

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

New England Power Pool Participants Committee

Docket No. ER18-2208-002

ORDER DENYING REHEARING

(Issued January 23, 2020)

1. New England Power Pool (NEPOOL) Participants Committee requests clarification or, in the alternative, rehearing of the Commission’s order in this proceeding,¹ which rejected NEPOOL’s proposed revisions to the Second Restated NEPOOL Agreement (NEPOOL Agreement) to state that members of the press are not eligible to become NEPOOL members and to define the term “Press” (NEPOOL Press Amendments). In this order, we deny rehearing.

I. Background

2. The NEPOOL Agreement outlines the establishment of NEPOOL and its governance rules, and NEPOOL Participants, also referred to simply as NEPOOL “members,”² act through the NEPOOL Participants Committee. The NEPOOL Participants Committee is authorized by section 6.1 of the NEPOOL Agreement and section 8.1.3(c) of the Participants Agreement³ to represent NEPOOL in proceedings before the Commission. Pursuant to section 2.2 of the Participants Agreement, NEPOOL provides the sole participant processes for advisory voting on ISO New England Inc.

¹ *New England Power Pool Participants Comm.*, 166 FERC ¶ 61,062 (2019) (NEPOOL Agreement Order).

² *Id.* P 44.

³ The Participants Agreement is the agreement among ISO New England Inc. (ISO-NE) and the NEPOOL Participants acting by and through the NEPOOL Participants Committee and the Individual Participants (as defined therein). NEPOOL Agreement, section 1.64.

matters and the selection of ISO-NE Board members, except for input from state regulatory authorities and as otherwise may be provided in the ISO-NE Transmission, Markets and Services Tariff (Tariff), Transmission Owners Agreement, and the Market Participant Services Agreement included in the Tariff. NEPOOL carries out these processes through various committees, with the NEPOOL Participants Committee and three technical committees responsible for specific tasks, responsibilities, and authorities dictated by NEPOOL arrangements.⁴

3. The NEPOOL Press Amendments proposed two principal changes to the NEPOOL Agreement. First, they contain a proposed definition of “Press” that defines the term as any individual who is (i) an employee, agent, or representative of any person or entity whose principal business includes common news reports for the purposes of publishing, broadcasting, or making available news to the public, and (ii) serving any role directly connected with the news collection and reporting. Second, the NEPOOL Press Amendments contain a proposed new section of the NEPOOL Agreement that makes the Press ineligible for both voting and non-voting NEPOOL membership.⁵

4. The NEPOOL Participants Committee noted in its filing that it had already revised its Principal Committee Bylaws and Standard Conditions to impose an obligation on all members not to quote publicly or to cause to be published (i) any statement made in, or (ii) any information distributed or shared confidentially in connection with, a NEPOOL meeting. The NEPOOL Participants Committee also stated that it had approved additions to the Participants Committee Bylaws that prohibit the public disclosure of statements made in NEPOOL meetings and clarified that the NEPOOL Participants Committee is the entity to approve or deny Press attendance as guests of members at NEPOOL meetings.⁶

5. The NEPOOL Participants Committee contended that permitting members of the press to become NEPOOL Participants would (i) inhibit NEPOOL’s ability to foster candid discussions and negotiations; (ii) limit its ability to narrow and resolve complex issues; (iii) increase the issues and scope of litigation at the Commission on ISO-NE Tariff changes; and (iv) undermine the effectiveness of the NEPOOL stakeholder process.⁷

6. The Commission rejected the NEPOOL Press Amendments in the NEPOOL Agreement Order. The Commission began by discussing the basis of its jurisdiction in

⁴ NEPOOL Agreement Order, 166 FERC ¶ 61,062 at P 2.

⁵ *Id.* P 6.

⁶ *Id.* P 8

⁷ *Id.* P 9.

this proceeding. It explained that NEPOOL membership enables stakeholders to provide input by attending NEPOOL meetings, engaging in deliberations, and voting on proposals that are before the NEPOOL Participants Committee. These proposals include Tariff changes and market rules proposed by ISO-NE, as well as alternative “jump ball” proposals that originate within NEPOOL. The Commission noted that the NEPOOL Participants Agreement requires ISO-NE to make a “jump ball” filing with the Commission when the NEPOOL Participants Committee supports by at least 60 percent a market rule modification that differs from an ISO-NE-proposed market rule modification. When this threshold is met, ISO-NE must file NEPOOL’s alternate proposal under Federal Power Act (FPA) section 205⁸ at the same time and on the same footing as ISO-NE’s proposal. Under the ISO-NE Participants Agreement, the Commission may adopt any or all of ISO-NE’s market rule proposal or the alternate market rule proposal that the Commission finds to be just and reasonable and preferable.⁹

7. The Commission found that NEPOOL’s rules regarding membership fall within the Commission’s jurisdiction because they directly affect Commission-jurisdictional rates.¹⁰ The Commission noted that NEPOOL membership confers voting rights and that the outcomes of NEPOOL votes both signal to the Commission stakeholder approval of ISO-NE proposals and have the potential to generate alternative “jump ball” proposals for Commission consideration. Consequently, the Commission found that the NEPOOL membership rules directly affect which filings the Commission receives under FPA section 205. The Commission stated that this finding is consistent with Commission precedent. The Commission noted that it had previously found that the stakeholder process within a regional transmission organization (RTO)/independent system operator “is a practice that affects the setting of rates, terms, and conditions of jurisdictional services of the type that the Supreme Court has held falls within the Commission’s jurisdiction.”¹¹

⁸ 16 U.S.C. § 824d(a) (2018).

⁹ NEPOOL Agreement Order, 166 FERC ¶ 61,062 at P 47.

¹⁰ Under FPA section 205, the Commission’s jurisdiction covers rates and charges by any public utility for or in connection with transmission or wholesale sales of electric energy in interstate commerce and to “all rules and regulations affecting or pertaining to” such rates. 16 U.S.C. § 824d(a). This “affecting” jurisdiction applies only to practices that “directly affect the wholesale rate.” *FERC v. Elec. Power Supply Ass’n*, 136 S.Ct. 760, 774 (2016) (*EPSA*).

¹¹ NEPOOL Agreement Order, 166 FERC ¶ 61,062 at P 48 (quoting *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229, at P 11 (2016) (*PJM*) (citing *EPSA*,

8. The Commission went on to find that the NEPOOL Participants Committee had not shown that the NEPOOL Press Amendments are just and reasonable and not unduly discriminatory or preferential. The Commission stated that the NEPOOL Press Amendments would deny NEPOOL membership to members of the press who otherwise would be eligible for NEPOOL membership as end-use participants and that they unjustly deny these persons the ability to vote on NEPOOL matters despite their stake in the outcome.¹² The Commission found that the record does not support the NEPOOL Participants Committee's concerns about reporting of stakeholder discussions by the press because the Participants Committee Bylaws and Standard Conditions already prohibit all NEPOOL members from reporting on deliberations or attributing statements to other NEPOOL members.¹³

9. Finally, the Commission stated that this proceeding is limited to determining whether the NEPOOL Press Amendments are just and reasonable and not unduly discriminatory or preferential. The Commission explained that arguments raising broader issues would be addressed in the related complaint proceeding in Docket No. EL18-196-000, which concerns the NEPOOL Participants Committee's policies prohibiting press and non-member, general public attendance at and reporting on NEPOOL stakeholder meetings.¹⁴

II. Rehearing Request

10. The NEPOOL Participants Committee maintains that the Commission did not explain how *PJM*¹⁵ supports the finding that NEPOOL's membership rules directly impact jurisdictional rates.¹⁶ According to the NEPOOL Participants Committee, *PJM* involves a wholly different set of facts, as it deals with an effort by PJM Interconnection,

136 S.Ct. at 774)).

¹² *Id.* P 49.

¹³ *Id.* P 50.

¹⁴ *Id.* P 51. The Commission addressed arguments raising broader issues in *RTO Insider LLC v. New England Power Pool Participants Committee*, 167 FERC ¶ 61,021 (2019) (*RTO Insider*), order on reh'g, *RTO Insider LLC v. New England Power Pool Participants Committee*, 170 FERC ¶ 61,035 (2020), issued in Docket No. EL18-196-000.

¹⁵ See *supra* note 11.

¹⁶ Rehearing Request at 5 (citing *PJM*, 157 FERC ¶ 61,229 at P 11).

L.L.C. (PJM) to recover costs that it expected to incur as part of its tariff obligation to provide for stakeholder input into the development of rates, terms, and conditions of service. The NEPOOL Participants Committee states that that cost recovery represents a clear impact on jurisdictional rates that is absent here.¹⁷ The NEPOOL Participants Committee states that the NEPOOL Press Amendments did not challenge or propose a jurisdictional rate, involve a public utility's revisions to its tariff, or attempt to recover the costs associated with a discrete aspect of the stakeholder process. The NEPOOL Participants Committee also states that the challenged conduct here is not that of a public utility subject to Commission jurisdiction, but rather that of a voluntary association that provides input to ISO-NE.¹⁸

11. The NEPOOL Participants Committee argues that the NEPOOL Agreement Order suggests that the Commission sees little to no limits on its jurisdiction. The NEPOOL Participants Committee bases this argument on *California Independent System Operator Corp v. FERC*.¹⁹ That case dealt with the question whether the Commission had authority under FPA section 206²⁰ to remove the board of directors of the California Independent System Operator Corp. and to dictate the method of choosing a new board under the theory that corporate governance of a public utility constitutes a "practice" that affects jurisdictional rates. The court rejected this theory. The NEPOOL Participants Committee notes that the court found that the theory could lead to a "staggering" expansion of Commission authority, and the NEPOOL Participants Committee argues that the NEPOOL Agreement Order rests on a similarly expansive theory of Commission authority. The NEPOOL Participants Committee states that the Commission finding in the NEPOOL Agreement Order "could subsume all aspects of the NEPOOL stakeholder process," including such things as the choice of venue for NEPOOL's meetings, NEPOOL's policy for admitting guests, the provisions for electing officers, or many other governing practices that are distinct from ratemaking.²¹

12. The NEPOOL Participants Committee states that it seeks clarification of the Commission finding that its membership rules directly impact Commission-jurisdictional rates. The NEPOOL Participants Committee also requests that the Commission fully articulate the basis for its decision, asserting that without an explanation of why *PJM* is

¹⁷ *Id.* at 6.

¹⁸ *Id.*

¹⁹ 372 F.3d 395 (D.C. Cir. 2004) (*CAISO*).

²⁰ 16 U.S.C. § 824e.

²¹ Rehearing Request at 8.

relevant here, the Commission will have failed to engage in reasoned decision-making.²² The NEPOOL Participants Committee states that if the Commission does not provide this clarification, it seeks rehearing on the grounds that the Commission has failed to explain the basis of its jurisdiction over the NEPOOL Press Amendments.²³

13. Public Citizen, Inc.; RTO Insider LLC; and Sustainable FERC Project, Conservation Law Foundation, Earthjustice, and Natural Resources Defense Council filed answers to the NEPOOL Participants Committee's request for clarification or rehearing.

III. Discussion

A. Procedural Matters

14. Rule 713(d) of the Commission's Rules of Practice and Procedure²⁴ prohibits answers to requests for rehearing. Accordingly, we reject the answers to the requests for rehearing in this proceeding.

B. Substantive Matters

15. The NEPOOL Participants Committee styles its filing as a request for clarification or, in the alternative, rehearing. While the NEPOOL Participants Committee asks the Commission to clarify the scope of its jurisdiction over the NEPOOL Press Amendments, it does not seek any specific clarification, i.e., the NEPOOL Participants Committee does not specify what it finds unclear in the Commission's finding. Instead, the NEPOOL Participants Committee argues that the Commission did not explain in the NEPOOL Agreement Order how *PJM* supports its claim of jurisdiction and that the Commission provided no other support for that claim. The NEPOOL Participants Committee then goes on to state that *PJM* is "factually dissimilar" and that "bare reliance" on that order represents a failure to engage in reasoned decision making.²⁵ Inasmuch as the NEPOOL Participants Committee alleges error in the Commission's order, and does not specify the lack of clarity in the Commission's order, we find that, in substance, the NEPOOL

²² *Id.* at 5-6.

²³ *Id.* at 6, 8-9.

²⁴ 18 C.F.R. § 385.713(d) (2019).

²⁵ Rehearing Request at 7.

Participants Committee's filing is a request for rehearing and will treat it as such.²⁶ For the reasons discussed below, we deny rehearing.

16. The NEPOOL Participants Committee is incorrect in asserting that *PJM* is the sole support for the Commission's assertion of jurisdiction. The Commission provided a reasoned explanation of its jurisdiction based directly on the relevant statutory language and its application to the facts presented here. The Commission noted that under FPA section 205, it has jurisdiction over all rules and regulations affecting or pertaining to jurisdictional rates. The Commission explained that NEPOOL's membership rules "directly affect Commission-jurisdictional rates" because

[m]embership in NEPOOL confers voting rights, and the outcomes of NEPOOL votes both signal to the Commission stakeholder approval of ISO-NE proposals and have the potential to generate alternative "jump ball" proposals for Commission consideration.²⁷

17. As a result, "NEPOOL's rules with respect to membership directly affect what filings the Commission receives pursuant to FPA section 205."²⁸ The NEPOOL Participants Committee does not contest or address this finding. Instead, it maintains that the Commission acted in "bare reliance on *PJM*" and states that the Commission "provides no explanation as to how the cited precedent supports the Commission's jurisdictional claims."²⁹ This assertion is incorrect. The Commission provided reasoning that applied statutory language to the facts presented, as described above. *PJM* stands for the general principle that the stakeholder process is a practice that directly affects the

²⁶ See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Indep. Sys. Operator*, 133 FERC ¶ 61,014, at P 15 (2010) (the Commission is "not obligated to accept a pleading solely on the basis of its party bestowed title and, instead, determines the substance of the pleading"). See also *id.* P 35 (rejecting requests for clarification and reconsideration as untimely requests for rehearing); *New York Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,206, at P 3 (2006) (rejecting request for clarification as essentially an untimely request for rehearing); *Friends of Keeseville, Inc.*, 39 FERC ¶ 61,269, at 61,880, *reh'g denied*, 41 FERC ¶ 61,071 (1987), *aff'd sub nom. Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230 (D.C. Cir. 1988) (rejection of motion for reconsideration on finding the pleading was, in essence, an untimely request for rehearing).

²⁷ NEPOOL Agreement Order, 166 FERC ¶ 61,062 at P 48.

²⁸ *Id.*

²⁹ Rehearing Request at 5, 7.

setting of rates, terms, and conditions of jurisdictional services of the type that the Supreme Court has held falls within the Commission's jurisdiction.³⁰ Precisely how, and to what degree, the stakeholder process does so in a particular case requires analysis of the specific facts presented in that case. The Commission provided that analysis in the NEPOOL Agreement Order.

18. We also disagree with the NEPOOL Participants Committee's argument that *PJM* is not on point because it concerns actions by a Commission-jurisdictional RTO whereas NEPOOL is not a public utility subject to Commission jurisdiction. The NEPOOL Participants Committee has sought in this proceeding to differentiate NEPOOL from other stakeholder organizations on the grounds that in other RTOs, "stakeholders are assembled by and at the direction of the particular RTO."³¹ But NEPOOL's separate corporate existence from ISO-NE and the separation of functions between it and ISO-NE does not exempt NEPOOL activities that directly affect jurisdictional rates from Commission jurisdiction. FPA section 205 applies to "*all* rules and regulations affecting or pertaining to" jurisdictional rates,³² and this designation of scope is broad enough to encompass those aspects of NEPOOL operations that the Commission found to be jurisdictional in the NEPOOL Agreement Order.

19. Finally, we find no support for the NEPOOL Participants Committee's contention that the Commission's rejection of the NEPOOL Press Amendments could have "staggering" implications that could result in expansion of Commission jurisdiction "to cover the choice of venue for NEPOOL's meetings, NEPOOL's policy on admitting guests, the provisions for the election of officers, or a multitude of governing practices wholly distinct from ratemaking."³³ The NEPOOL Press Amendments pertain solely to qualifications for NEPOOL membership. The NEPOOL Participants Committee does not indicate how rejection of the Press Amendments could have implications for matters that do not pertain to qualifications for NEPOOL membership, such as meeting venue or admittance of guests, and we are unable to identify any such implications based on the record in this proceeding.

³⁰ See *supra* notes 10-11 and accompanying text.

³¹ New England Power Pool Participants Committee, Filing, Docket No. ER18-2208-000, at 2 (filed Aug. 13, 2018).

³² 16 U.S.C. § 824d(a) (emphasis supplied).

³³ Rehearing Request at 8.

The Commission orders:

The NEPOOL Participants Committee's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.