be 'economically viable,'" and has, therefore, insisted that these costs be reflected in the Net CONE values used to set a demand curve.[96] At the outset, the Commission's failure to acknowledge, much less justify, its departure from that precedent[97] or to respond to NEPGA's arguments based on that precedent[98] was arbitrary and capricious and would, standing alone, be sufficient to justify reversal.

The Commission's focus on the fact that the reference unit's interconnection costs are the same as they were in the last Net CONE review misses the point and, again, has the Commission arbitrarily and capriciously responding to serious objections "with a non

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94 Section 205 Order, 175 FERC ¶ 61,172 at P 80 (footnotes omitted).

95 *Id.*

96 *NYISO*, 134 FERC ¶ 61,058 at P 53 (footnote omitted).

97 *See Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

98 *See, e.g., PPL Wallingford*, 419 F.3d at 1198; *K N Energy*, 968 F.2d at 1303.

sequitur."[99] With ISO-NE's acknowledgement that it assumed Network Upgrade costs of zero, the fact that ISO-NE included $27 million in interconnection costs for interconnection facilities up to the point of interconnection is irrelevant; the issue is whether zero understates the costs of interconnection facilities beyond the point of interconnection – *i.e.*, Network Upgrades. The Section 205 Order does not even attempt to grapple with the latter issue. Likewise, the burden was on ISO-NE to demonstrate that its assumption of zero Network Upgrade costs was reasonable, particularly given the Commission's contrary precedent; it was not NEPGA's burden to prove otherwise.

3. The Commission's Acceptance of ISO-NE's Modeling Assumption that the Reference Unit Would Operate Solely on Natural Gas was Arbitrary and Capricious

In the December 31 Filing, ISO-NE explained that "[t]he reference technology facility is assumed to be dual-fuel capable with on-site backup fuel, in the form of No. 2 fuel oil, to address any potential issues with the availability of natural gas supply in the general region."[100] ISO-NE also stated that "[t]he assumption that the reference unit installs and maintains backup oil fuel capability is important, as that is a significant addition to the reference unit's capital costs and it supports the reference unit's assumed market participation in the [EAS] markets . . . ."[101] At the same time, the March 30 Filing indicated that, for purposes of estimating the reference unit's EAS revenues, the reference unit "is assumed to always run on natural gas, rather than on its oil backup

99 *Vernon*, 845 F.2d at 1048.

100 December 31 Filing, Transmittal Letter at 9 (footnote omitted).

101 March 30 Filing, Transmittal Letter at 24.

fuel," for a number of reasons, including, notably, because "natural gas is the more economical fuel to use, relative to fuel oil, in nearly all hours in the dispatch model."[102]

As NEPGA pointed out, ISO-NE's positions are internally inconsistent. It makes no sense to assume that oil capability is necessary to address concerns about natural gas supply but then also assume that oil is never used.[103] The Commission cavalierly brushed aside these concerns. Based on the Commission's flawed finding that the reference unit would always be able to obtain natural gas as discussed in Section III.B.1 above, the Section 205 Order found that ISO-NE was not required to "account for oil operation in its dispatch model to produce a reasonably accurate estimate of net EAS revenues."[104] The Commission further found that ISO-NE's assumption that the reference unit would only run on natural gas "is consistent with ISO-NE's other assumptions in its dispatch model that the reference unit is operating under normal conditions and is able to procure natural gas at the prevailing market price whenever the reference unit is dispatched for energy."[105]

4. The Commission Arbitrarily and Capriciously Accepted ISO-NE's Understated Gas Pipeline Lateral Costs

The January 21 NEPGA Protest, supported by the LAI Initial Affidavit, explained that ISO-NE's assumed gas interconnection costs of $11 million, consisting of $2 million

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102 *Id.* at 23 (also stating that natural gas is "the lower-cost fuel in 99.8 percent of the limited number of hours when the reference unit is dispatched for energy in the dispatch model"). *See also id.* at 23-24 (stating that, for those hours when oil costs less than natural gas, "the dispatch model assumes that the unit will nonetheless operate on natural gas, in order to preserve its oil inventory" (footnote omitted)).

103 *See* NEPGA January 21 Protest at 28-29.

104 Section 205 Order, 175 FERC ¶ 61,172 at P 71.

105 *Id.* at P 167 (footnote omitted).

for a fuel gas metering station and $9 million for a 2-mile, 16 inch lateral, were significantly understated in comparison to recent meter stations and lateral construction projects in southern New England and the Lower Hudson Valley.[106] As an initial matter, the Section 205 Order suggests that the Commission misunderstood the record before it, as it states that "ISO-NE calculated interconnection lengths . . . using averaged data from other recent generation projects in the area."[107] In truth, ISO-NE did nothing of the kind; it simply "assume[d] that a two-mile interconnection to both the gas and electric grids would be required."[108]

Even aside from that initial, critical misunderstanding, the Commission neglected its obligation to ensure that its decision was supported by substantial evidence and otherwise reflected reasoned decision-making. For example, Ms. Wilmer and Mr. Levitan testified that each of the four pipeline metering stations built in the last five years had costs "at least five times ISO-NE's cost assumption."[109] They further testified that "the Fitchburg Expansion project, a 12-inch pipeline built over 10 years ago was 20% more expensive than ISO-NE's assumption for the 16-inch pipeline project," while "the costs of more recent projects are 4 to 6 times more expensive per mile than ISO-NE assumes."[110] Ms. Wilmer and Mr. Levitan corroborated their findings with Enbridge, the operator of the Algonquin pipeline, which confirmed that the anticipated costs of a metering station and the 2-mile lateral would be significantly higher than assumed by ISO-NE.[111]

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106 *See* January 21 NEPGA Protest at 25-28; LAI Initial Affidavit, ¶¶ 34-39.

107 Section 205 Order, 175 FERC ¶ 61,172 at P 37.

108 December 31 Filing, Transmittal Letter at 10.

109 January 21 NEPGA Protest at 27. *See also* LAI Initial Affidavit, ¶ 36.

110 January 21 NEPGA Protest at 27 (footnote omitted).

111 *See id.*

Similarly, CPV Towantic's protest to the December 31 Filing was supported by a declaration from Daniel Nugent, Senior Vice President for Engineering and Construction at Competitive Power Ventures, Inc. ("CPV"), who analyzed public cost data for another set of comparable natural gas lateral pipelines, three of which were CPV-developed projects whose construction Mr. Nugent oversaw.[112] The results of Mr. Nugent's independent analysis were fully consistent with the results of the analysis performed by Ms. Wilmer and Mr. Levitan and "demonstrate that using actual data from projects similar to the [reference unit] results in costs in excess of three times what ISO-NE has adopted for its Net CONE model . . . ."[113] Specifically, Mr. Nugent evaluated similarly situated pipelines using an industry standard inch-mile comparison and found the cost of the gas lateral should be $749,000 per inch-mile based upon the evidence,[114] which equates to a total gas lateral pipeline cost for the reference unit on the order of $24 million,[115] compared with ISO-NE's assumed cost of $9 million.[116] Mr. Nugent also performed a similar inch-mile analysis on the pipelines analyzed by Ms. Wilmer and Mr. Levitan and determined that their comparable lateral costs averaged $777,000 per inch-mile,[117] very much in line with those of the laterals he analyzed.[118] And while Ms. Wilmer's and Mr.

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112 *See* Motion to Intervene and Protest of CPV Towantic, LLC, Attachment A, Declaration of Daniel Nugent, Docket No. ER21-787-000 (filed Jan. 21, 2021) (the "Nugent Declaration").

113 *Id.*, ¶ 14.

114 *Id.*, ¶ 11.

115 *Id.*, ¶ 17.

116 Section 205 Order, 175 FERC ¶ 61,172 at P 75.

117 *See* Nugent Declaration, ¶ 14.

118 *See also* Protest of Dominion Energy Services, Inc. at 4, Docket No. ER21-787-000 (filed Jan. 21, 2021) (noting that the onshore portion of a lateral connecting the Salem Harbor Power Station with Algonquin's system cost $29.2 million per mile).

Levitan's metering station cost estimates were above Mr. Nugent's estimates, both were well above the ISO-NE filed values.[119] The outlier was ISO-NE, which provided no concrete evidence in support of its assumptions about lateral costs.

ISO-NE did not dispute the accuracy of the evidence submitted by NEPGA, CPV and others.[120] Nonetheless, the Commission found ISO-NE's cost estimates to be reasonable, finding that:

> [w]hile the costs of any particular lateral pipeline may be more or less than those of the reference unit, . . . ISO-NE reasonably based these cost estimates on consultant Mott MacDonald's comprehensive power plant cost-estimating database, noting that a survey of 16 projects in the database resulted in a range of $3.2 million to $5.1 million per mile.[121]

Casually acknowledging that real-world costs could be "more or less" than those estimated for a reference unit that is supposed to be representative of a new entrant does not satisfy the requirements of reasoned decision-making,[122] particularly when record evidence demonstrated that the costs were likely to be multiple times higher.[123]

Notably, ISO-NE indicated that its expert's estimates were based on "proprietary data for projects throughout the United States including in New England, New York, and PJM."[124] There was therefore no way for intervenors or the Commission to assess the data, and the Commission made no effort to reconcile ISO-NE's assumed costs with

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119 *See* Nugent Declaration, ¶ 14.

120 *See* Section 205 Order, 175 FERC ¶ 61,172 at P 30 (summarizing ISO-NE's arguments with respect to its cost estimates).

121 *Id.* at P 75.

122 *See, e.g., Allentown*, 522 U.S. at 374; *U.S. Chamber*, 885 F.3d 360 at 382.

123 *See, e.g.*, *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

124 Section 205 Order, 175 FERC ¶ 61,172 at P 30.

significantly higher costs for real-world projects discussed in the testimony of Ms. Wilmer and Mr. Levitan and Mr. Nugent. Indeed, although the Section 205 Order acknowledged that "location can greatly affect the estimate,"[125] the Commission did not even attempt to determine whether the location of the projects reviewed by Mott MacDonald were in fact comparable to the reference unit. Equally important, the Commission also failed to explain why it had chosen to rely on Mott MacDonald's cost estimates, which were based on unidentified projects outside Connecticut (where the reference unit is assumed to be located), while ignoring figures corroborated by Enbridge, the owner and operator of the Algonquin pipeline at issue here, confirming that ISO-NE's costs were understated. The Commission is forbidden from taking this type of "ostrich's approach," where it "confine[s] its attention to evidence that support[s] its conclusion and . . . ignore[s] any contrary evidence."[126]

5. Acceptance of EAS Revenue Estimates that Excluded the Reference Unit was Arbitrary and Capricious

The Commission's acceptance in the Section 205 Order of an estimate of EAS revenues calculated without including the reference unit to which those revenues will be attributed in the EAS market was arbitrary and capricious. Particularly given the

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125 *Id.* at P 75.

126 *International Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986). *See also Genuine Parts*, 890 F.3d at 312 (making clear that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such evidence without adequate explanation"); *Tenneco*, 969 F.2d at 1214 (finding that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence"); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) (holding that the agency may not rely on a "clipped view of the record" to support its conclusion); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (finding decision to be arbitrary and capricious where the agency "ostrich fashion, did not discuss the most substantial objections to its approach, though the objections were argued vigorously to it").

Commission's justification for accepting the revised definition of "Net CONE," the Commission's acceptance of these estimates renders the Section 205 Order "internally inconsistent"[127] and "illogical on its own terms . . . ."[128]

In accepting the new definition of "Net CONE," the Commission makes much out of the market equilibrium assumption embodied in this definition allegedly being consistent with the overall capacity market design.[129] While Petitioners continue to disagree with that characterization, they certainly agree that consistency with the market design is both desirable and required. That makes the Commission's acceptance of ISO-NE's estimate of EAS revenues all the more inexplicable and arbitrary and capricious. The whole point of deducting estimated EAS revenues from CONE to calculate Net CONE is to account for the fact that "[t]he energy and capacity markets are designed to work together" and, specifically, to "[r]ecogniz[e] the interaction between those two markets" by "estimat[ing] the energy and ancillary services revenues that a reference resource will receive in a given delivery year in those markets."[130] As the Commission observed in the Complaint order: "Net CONE is the gross cost of new entry, ***less the net revenues the resource is expected to earn from providing energy and ancillary services***."[131] The assumption that the reference unit will participate in the EAS

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127 *ANR*, 904 F.3d at 1028. *See also, e.g.*, *General Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

128 *GameFly*, 704 F.3d at 148 (citation omitted).

129 *See* Section 205 Order, 175 FERC ¶ 61,172 at P 123 (finding that the new "definition, by codifying the assumption of long-term equilibrium, results in a methodology for estimating net [energy and ancillary services] revenues that is consistent with the economic theory of the Forward Capacity Market").

130 *PJM Interconnection, L.L.C.*, 171 FERC P 61,153 at P 309 (2020).

131 Complaint Order, 175 FERC ¶ 61,177 at P 3 (emphasis added).

markets is thus embedded in, and logically inseparable from, the assumption that it will receive revenues in those markets. Estimating EAS revenues for purposes of the Net CONE under an assumption that the reference unit does not participate in the EAS markets, as ISO-NE did, is illogical and inconsistent with the indisputable purpose of the Net CONE calculation. If the reference unit is assumed not to participate in the EAS markets, then its estimated EAS revenues should be zero, and Net CONE should equal gross CONE.

NEPGA made the foregoing point in its protest to the December 31 Filing[132] and submitted expert testimony demonstrating how ISO-NE's approach materially biases the estimated EAS revenues upward and Net CONE downward.[133] All the Section 205 Order had to offer in response were musings that "(1) entry of the reference unit would occur simultaneously with other entry, exit, and changes in load; (2) the reference unit is hypothetical, and the actual new entrant may be different; and (3) the new entrant need not enter when the system is perfectly balanced."[134] This falls well short of what the APA requires. Speculation about other market changes that might coincide with the reference unit's entry or that the actual new entrant could be different from the reference unit does not justify excluding the reference unit, to which the estimated EAS are being imputed, for purposes of "approximat[ing] the compensation a new entrant needs from the capacity market in the first year of operation to recover its capital and fixed costs under long-term

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132 *See* January 21 NEPGA Protest at 40 ("If ISO-NE is to assume that the Reference Unit will earn non-capacity market revenues, the only reasonable expectation is that it will contribute supply to the system and will have a material effect on degrading its forecast revenues.").

133 *See id.*, Attachment B, Affidavit of Matthew W. Tanner on Behalf of the New England Power Generators Association, Inc. at ¶¶ 51-53 (the "Tanner Affidavit").

134 Section 205 Order, 175 FERC ¶ 61,172 at P 127.

equilibrium conditions."[135] And, as with the suggestion that the reference unit "need not enter" the EAS markets under the assumed conditions,[136] ISO-NE and the Commission cannot have it both ways: the reference unit cannot be assumed to participate in the EAS markets in one part of the Net CONE calculation while simultaneously being assumed ***not*** to participate in another part of that same Net CONE calculation. That does not meet the Tariff requirement that Net CONE be determined "given reasonable expectations" about EAS revenues[137] or the APA requirement to engage in reasoned decision-making,[138] including the requirement to provide a meaningful response to serious objections, like those raised by NEPGA.[139]

6. The Commission's Acceptance of EAS Revenues Estimated Using an Unrealistically High Number of Scarcity Hours was Arbitrary and Capricious

As explained in the NEPGA Protest, ISO-NE estimated EAS revenues making a wholly unrealistic assumption about the number of scarcity hours.[140] Specifically, ISO-NE assumed 11.3 hours of Capacity Scarcity Conditions annually, compared with an average

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135 *ISO New England Inc.*, 170 FERC ¶ 61,052 at P 3 (2020) ("*ISO-NE*").

136 Section 205 Order, 175 FERC ¶ 61,172 at P 127.

137 Tariff, § 1.2.2 (definition of "Net CONE"). Petitioners note that, in this respect, the new and old definitions of "Net CONE" are identical; both require "reasonable expectations" about energy and ancillary services revenues.

138 *See, e.g., State Farm*, 463 U.S. at 43 (explaining that an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (stating that "the Commission must be able to demonstrate that it has 'made a reasoned decision based upon substantial evidence in the record'" (citation omitted)).

139 *See, e.g.*, *NorAm*, 148 F.3d at 1165; *KN Energy*, 968 F.2d at 1303; *Vernon*, 845 F.2d at 1048.

140 *See* January 21 NEPGA Protest at 42-46; Tanner Affidavit, ¶¶ 12, 54-55.

of 1.6 hours annually since June 1, 2014.[141] The Commission accepted this patently unrealistic assumption "for consistency's sake," given that ISO-NE "model[ed] scarcity hours and regular hours under the same market supply assumption," and accused NEPGA of "disregard[ing] ISO-NE's stated purpose: to model scarcity hours under long-term equilibrium . . . ."[142] But it is the Commission that is disregarding the purpose of the whole exercise of calculating Net CONE and the Tariff requirement that this exercise be undertaken based on "***reasonable expectations*** of the energy and ancillary services revenues . . . ."[143]

As noted above, Net CONE is intended to represent the first-year capacity market revenue the reference unit would need to recover its capital and fixed costs,[144] and it is, therefore, calculated by deducting from gross CONE "the net revenues the resource is expected to earn from providing energy and ancillary services."[145] Regardless of ISO-NE's "stated purpose" for estimating scarcity hours or some perceived consistency with how ISO-NE models non-scarcity hours,[146] the fact remains that estimating EAS revenues under an unrealistic assumption about the number of scarcity hours – particularly when the assumed number of scarcity hours is nearly 10 times the average number of scarcity hours observed in the last since June 1, 2014 – will artificially inflate estimated EAS revenues and will not, therefore, result in a Net CONE value

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141 *See* January 21 NEPGA Protest at 45.

142 Section 205 Order, 175 FERC ¶ 61,172 at P 134.

143 Tariff, § 1.2.2 (emphasis added).

144 *ISO-NE*, 170 FERC ¶ 61,052 at P 3.

145 Complaint Order, 175 FERC ¶ 61,177 at P 3.

146 Section 205 Order, 175 FERC ¶ 61,172 at P 134.

reflecting "reasonable expectations" about EAS revenues.[147] The Commission's reasoning was not responsive to NEPGA's serious objections on this issue, which renders the Section 205 Order arbitrary and capricious.[148]

The Commission's reasoning was also inconsistent with its recognition elsewhere in the Section 205 Order about the need to make reasonable assumptions. Just as ISO-NE did not "identify a single natural gas facility in New England that lacks on-site compression,"[149] there is no record evidence suggesting one can reasonably expect there to be anything close to 11.6 scarcity hours during any of the relevant Capacity Commitment Periods. That makes the Section 205 Order "illogical on its own terms"[150] and not based on substantial evidence.[151]

147 Tariff, § 1.2.2.

148 *See also, e.g.*, *NorAm*, 148 F.3d at 1165; *KN Energy*, 968 F.2d at 1303; *Vernon*, 845 F.2d at 1048.

149 Section 205 Order, 175 FERC ¶ 61,172 at P 63.

150 *GameFly*, 704 F.3d at 148 (citation omitted).

151 *See* 16 U.S.C. § 825l(b) (2018). *See also*, *e.g.*, *Tenneco*, 969 F2d 1187, 1214 (stating that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence").

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that the Commission grant rehearing of the May 28 Orders as requested herein.

Respectfully submitted,

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Dated: June 28, 2021

CERTIFICATE OF SERVICE

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

Dated at Washington DC, this 28th day of June, 2021.

/s/ Stephanie S. Lim
Stephanie S. Lim