

herein, the Complaint must be summarily rejected, because Complainants have failed to satisfy their burden under Section 206 of the Federal Power Act (the “FPA”).⁶ Complainants have not made even a *prima facie* showing that ISO-NE’s existing market rules concerning capacity accreditation and the designation of operating reserves afford undue preferences to “gas-only resources” – *i.e.*, natural gas-fired resources “that have neither dual-fuel capability nor dedicated, firm natural gas supply arrangements”⁷ Moreover, while EPSA agrees that holistic improvements to the capacity accreditation and operating reserves designation rules are necessary and appropriate, the fact is that ISO-NE is already working with stakeholders on ways to develop just such improvements,⁸ and the Commission should allow those efforts to continue, rather than selectively and prematurely intervening to address the treatment of just a single class of resources, as Complainants propose.

I. PROTEST

A. Complainants Have Not Satisfied Their Burden under Section 206 of the FPA

The gist of the Complaint is that ISO-NE’s existing rules with respect to capacity accreditation and the designation of operating reserves allegedly grant gas-only resources “undue preferences,” because they do not “take into account the uncertainty of natural gas supply in New England, particularly in winter peak conditions.”⁹ As discussed

⁶ 16 U.S.C. § 824e (2018).

⁷ Complaint at 1.

⁸ See Revisions to ISO New England Transmission, Markets and Services Tariff of Buyer-Side Market Power Review and Mitigation Reforms, Transmittal Letter at 40-41, Docket No. ER22-1528-000 (filed Mar. 31, 2022) (the “March 31 Filing”).

⁹ Complaint at 1

in more detail in Section I.B below, a majority of ISO-NE stakeholders have recognized the need to improve ISO-NE's capacity accreditation and ancillary services rules, and, consequently, voted to support a two-year plan whereby ISO-NE will work with stakeholders to revise these rules. EPSA supports this effort and, in particular, what the Complaint characterizes as ISO-NE's "Effective Load Carrying Capability ("ELCC") project,"¹⁰ whereby ISO-NE will develop capacity accreditation rules that account for a variety of factors, including fuel restrictions, that can affect resource availability. Indeed, EPSA has consistently supported ELCC initiatives, having previously "urg[ed] the Commission to encourage the development and implementation of this type of capacity accreditation approach in every [capacity market] to ensure reliability and resource adequacy."¹¹ But the recognition that ISO-NE's capacity accreditation and ancillary services rules can and should be improved for all resources does not imply, much less demonstrate, that the rules are unduly preferential as to a single class of resources, as Complainants would have the Commission believe.

Under Section 206(b) of the FPA, Complainants bear the burden of proof in this proceeding to demonstrate that ISO-NE's existing rules with respect to capacity accreditation and the designation of operating reserves, as those rules relate to gas-fired resources, are unduly preferential, as they allege.¹² As such, Complainants also "bear[] the burden of production, or the need to provide sufficient evidence to establish a *prima*

¹⁰ *Id.* at 27.

¹¹ Comments of the Electric Power Supply Association at 3, Docket No. ER21-2043-000 (filed June 22, 2021).

¹² 16 U.S.C. § 824e(b); *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014). Complainants must meet this burden before the Commission can modify the existing rate. *See, e.g., Emera Maine v. FERC*, 854 F.3d 9, 24-25 (D.C. Cir. 2017) ("Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate.").

facie case.”¹³ Even where a complainant meets that threshold burden, “[t]he ultimate burden of persuasion remains with the complainant and a complainant prevails only if a preponderance of evidence supports its position.”¹⁴ Complainants have satisfied neither their threshold burden nor their ultimate burden, and the Complaint must, therefore, be summarily rejected.

To prevail on their claims of undue preference, Complainants would have to demonstrate that ISO-NE’s rules treat similar resources differently¹⁵ or dissimilar resources the same.¹⁶ Complainants do neither. Instead, Complainants and their witness, Stephen J. Rourke,¹⁷ offer only “general, unsubstantiated assertions insufficient to support an FPA section 206 complaint.”¹⁸

As an initial matter, Complainants erroneously claim that “[w]ith the notable exception of gas-only resources, ISO-NE differentiates its capacity accreditations on the basis of whether a generation resource’s energy *input* is under the generator’s control or

¹³ *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Services Into Mkts. Operated by Cal. Indep. Sys. Operator Corp. and Cal. Power Exchange*, Opinion No. 536, 149 FERC ¶ 61,116 at P 45 (2014) (“SDG&E”) (footnote omitted), *on reh’g*, 153 FERC ¶ 61,144 (2015), *aff’d sub nom. MPS Merchant Servs., Inc. v. FERC*, 863 F.3d 1155 (9th Cir. 2016).

¹⁴ *City of Oakland, California v. Pacific Gas & Elec. Co.*, 165 FERC ¶ 61,249 at P 24 (2018) (footnote omitted), *on reh’g*, 167 FERC ¶ 61,097 (2019). *See also, e.g., SDG&E*, 149 FERC ¶ 61,116 at P 45 (“[T]he burden of proof under the Administrative Procedure Act 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. . . . [W]hen a party has the burden of persuasion, it will lose ‘if the evidence is evenly balanced’ The party bearing the burden of proof will prevail only if the preponderance of evidence supports its position.” (footnotes omitted)).

¹⁵ *See, e.g., “Complex” Consol. Edison v. FERC*, 165 F.3d 992, 1012 (D.C. Cir. 1999); *Sebring Util. Comm’n v. FERC*, 591 F.2d 1003, 1009, n.24 (D.C. Cir. 1979).

¹⁶ *See, e.g., Alabama Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27-28 (D.C. Cir. 1982).

¹⁷ *See* Complaint, Exhibit, A, Affidavit of Stephen J. Rourke (the “Rourke Affidavit”).

¹⁸ *Central Hudson Gas & Elec. Corp. v. New York Indep. Sys. Operator, Inc.*, 178 FERC ¶ 61,194 at P 63 (2022).

subject to factors or conditions outside of its control.”¹⁹ This assertion misrepresents the current state of ISO-NE’s market rules. Those rules do not differentiate between resources on the basis of control over inputs but instead do so on the basis of control over output. Specifically, ISO-NE’s current accreditation rules consider whether the resource is an Intermittent Power Resource²⁰ – *i.e.*, whether the resource owner has “control over its net power **output**.”²¹

In any event, the currently effective accreditation rules grant no undue preference to gas-only resources because those rules do not consider factors impacting any resource’s expected availability or unavailability during severe conditions for any technology type. To be sure, ISO-NE has previously raised concerns about gas-fired resources’ access to natural gas during certain severe conditions. But this does not establish the existence of any kind of undue preference. The reality is that all non-intermittent resources face fuel delivery concerns in severe conditions, and, at this time, those concerns are not accounted for in ISO-NE’s capacity accreditation rules with respect to **any** resources. That is not to say that the rules cannot be improved, and, indeed, the expectation is that the ELCC project will lead to a revised capacity accreditation approach that will account for “limitations on fuel supplies,” among other

¹⁹ Complaint at 15 (emphasis added). See also *id.* at 22 (“ISO-NE confers an undue preference upon gas-only resources as compared to other resources, such as wind, solar and run-of-river hydro, which are subject to a capacity accreditation that reduces their overall capacity ratings based upon input energy variability.”).

²⁰ See ISO-NE Tariff, § III.13.1.2.2.1 (Qualified Capacity for Existing Generating Capacity Resources Other Than Intermittent Power Resources); *id.*, § III.13.1.2.2.2 (Qualified Capacity for Existing Generating Capacity Resources that are Intermittent Power Resources).

²¹ *Id.*, § 1.2.2 (defining an “Intermittent Power Resource” as “a wind, solar, run of river hydro or other renewable resource that does not have control over its net power output”).

factors not accounted for in the existing rules.²² But the fact remains that the current capacity accreditation rules do not treat resources differently based on their availability during extreme conditions.

That the currently effective rules do not account for availability during extreme conditions is evident from the statement of ISO-NE's Peter Brandien attached to the Complaint.²³ Addressing steps taken by ISO-NE to prepare for the winter season and concerns regarding the availability of natural gas, Mr. Brandien stated:

the biggest challenge we see going into this winter—what keeps me up at night—is an extended cold snap **when non-gas fuel inventories are depleted**, or an operating day in which New England is primarily utilizing nuclear, coal, and oil resources and we suddenly lose a large non-gas resource.²⁴

Indeed, as recently as this past December, ISO-NE expressed serious concerns about fuel deliveries for oil-fired and liquefied natural gas (“LNG”) facilities:

New England generators rely on the delivery of both global and domestic fuel supplies to produce electricity. As the world recovers from the pandemic, global fuel supply chains are being stretched, leading to high prices for oil and LNG across the globe. These issues may limit the ability for resources in New England to replenish their tanks if they run low during the winter months. These limitations are in addition to typical logistical challenges, such as inclement weather, that can affect fuel deliveries into the region. A national shortage of truck drivers may also affect the speed at which some generators can replenish their fuel supplies, as the trucking

²² See March 31 Filing, Testimony of Vamsi Chadalavada on behalf of ISO New England Inc. regarding the Need for a Transition to the MOPR's Elimination at 43 (the “Chadalavada Testimony”) (“It is anticipated that the revised approach will account for intermittency, limitations on fuel supplies, and other factors traditionally ignored in resource adequacy assessment and capacity qualification processes (and largely ignored in [ISO-NE]'s current process).”).

²³ See Complaint, Exhibit D, Remarks by Peter Brandien, Vice President, Operations, ISO New England at the October 20, 2016 FERC Panel Discussion regarding Winter 2016-2017 Operations and Market Performance in Regional Transmission Organizations and Independent System Operators, Docket No. AD16-24-000 (filed Oct. 20, 2016) (the “Brandien 2016 Statement”).

²⁴ *Id.* at 5 (emphasis added).

system is shared by multiple industries, including commercial and residential heating and electric generation.²⁵

Notwithstanding such concerns, the currently effective capacity accreditation process does not consider whether a resource will be able to obtain fuel during extreme conditions or will otherwise be available during such conditions.

To the contrary, it continues to be the case that the Qualified Capacity of a non-intermittent resource (*i.e.*, any resource that, unlike an Intermittent Resource, can control its output) is determined based on the resource's Seasonal Claimed Capability.²⁶ A resource's Seasonal Claimed Capability, in turn, is demonstrated through audits, which "determine[] a Generator Asset's capability to perform under specified summer and winter conditions for a specified duration."²⁷ In this way, there can be no "undue preference" for gas-only resources, because ISO-NE's capacity accreditation rules simply do not account for potential fuel interruptions or other limitations for any non-intermittent resources. Also in this way, rewriting the capacity accreditation rules to account for these factors solely with respect to gas-fired resources and not other non-intermittent resources, as the Complaint would have the Commission do, would be unduly discriminatory against gas-fired resources and unduly preferential in favor of other resources. This is precisely why it is necessary and appropriate for ISO-NE to undertake reforms to the accreditation rules on a comprehensive basis that accounts for the limitations of *all* resources.

²⁵ ISO-NE, *Harsh Weather Conditions Could Pose Challenges to New England's Power System This Winter* at 2 (Dec. 6, 2021), https://www.iso-ne.com/static-assets/documents/2021/12//20211206_pr_winteroutlook2122.pdf.

²⁶ See ISO-NE Tariff, § III.13.1.2.2.1.2.

²⁷ *Id.*, § III.1.5.1.1(a)(ii).

Relatedly, the Complaint also appears to confuse capacity accreditation for resource adequacy purposes with ISO-NE's energy security procedures. In particular, Mr. Rourke claims that "[d]ual fuel natural gas, LNG supplied gas, oil, coal, pumped storage hydro, conventional hydro with pond storage, and nuclear units all have fuel sources that are stored nearby or on-site and can be tracked and evaluated by the system operator," and that "[i]n that way, these resources, particularly during the winter period, are different from the pipeline-supplied natural gas only generators."²⁸ But ISO-NE's ability to track the fuel availability of certain resources and to use such tracking for planning purposes does not indicate that such resources are immune to fuel disruptions or have unlimited availability, much less that it is unduly discriminatory or preferential not to account for trackability in the capacity accreditation process. Moreover, the Complaint fails to show how potential fuel limitations in the winter affect a resource's resource adequacy contribution in summer-peaking ISO-NE. Modifying ISO-NE's capacity construct to account for fuel security challenges will have far reaching consequence for all stakeholders, including customers, and any such modifications must, therefore, be developed and implemented in a holistic and thoughtful matter that recognizes energy security issues affecting all resources, not just a single class of resources. The ELCC project promises just such a holistic and thoughtful examination, in contrast to Complainants' selective and unduly discriminatory approach.

Similarly, Complainants fail to support their contention that "ISO-NE confers an undue preference upon gas-only resources as compared to other resources, such as wind, solar and run-of-river hydro, which are subject to a capacity accreditation that

²⁸ Rourke Affidavit, ¶ 25.

reduces their overall capacity ratings based upon input energy variability.”²⁹ As discussed above, there are separate accreditation rules for intermittent resources.³⁰ Reforms to capacity accreditation rules must, therefore, be holistic in order to address all such variability, without undue discrimination or preference. Indeed, while the Complaint suggests that the currently effective accreditation rules unduly discriminate against intermittent resources, the Complaint does not claim, much less demonstrate, that the Qualified Capacity of intermittent resources is, in fact, understated, and ISO-NE’s March 31 Filing suggests the opposite: namely, that the existing rules may still overestimate the resource adequacy contribution of intermittent resources.³¹

Even aside from their failure to show an undue preference under ISO-NE’s rules, Complainants also fail to substantiate their claims of threats to the ISO-NE system. For example, Mr. Rourke’s affidavit refers vaguely to potential difficulties that ISO-NE will face if gas-only resources are unable to obtain natural gas, but does not provide any data or quantification that would establish any sort of pattern of non-performance or even specific instances of non-performance attributable to an inability to obtain natural gas. The Complaint also attaches statements by Mr. Brandien, which were provided in support of

²⁹ Complaint at 22.

³⁰ *Cf. ISO New England Inc.*, 122 FERC ¶ 61,171 at P 15 (2008) (noting that “ISO-NE recognizes the difficulty, and the limits, of predicting the reliability of Intermittent Resources”).

³¹ See Chadalavada Testimony at 13 (stating that “the current market construct utilizes imprecise measures of technologies’ actual contributions to resource adequacy in the [Forward Capacity Auction (“FCA”)] qualification process. While this has not been a concern to date given the relatively low penetration of intermittent resources, the entry of large quantities of state sponsored resources could substantially magnify the problem with the market’s current method of resource capacity accreditation.”). See *also id.* at 13-14 (explaining that, under ISO-NE’s current rules, “800 MWs of nameplate PV solar projects would have a summer qualified capacity of 400 MW in the FCA” but that “the actual contributions to reliability of the PV solar resource may be a fraction of the 400 MW for which it would be paid”).

ISO-NE's Pay for Performance market rule changes³² and which discuss ISO-NE's winter preparedness efforts through the winter of 2016/2017,³³ but does not explain why the Pay for Performance rules do not sufficiently penalize gas-only resources that fail to perform in severe conditions, or why other steps taken by ISO-NE since that time do not adequately address the concerns raised in the Complaint.

B. The Commission Should Summarily Deny the Complaint and Allow ISO-NE and Stakeholders to Continue Examining Potential Changes on a Holistic Basis

As explained above, the Complaint should be summarily denied because it fails to demonstrate ISO-NE's existing rules grant gas-only resources an undue preference. Moreover, even to the extent that the Commission has any concerns regarding the issues raised in the Complaint with respect to the potential unavailability of natural gas, denial of the Complaint is appropriate because ISO-NE has already committed in its March 31 Filing to examine its rules relating to capacity accreditation and ancillary services.³⁴

The March 31 Filing proposes to eliminate the minimum offer price rule ("MOPR"), with a two-year mechanism (the "Transition Mechanism") that will first allow "a substantial quantity of state-sponsored policy resources to enter the market without buyer-side market power mitigation review during the next two [FCAs] 17 and 18,"³⁵ and the complete

³² See Complaint, Exhibit C, Excerpts from Testimony of Peter Brandien on Behalf of ISO New England Inc., included as Att. I.-1b to ISO-NE Filing of Performance Incentives Market Rule Changes, Docket No. ER14-1050-000 (filed Jan. 17, 2014).

³³ See Brandien 2016 Statement.

³⁴ The Commission has previously rejected complaints and allowed issues raised therein to be addressed by stakeholders. See, e.g., *Independent Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 at P 71 (2015), *on reh'g*, 170 FERC ¶ 61,118 (2020); *New England Power Generators Assoc., Inc. v. ISO New England Inc.*, 150 FERC ¶ 61,053 at P 43, *on reh'g*, 153 FERC ¶ 61,222 (2015), *aff'd sub nom. New England Power Generators Ass'n, Inc. v. FERC*, 879 F.3d1192 (D.C. Cir. 2018); *FirstEnergy Solutions Corp. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,209 at P 45 (2013), *on reh'g*, 151 FERC ¶ 61,205 (2015).

³⁵ March 31 Filing, Transmittal Letter at 1.

replacement of the MOPR with reformed buyer-side market power mitigation rules in FCA 19.³⁶ As the March 31 Filing explains, the Transition Mechanism is necessary and was supported by stakeholders to “help prevent adverse impacts to reliability that could result with the MOPR’s immediate elimination, and prevent accompanying harms to investors and consumers.”³⁷

As relevant here, the March 31 Filing explains that the Transition Mechanism will give ISO-NE time to work with stakeholders “to complete two market design enhancements, the first to overhaul the method the ISO employs to establish capacity resource accreditation values, and the second to implement day-ahead ancillary services.”³⁸ These changes can reasonably be expected to address the concerns raised in the Complaint. For example, the March 31 Filing states, “[f]undamentally, under the current FCM rules, the qualified capacity values of **all capacity resources** may not reflect resources’ actual contributions to the system’s reliability as the system transitions to one with substantially more highly variable, weather-dependent resources.”³⁹ Accordingly, ISO-NE and its stakeholders are expected to examine issues relating to fuel availability in the ELCC project.

While acknowledging that ISO-NE’s ongoing ELCC project “should help to more accurately capture the real capacity value contributions of the pipeline-supplied, natural gas only resources in New England,”⁴⁰ Complainants go on to assert that implementing

³⁶ See *id.* at 1-2.

³⁷ *Id.* at 22.

³⁸ *Id.* at 39 (footnote omitted).

³⁹ Chadalavada Testimony at 15 (emphasis added).

⁴⁰ Rourke Affidavit, ¶ 26.

such reforms beginning with FCA 19 “unequivocally is too late.”⁴¹ Complainants’ desire that reforms be implemented selectively – and in an unduly discriminatory manner – and sooner does not establish that implementing more comprehensive and holistic reforms following the conclusion of the stakeholder process is “too late” in any way relevant to FPA Section 206. Every stakeholder would like rules changes benefitting its interests implemented now and those benefiting others’ interests later or not at all, but that does not render the delay needed to develop a comprehensive proposal accounting for the needs of the market and balancing the interests of all stakeholders unreasonable. As Complainants presumably know, stakeholder processes take time, and there is nothing unreasonable about the schedule under which this stakeholder process is being undertaken. Indeed, the Complaint never attempts to reconcile the timing of its requested relief with statements by ISO-NE regarding how long it will take to address the novel question of capacity accreditation for thermal resources in the context of a comprehensive ELCC reform. This is all the more troubling given that the rushed approach urged by Complainants would circumvent the stakeholder process in the name of accelerating implementation of their preferred changes by just a single FCA, from FCA 19 to FCA 18.

In the March 31 Filing, ISO-NE states its intent to begin the formal stakeholder process with respect to accreditation in June 2022, and indicates that “stakeholder discussions are scheduled to continue through 2022 and be completed in June 2023, with a filing to the Commission to follow shortly thereafter,”⁴² which “is anticipated to permit the ISO to incorporate the new resource capacity accreditation methodology for FCA 19

⁴¹ Complaint at 28.

⁴² March 31 Filing, Transmittal Letter at 40 (footnote omitted).

(to be held in February 2025), a process that begins in February 2024.”⁴³ This schedule is eminently reasonable in light of the complexity of the issues that must be considered in revising ISO-NE’s accreditation rules. The Commission should therefore deny the Complaint and allow this process to proceed as agreed to by ISO-NE’s stakeholders.⁴⁴ Indeed, the sooner the Commission can deny the Complaint, the better, because just the pendency of the Complaint, when coupled with the restrictions imposed by the Commission’s *ex parte* rules,⁴⁵ will limit the ability of ISO-NE and stakeholders to obtain informal guidance from FERC Staff on novel issues relevant to the potential reforms.

⁴³ *Id.* at 41 (footnote omitted).

⁴⁴ *Id.* at 75 (“At its February 3, 2022 meeting, the Participants Committee considered and ultimately approved the package of MOPR reforms filed herein (including the Transition Proposal, with almost 70 percent in favor.” (footnote omitted)).

⁴⁵ See 18 C.F.R. § 385.2201 (2021).

II. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA requests that the Commission deny the Complaint.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: /s/ David G. Tewksbury

David G. Tewksbury
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, NW
Washington, DC 20001

Nancy Bagot
Senior Vice President
Bill Zuretti
Director, Regulatory Affairs and Counsel
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005

On behalf of the
Electric Power Supply Association

Dated: April 14, 2022

CERTIFICATE OF SERVICE

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

Dated at Washington DC, this 14th day of April, 2022.

/s/ David G. Tewksbury
David G. Tewksbury