

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

**North America Electric
Reliability Corporation**

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)

Docket No. RD23-1-___

**REQUEST FOR REHEARING OF THE ELECTRIC POWER SUPPLY
ASSOCIATION, THE NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC. AND THE PJM POWER PROVIDERS GROUP**

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 the New England Power Generators Association, Inc. (“NEPGA”)⁴ and The PJM Power Providers Group (“P3”⁵ and collectively with EPSA and NEPGA, “Petitioners”) respectfully request

¹ 16 U.S.C. § 825f (2018).

² 18 C.F.R. § 385.713 (2022).

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. The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular NEPGA member.

⁵ P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. (“PJM”) region. Combined, P3 members own over 83,000 MWs of generation assets and produce enough power to supply over 63 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained herein represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

rehearing of the Commission’s February 16, 2023, order in the above-captioned proceeding.⁶ In approving NERC Reliability Standard EOP-012-1 (Extreme Cold Weather Preparedness and Operations) (“Standard EOP-012-1”), as proposed by the North American Electric Reliability Corporation (“NERC”),⁷ without addressing how generators can recover the costs associated with complying with that standard, the Commission breached its duty to ensure that proposed reliability standards are “just” and “reasonable” as required by Section 215(d)(2) of the FPA⁸ and failed to engage in reasoned decision-making.

I. BACKGROUND

In the October 28 Filing, NERC proposed two new reliability standards intended “to reduce the risks posed by extreme cold weather to the reliability of the Bulk-Power System.”⁹ As relevant here, one of those standards, Standard EOP-012-1, included two new requirements, Requirements R1 and R2. Under Requirement R1, the owner of a new generating unit would, absent exemption, be required to “[i]mplement freeze protection measures that provide capability to operate for a period of not less than twelve (12) continuous hours at the Extreme Cold Weather Temperature” or to identify the

⁶ *North Am. Elec. Reliability Corp.*, 182 FERC ¶ 61,094 (2023) (the “February 16 Order”).

⁷ See Petition of the North American Electric Reliability Corporation for Approval of Proposed Reliability Standards EOP-011-3 and EOP-012-1 and Request for Expedited Action, Docket No. RD23-1-000 (filed Oct. 28, 2022) (the “October 28 Filing”). Petitioners did not object to the other reliability standard, Reliability Standard EOP-011-3, proposed in the October 28 Filing. See Comments of the Electric Power Supply Association and The PJM Power Providers Group at 1, Docket No. RD23-1-000 (filed Dec. 8, 2022) (the “EPSA/P3 Comments”). See *also generally* Motion to Intervene and Comments of the New England Power Generators Association, Inc., Docket No. RD23-1-000 (filed Dec. 8, 2022) (the “NEPGA Comments”).

⁸ 16 U.S.C. § 824o(d)(2) (2018).

⁹ October 28 Filing at 1.

“technical, commercial, or operational constraints” that prevent it from doing so.¹⁰ Under Requirement R2, the owner of an existing generating unit would, absent exemption, be required to “ensure its generating unit(s) add new or modify existing freeze protection measures as needed to provide the capability to operate for a period of not less than one (1) hour at the unit(s) Extreme Cold Weather Temperature.”¹¹

In their comments, Petitioners expressed concern that acceptance of Standard EOP-012-1 would require generation owners to incur potentially significant costs that they lack a reasonable opportunity to recover through rates.¹² They outlined different options available to the Commission to address this issue, including the initiation of a new proceeding under Section 206 of the FPA¹³ or remand with instruction to NERC to work with the balancing authorities,¹⁴ but emphasized that, regardless of which approach was employed, cost recovery mechanisms needed to be in place by the standard’s proposed effective date.¹⁵

In the February 16 Order, the Commission approved the reliability standards as proposed.¹⁶ The Commission declined to address concerns raised regarding cost recovery on the grounds that such concerns were “outside the scope of the instant proceeding.”¹⁷

¹⁰ *Id.* at 34.

¹¹ *Id.* at 36.

¹² See EPSA/P3 Comments at 10-13; NEPGA Comments at 4-6.

¹³ 16 U.S.C. § 824e (2018).

¹⁴ See EPSA/P3 Comments at 11-12.

¹⁵ See *id.* at 12; NEPGA Comments at 4-6.

¹⁶ See February 16 Order, 182 FERC ¶ 61,094 at P 1.

¹⁷ *Id.* at P 83.

II. REQUEST FOR REHEARING

Under Section 215 of the FPA, the Commission “may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.”¹⁸ “Just” and “reasonable” are terms of art that, together, have a recognized meaning under Part II of the FPA and the FPA’s sister statute, the Natural Gas Act (the “NGA”),¹⁹ and Congress was well aware of their meaning when it incorporated them into Section 215 as a new provision of Part II.²⁰ As the Supreme Court has explained, “‘when Congress employs a term of art,’ that usage itself suffices to “adop[t] the cluster of ideas that were attached to each borrowed word” in the absence of indication to the contrary.”²¹ When it enacted Section 215, Congress gave no indication that it intended “just” and “reasonable” have a different meaning in the Section 215 setting than they have under other, older provisions of Part II of the FPA and the NGA, and there is a long line of precedent under those older provisions making clear that a practice cannot be “just” and “reasonable” if it deprives a regulated entity of a reasonable opportunity to recover its costs.²² That being the case, concerns raised by Petitioners that, in approving

¹⁸ 16 U.S.C. § 824o(d)(2) (2018).

¹⁹ 15 U.S.C. §§ 717, *et seq.* (2018).

²⁰ See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) (explaining that when “a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it” (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))). See also, e.g., *George v. McDonough*, 142 S.Ct. 1953, 1959 (2022) (“*George*”) (same); *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1801 (2019) (same).

²¹ *George*, 142 S.Ct. at 1963 (quoting *FAA v. Cooper*, 566 U.S. 284, 292 (2012)).

²² See, e.g., *Federal Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (“*Hope*”); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987); *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005), *on reh’g*, 114 FERC ¶ 61,265 (2006).

Standard EOP-012-1, the Commission was imposing costs on generation owners that lack any means of recovering those costs were squarely within the scope of this proceeding. Thus, the Commission's refusal to address those concerns was contrary to law and arbitrary and capricious.

The Commission was also required to address the cost recovery issue given the serious competitive implications of Standard EOP-012-1. As Petitioners explained, vertically integrated utilities likely will be able to recover the costs of the additional freeze protection measures, but competitive generation owners lack similar opportunities.²³ In addition, notwithstanding the Commission's having quite properly told NERC that exemptions should "be the exception and not the rule,"²⁴ there will undoubtedly still be some generation facilities that are exempted from these requirements and that do not, therefore, incur the associated costs. The upshot is that the lack of opportunities for cost recovery will put non-exempt, competitive generators at a competitive disadvantage.²⁵ Consideration of the cost recovery issue was thus essential, because, as the Commission has recognized, Section 215 requires that it "give special attention to the effect of a proposed Reliability Standard on competition."²⁶ The February 16 Order not only neglected to give this issue special attention, it gave this issue no attention at all.

To be sure, in Order No. 672, the Commission outlined factors it intended to use in

²³ See EPSA/P3 Comments at 10-11.

²⁴ February 16 Order, 182 FERC ¶ 61,094 at P 4.

²⁵ See EPSA/P3 Comments at 8.

²⁶ *Rules Concerning Certification of the Elec. Reliability Org.; & Procedures for the Establishment, Approval, & Enforcement of Elec. Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104 at P 332 ("Order No. 672"), *on reh'g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006).

considering “whether a proposed Reliability Standard is just and reasonable,”²⁷ and none of those factors speaks directly to the issue of cost recovery.²⁸ Significantly, however, the Commission made clear that Order No. 672’s list of factors was not exhaustive and that it would consider “other factors that are appropriate for the particular Reliability Standard proposed.”²⁹ In addition, Order No. 672 recognizes the Commission’s obligation under Section 219(b)(4) of the FPA³⁰ to “allow recovery of all costs prudently incurred to comply with the Reliability Standards.”³¹ Standard EOP-012-1 imposes costs on generation owners by requiring investments, potentially substantial investments, in freeze protection measures that will enable their units to operate for the prescribed time periods under the applicable cold weather conditions. Under the circumstances, it is hard to see how the question of whether generation owners will have a reasonable opportunity to recover the associated costs would not be a “factor[s] that [is] appropriate for the particular Reliability Standard proposed.”³² That is particularly true when one accounts for the competitive implications described above.

Consideration of cost recovery issues was all the more appropriate given that Section 215 of the FPA unambiguously bars the adoption through a reliability requirement

²⁷ *Id.* at P 323.

²⁸ *See id.* at PP 324-35.

²⁹ *Id.* at P 323. *See also id.* at P 337 (“The Commission may consider any other factors it deems appropriate for determining if the proposed Reliability Standard is just and reasonable, not unduly discriminatory or preferential, and in the public interest.”).

³⁰ 16 U.S.C. § 824s(b)(4) (2018).

³¹ Order No. 672, 114 FERC ¶ 61,104 at P 259. *See also* 18 C.F.R. § 35.35(f) (2022) (“The Commission will approve recovery of prudently-incurred costs necessary to comply with the mandatory reliability standards pursuant to section 215 of the Federal Power Act, provided that the proposed rates are just and reasonable and not unduly discriminatory or preferential.”);

³² Order No. 672, 114 FERC ¶ 61,104 at P 323.

of “any requirement to enlarge [bulk-power system] facilities or to construct new transmission capacity or generation capacity”³³ and restricts the scope of permissible requirements to the operation of existing facilities within existing equipment and system limits.³⁴ As an initial matter, as Petitioners explained in their comments, Standard EOP-012-1 exceeded the scope of a permissible reliability requirement by requiring generation owners to make physical modifications to their existing facilities.³⁵ At a minimum, even if NERC can be said to possess such broad authority “require the implementation of physical modifications to improve reliability,”³⁶ the undeniable tension between Congress’s intent to limit its authority to order enlargement or construction of facilities and the requirements Standard EOP-012-1 made consideration of the cost recovery issues entirely appropriate and, indeed, essential here.

Ultimately, even if Order No. 672 could be read to give the Commission absolute discretion to decide what additional factors beyond those listed in that rule might be appropriate in a given case, the fact remains that Congress left the Commission no such discretion when it commanded that reliability standards be “just” and “reasonable.” Section 215(d)(2) of the FPA³⁷ required the Commission to consider any and all factors

³³ 16 U.S.C. § 824o(d)(3) (2018).

³⁴ See *id.* (stating that the term “reliability requirement” “includes requirements for the **operation of existing bulk-power system facilities**, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for **reliable operation** of the bulk-power system” (emphasis added)). See also 16 U.S.C. § 824o(d)(4) (2018) (defining “reliable operation” as “operating the elements of the bulk-power system **within equipment and electric system thermal, voltage, and stability limits** so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements” (emphasis added)).

³⁵ See EPSA/P3 Comments at 4-6.

³⁶ February 16 Order, 182 FERC ¶ 61,094 at P 48.

³⁷ 16 U.S.C. § 824o(a)(3) (2018).

bearing on the justness and reasonableness of the proposed reliability standard, regardless of what may have been contemplated by Order No. 672, and the Commission obviously “cannot rely on one of its own regulations to trump the plain meaning of a statute.”³⁸ While the terms “just” and “reasonable” may be “incapable of precise judicial definition,” they require “an appropriate ‘balancing of the investor and the consumer interests’³⁹ that never occurred here.

That NERC opposed consideration of cost recovery issues in connection with its October 28 Filing⁴⁰ does not excuse the February 16 Order’s failure to consider these issues. While Section 215 of the FPA requires the Commission to “give due weight to the technical expertise of [NERC] with respect to the content of a proposed standard or modification to a reliability standard,”⁴¹ cost recovery is not an issue on which NERC can claim to possess any technical expertise. Rather, it is an issue that goes to the Commission’s ratemaking expertise as the industry’s economic regulator and its duty to ensure that the entities it regulates are not deprived of their statutory and, indeed, constitutional rights to “just” and “reasonable” compensation for regulated services. Moreover, even assuming *arguendo* that NERC’s position could reasonably be characterized as a product of its technical expertise, the Commission has rejected the proposition that “giving due weight means a rebuttable presumption that the [proposed]

³⁸ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002) (“*Atlantic City*”) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). See also, e.g., *Public Serv. Elec. & Gas Co. v. FERC*, 989 F.3d 10, 19 (D.C. Cir. 2021) (stating that “a regulation can never trump the plain meaning of a statute” (internal citations omitted)).

³⁹ *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 532 (2008) (quoting *Hope*, 320 U.S. at 603).

⁴⁰ See Reply Comments of the North American Electric Reliability Corporation at 10-11, Docket No. RD23-1-000 (filed Dec. 16, 2022).

⁴¹ 16 U.S.C. § 824o(d)(2) (2018).

Reliability Standard meets the statutory requirement of being just, reasonable, not unduly discriminatory or preferential, and in the public interest.”⁴²

To be clear, Petitioners are not saying that the Commission must prescribe specific cost recovery mechanisms through action in this “RD” docket. As indicated in Petitioners’ comments, there were (and are) multiple avenues through which the Commission could ensure that generation owners are afforded an opportunity to recover the costs associated with Standard EOP-012-1. The Commission could have remanded this reliability standard to NERC with instructions to instead require balancing authorities to ensure sufficient quantities of weather resilient generation are available, which would then have allowed for the development of rules that would also address cost recovery.⁴³ Alternatively, the Commission could have approved the proposed reliability standard while separately acting under Section 206 of the FPA⁴⁴ to require regional transmission organizations and independent system operators to establish cost recovery mechanisms or to show cause why their existing rules already provide adequate opportunities for cost recovery.⁴⁵ What the Commission was not allowed to do was disavow any obligation to address recovery of costs incurred to comply with a reliability requirement that could only be approved if found to be just and reasonable.

At a bare minimum, reasoned decision-making required the Commission to respond to, and engage with, the serious objections raised by Petitioners.⁴⁶ Here, as in

⁴² See Order No. 672, 114 FERC ¶ 61,104 at P 345.

⁴³ See EPSA/P3 Comments at 2.

⁴⁴ 16 U.S.C. § 824e (2018).

⁴⁵ See EPSA/P3 Comments at 2.

⁴⁶ See, e.g., *American Clean Power Ass’n v. FERC*, 54 F.4th 722, 728 (D.C. Cir. 2022) (“ACPA”); *New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir.

past cases overturned by the courts of appeal, the Commission “failed to take seriously its responsibility to respond at all.”⁴⁷ Instead, the February 16 Order simply declared these objections to be “outside the scope of the instant proceeding.”⁴⁸ Not only does that fail to engage with the merits of Petitioners’ arguments, it fails even to explain how or why those arguments are alleged to be beyond the scope. Indeed, the Commission made no attempt to define the proper scope of this proceeding, much less to reconcile that definition with the statutory requirement that proposed reliability requirements be “just” and “reasonable.”

III. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission’s Rules of Practice and Procedure,⁴⁹ Petitioners hereby identify the issues on which they seek rehearing and provide representative precedent in support of their position on such issues:

1. The Commission’s holding that Petitioners’ cost recovery concerns were outside the scope of this proceeding was contrary to law. Congress’s use of the terms “just” and “reasonable” in Section 215 of the FPA⁵⁰ imported the “cluster of ideas” attached to each term, *George*, 142 S.Ct. at 1963 (quoting *Cooper*, 566 U.S. at 292), including the principle that a practice cannot be just and reasonable if it deprives a regulated entity of a reasonable opportunity to recover its costs, *see, e.g., Hope*, 320 U.S. at 603.
2. Consideration of Petitioners’ cost recovery concerns was not foreclosed by Order No. 672, because that rule left open the possibility of considering “other factors,” Order No. 672, 114 FERC ¶¶ 61,104 at P 323, and because

2018) (“NEPGA”); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) (“*NorAm*”).

⁴⁷ *NorAm*, 148 F.3d at 1165.

⁴⁸ February 16 Order, 182 FERC ¶¶ 61,094 at P 83.

⁴⁹ 18 C.F.R. § 385.713(c)(2) (2022).

⁵⁰ 16 U.S.C. § 824o (2018).

a Commission rule cannot “trump the plain meaning of a statute,” *Atlantic City*, 295 F.3d at 11.

3. The Commission’s refusal to grapple with Petitioners’ cost recovery arguments and its failure to explain the basis for its determination that these issues were beyond the scope were arbitrary and capricious and failed to satisfy the requirements of reasoned decision-making. See *ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211.
4. The failure to address cost recovery concerns and related concerns about the impact on competition also violated the Commission’s obligation under Section 215 of the FPA⁵¹ to “give special attention to the effect of a proposed Reliability Standard on competition.” Order No. 672, 114 FERC ¶ 61,104 at P 332.
5. That failure also ran afoul of the requirements of Section 219 of the FPA Section 219(b)(4) of the FPA⁵² to “allow recovery of all costs prudently incurred to comply with the Reliability Standards.” Order No. 672, 114 FERC ¶ 61,104 at P 259. See also 18 C.F.R. § 35.35(f) (2022).
6. The February 16 Order violates Section 215 of the FPA⁵³ by approving a reliability standard that unlawfully requires the enlargement or construction of generation facilities. See 16 U.S.C. §§ 824o(d)(3), 824o(d)(4) (2018).

⁵¹ 16 U.S.C. § 824o (2018).

⁵² 16 U.S.C. § 824s(b)(4) (2018).

⁵³ 16 U.S.C. § 824o (2018).

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully requests that the Commission grant rehearing as requested herein.

Respectfully submitted,

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Dated: March 20, 2023

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, D.C., this 20th day of March 2023.

/s/ David G. Tewksbury
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