

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association Inc.	)	
	)	
v.	)	Docket No. EL10-____-000
	)	
ISO New England Inc.	)	
	)	
ISO New England Inc. and	)	
New England Power Pool	)	Docket No. ER10-787-000
	)	

***COMPLAINT REQUESTING FAST TRACK PROCESSING  
BY NEW ENGLAND POWER GENERATORS ASSOCIATION  
AGAINST ISO NEW ENGLAND***

The New England Power Generators Association Inc. (“NEPGA”)<sup>1</sup> hereby submits this Complaint against ISO New England Inc. (“ISO-NE”),<sup>2</sup> pursuant to section 206 of the Federal Power Act (“FPA”)<sup>3</sup> and Rule 206 of the Commission’s Rules,<sup>4</sup> and requests fast track processing under Rule 206(h).<sup>5</sup> This Complaint arises out of several unjust and unreasonable provisions of the tariff governing the Forward Capacity Market (“FCM”) which were not

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<sup>1</sup> NEPGA is a private, non-profit entity that advocates for the business interests of non-utility electric power generators in New England. NEPGA’s member companies represent approximately 28,000 megawatts of electrical generating capacity throughout the New England region. The comments contained in this filing represent the position of NEPGA as an organization, but not necessarily the position of any particular member with respect to any statement, concept, issue or position expressed herein.

<sup>2</sup> ISO-NE is the RTO for the New England bulk power market, which it administers pursuant to its tariff.

<sup>3</sup> 16 U.S.C. § 824e.

<sup>4</sup> 18 C.F.R. § 385.206.

<sup>5</sup> *Id.* § 385.206(h).

substantially corrected in the proposed FCM Revisions.<sup>6</sup> The Complaint replicates our Protest in Docket No. ER10-787-000,<sup>7</sup> making only a few additional narrow points.

We file in this separate complaint proceeding, in addition to filing the Protest, in order to eliminate any argument that the relief we seek cannot be granted in response to our Protest, but only in response to a separate complaint.<sup>8</sup> And because our arguments concern ISO-NE's tariff, we must name ISO-NE as the respondent. In reality, however, ISO-NE has spent many years pressing for effective capacity market reform, and we are hopeful that it will continue to do so in response to our concerns. We file this Complaint—not because we think ISO-NE has done anything wrong—but because we must do so in order to eliminate arguments that the Commission cannot grant the full measure of relief we seek. We hope that, as in some past complaint proceedings against RTOs,<sup>9</sup> this complaint will be viewed as a constructive effort, not as an onslaught of litigation. The Commission should summarily grant this Complaint, or grant the alternative relief set forth below.

We note again that there are a number of the components of the FCM Revisions that we support and that can be approved as just and reasonable. Other revisions, however, while pointing in the right direction, fall far short of being just and reasonable. The principal flaws of

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<sup>6</sup> *ISO New England*, Docket No. ER10-787-000, Various Revisions to FCM Rules Related to FCM Redesign (Feb. 22, 2010).

<sup>7</sup> *ISO New England*, Docket No. ER10-787-000, Motion to Intervene and Protest of the New England Power Generators Association (Mar. 15, 2010) (“Protest”).

<sup>8</sup> Specifically, the Protest, in addition to urging the rejection of the FCM Revision, also pointed out unjust and unreasonable features of the underlying FCM Rules and suggested alternatives which would avoid these problems. Some parties might question the propriety of such proposals in a protest filed under section 205 of the FPA, 16 U.S.C. § 824d. In order to remove any potential procedural obstacle to Commission action on these proposed alternatives, we raise the same issue and arguments in this Complaint under section 206, 16 U.S.C. § 824e, as is indisputably proper (as well as to discuss the issue of a refund effective date). *See* discussion on page 20.

<sup>9</sup> *See, e.g., Neptune Reg'l Transmission Sys. v. PJM Interconnection*, 110 FERC ¶ 61,098 (2005) (settling an unresolved policy question even as parties had no material disagreements of fact), *petition denied sub nom. Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164 (D.C. Cir. 2007); *FirstEnergy Serv. Co. v. PJM Interconnection*, 129 FERC ¶ 61,249 at PP 20-22 (2009) (seeking waiver of tariff provision).

the FCM and the FCM Revisions were set forth in detail in our Protest against the FCM Revisions. We incorporate the Protest, attached hereto as Appendix A, in its entirety and adopt its argument in full. We file this complaint in both dockets in order to ensure that the record is complete in both dockets, but do not, at this point, seek consolidation.

In addition to the points made in our Protest, which are summarized below, we make three other brief points:

*First*, in the few days since the filing of the Protest, additional leading industry experts have added their concerns to those already raised in the Protest. The Protest was supported by Dr. Roy Shanker<sup>10</sup> and Mr. Robert Stoddard.<sup>11</sup> In addition, ISO-NE's External Market Monitor, Dr. David Patton, has filed comments on behalf of Potomac Economics,<sup>12</sup> and Dr. Miles Bidwell has submitted an affidavit on behalf of the Boston Gen Companies,<sup>13</sup> both in the FCM Revisions docket. While their opinions differ on certain details, these experts all agree that the threat posed to the FCM by Out-of-Market ("OOM") supply is severe, and that the proposed FCM Revisions are inadequate to counter this threat; in addition, they each set forth the direction an effective response must take.<sup>14</sup>

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<sup>10</sup> *Affidavit of Roy J. Shanker on Behalf of New England Power Generators Association*, attached to Protest as Exhibit 1 ("Shanker Aff.").

<sup>11</sup> *Affidavit of Robert B. Stoddard on Behalf of New England Power Generators Association*, attached to Protest as Exhibit 3 ("Stoddard Aff.").

<sup>12</sup> *ISO New England*, Docket No. ER10-787-000, Motion to Intervene and Comments of Potomac Economics, Ltd., on Revisions to FCM Rules Related to FCM Redesign Filed by ISO New England, Inc. (Mar. 15, 2010), attached hereto as Appendix B ("Patton Filing").

<sup>13</sup> *ISO New England*, Docket No. ER10-787-000, Protest and Comments of the Boston Gen Companies at Attachment A (Mar. 15, 2010), attached hereto as Appendix C ("Bidwell Aff.").

<sup>14</sup> We will refrain from offering a point-by-point rebuttal of the justifications for suppressing capacity prices offered by parties with a vested interest in such price outcomes. The Protest anticipated and sufficiently addressed this issue.

*Second*, we also fully support Dr. Patton’s conclusion on locational pricing: that it is best to include all reliability needs in the modeling of zones. In the past, market power concerns have hampered efforts to adopt this approach. The FCM Revisions included a proposal to permit some types of de-list bids to be included in the modeling, and, in our Protest, we argued that *all* de-list bids are mitigated and should be allowed to set price. If the Commission were to determine that additional mitigation is warranted if constraints are modeled more robustly, we would be willing to modify our proposal to recommend that dynamic de-list bids from “pivotal” suppliers would not be allowed to set price, as set forth in detail below.

*Third*, we highlight the fact that the FCM Revisions—notwithstanding the suggestion of some parties with an interest in maintaining downwardly distorted prices—do *not* reflect a substantial compromise delicately balancing the interests of all stakeholders, nor could it be regarded as anything akin to a settlement. No one in the Generator Sector supported it, nor did most of the suppliers.<sup>15</sup> It maintains in general the underlying infirmities of the current FCM rules. Hence, the FCM Revisions should be entitled to no more deference than the proposed RPM settlement PJM submitted last year, which exclusively reflected load interests.<sup>16</sup>

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<sup>15</sup> See detailed discussion in Protest at 35-40.

<sup>16</sup> Cf. *PJM Interconnection*, 126 FERC ¶ 61,275 at PP 9-12, 20 (declining to treat tariff change agreement between RTO and load-side interests only as a “settlement”), *order on reh’g*, 128 FERC ¶ 61,157 (2009); see also Minutes of NEPOOL Participants Committee meeting (Nov. 6, 2009), available at [http://www.iso-ne.com/committees/comm\\_wkgrps/prtcpnts\\_comm/prtcpnts/mtrls/2010/jan82010/supplemental\\_notice\\_npc\\_mtg\\_20100108.pdf](http://www.iso-ne.com/committees/comm_wkgrps/prtcpnts_comm/prtcpnts/mtrls/2010/jan82010/supplemental_notice_npc_mtg_20100108.pdf) (FERC mediator warned stakeholders that “a solution that failed reasonably to acknowledge the needs and interests of any one Sector would enjoy far less deference than a proposal that was broadly accepted across Sectors”).

*I. THE CURRENT FORWARD CAPACITY MARKET IS UNJUST AND UNREASONABLE*

A complaint filed under section 206 needs to show that the existing rate design is “unjust, unreasonable, unduly discriminatory or preferential.”<sup>17</sup> This Complaint, as further elucidated by the Protest, amply meets that standard.

*A. The Forward Capacity Market Rules—Current and Proposed—Lead to Unjust and Unreasonable Prices Distorted by Buyer Market Power and Other OOM Supply*

Though often overlooked, the issue of mitigating buyer market power is as important as that of mitigating seller market power.<sup>18</sup> In its classic form, buyer market power is the exact mirror image of withholding on the supply side. Seller market power typically involves the uneconomic *withholding* of capacity *from* the market, while buyer market power typically involves the converse: the uneconomic *injection* of capacity *into* the market. This buyer-side conduct can be profitable in circumstances directly analogous to withholding.

The Commission correctly recognized this serious problem when it approved the FCM settlement. There it stated that “when loads own new resources, they may have an interest in depressing the auction price, since doing so could reduce the prices they must pay for existing capacity procured in the auction.”<sup>19</sup> The ISO-NE Internal Market Monitor has made similar observations.<sup>20</sup> For purposes of setting the competitive clearing price for a Forward Capacity Auction (“FCA”), the particular vehicle used to subsidize the new resource—and the real or

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<sup>17</sup> 16 U.S.C. § 824e(a).

<sup>18</sup> See detailed discussion in Protest at 15-21.

<sup>19</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (2006).

<sup>20</sup> *ISO New England Inc.*, Docket No. ER09-1282-000, Internal Market Monitoring Unit Review of the Forward Capacity Market Auction and Design Elements at 43 (June 5, 2009) (“Internal Market Monitor Report”) (“Because the annual new capacity requirement is small relative to the size of existing generation capacity, *buyers may have the ability and incentive to exploit the market’s price sensitivity* by building or contracting for a large amount of new capacity bilaterally and then offering such capacity into the FCA at an uncompetitively low price. This could depress the capacity clearing price in the FCAs, depending on the size of the capacity addition. This is a concern because depressed prices, or even the prospect of depressed prices, could prevent the FCM from attracting or retaining competitive, market-based resources.”) (footnote omitted; emphasis added).

alleged motive for the subsidy—is irrelevant (be it utility ownership, long-term contracts, or subsidies through state programs).

The FCM’s current Alternative Price Rule (“APR”) is almost entirely toothless against any persistent attempt of price distortion through buyer market power.<sup>21</sup> As a consequence, large-scale use of buyer market power was observed in the FCM operating under its current, flawed rules. Even the FCM Revisions concede that under the APR, “[w]hen significant quantities of OOM resources clear in the FCA and new entry is needed, the clearing price *may not reflect* the cost of new competitive resources because new resources are completely displaced by OOM resources that are willing to offer into the FCA at a price well below the cost of new resources supported only by market revenues.”<sup>22</sup> A more detailed and complete description of the actual state of the FCM is offered by Mr. Stoddard.<sup>23</sup>

In light of this, the need for reform of the FCM to effectively curb the price-distorting effects of uneconomic supply cannot sensibly be disputed. Indeed, the primary focus of our Protest was ISO-NE’s and the New England Power Pool’s (“NEPOOL”) proposed FCM Revisions and their changes to the APR.<sup>24</sup> Unfortunately, the FCM’s proposed replacements, APR-1, -2, and -3, are barely improvements and will be circumvented almost as easily as the original version and, even when triggered, will fail to set the appropriate price.<sup>25</sup>

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<sup>21</sup> See detailed discussion in Protest at 22-26.

<sup>22</sup> Filing letter accompanying FCM Revisions (“Filing Letter”) at 13 (emphasis added).

<sup>23</sup> Stoddard Aff. ¶¶ 12-21.

<sup>24</sup> Filing Letter at 13-19.

<sup>25</sup> See detailed discussion in Protest at 30-35.

*B. The Forward Capacity Market Rules—Current and Proposed—Are Unjust and Unreasonable Because They Fail to Acknowledge Locational Price Differences*

Our Protest previously demonstrated that FCM fails to meet the Commission requirement that it be *locational*.<sup>26</sup> New England has, however, had a single uniform clearing price in the first three FCAs (aside from some minor variances resulting from pro-rationing rules). Prices have not separated, even though ISO-NE has rejected de-list bids in constrained regions for reliability reasons in two of the first three FCAs. This alone is compelling evidence that there are problems with the current rules.

ISO-NE and NEPOOL proposed some improvements, but, in addition to those, we submit that all zones should be modeled in the first instance. There is no justification for failing to do so. Prices will only separate if there are true zonal constraints—precisely the conditions when they should separate. And locational signals then will be sent to new generation or demand resources that additional supply is needed.

ISO-NE and NEPOOL also propose to add some types of bids to those that are analyzed in determining whether to create additional zones, but we advocate that additional bids should also be included. Another option, as discussed further below, would be to include all reliability requirements in the modeling of zones.

*C. CONE Is Currently Understated and Is Causing the Unjust and Unreasonable Application of Tariff Provisions that Rely Upon CONE*

Our Protest also demonstrated that the Cost of New Entry (“CONE”) value used in FCM is far below any reasonable estimate of the actual cost of new entry and that this is causing tariff provisions that rely upon CONE to be ineffectual.<sup>27</sup> We thus request that CONE be updated to reasonable levels, either at the original FCM value of \$7.50/kW-month or by a new estimate of

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<sup>26</sup> See *id.* at 53-67.

<sup>27</sup> See detailed discussion in Protest at 67-75.

the costs to construct a new peaking unit (PJM recently underwent a similar process, and the latest reset process is ongoing in NYISO).

## *II. ADDITIONAL EVIDENCE CONFIRMS THAT ISO-NE'S AND NEPOOL'S PROPOSED APR REFORMS "FALL WELL SHORT"*

Every expert economist that filed analyses in response to the ISO-NE and NEPOOL FCM Revisions agreed that the proposed reforms do not go nearly far enough.<sup>28</sup> In addition to Dr. Shanker and Mr. Stoddard, the External Market Monitoring Unit (“EMMU”) for ISO-NE, Dr. David Patton of Potomac Economics, found that the proposed reforms “fall well short” of the objective of “minimiz[ing] the price effects of OOM capacity.”<sup>29</sup> Dr. Miles Bidwell—like Mr. Stoddard, one of the principal designers of the FCM—found that the proposed reforms “are woefully inadequate to address the profound problems that afflict the FCM.”<sup>30</sup> We address each in turn.

### *A. Dr. Patton*

As the EMMU, Dr. Patton is “required under the provisions of the ISO-NE Tariff to monitor and evaluate the market outcomes and market rules to promote the efficiency and competitiveness of the ISO-NE markets.”<sup>31</sup> In response to a request by NEPGA, Dr. Patton is evaluating ISO-NE’s and NEPOOL’s proposed APR and has issued his initial review.<sup>32</sup> In his analysis, Dr. Patton identifies:

[T]he practical objective of the APR or similar provisions would be to minimize the price effects of OOM capacity without undue increases in consumer costs.

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<sup>28</sup> ISO-NE’s own economist, Dr. Robert Ethier, did not address this question, but ISO-NE itself already proposed an additional stakeholder process to discuss further reforms to the APR.

<sup>29</sup> Patton Filing at 15.

<sup>30</sup> Bidwell Aff. ¶ 32.

<sup>31</sup> Patton Filing at 2.

<sup>32</sup> Dr. Patton’s full analysis will be included in his “2009 Market Assessment to be published this spring.” *Id.* at 3.

This is the objective we will use to evaluate the rules that seek to address OOM capacity, although a second objective that could be considered is whether the proposed revisions work to deter entry of OOM capacity into the region.<sup>33</sup>

After analyzing the proposed reforms by ISO-NE and NEPOOL to the APR, Dr. Patton concluded that the proposed reforms “fall well short” of these objectives, and identified four specific shortcomings, including the following:

- The APR does not trigger when new capacity is not needed, or when the OOM quantity is less than the amount of new capacity needed. In both cases, the OOM capacity can substantially lower prices while no APR adjustment will occur.
- The APR adjustment only occurs when the OOM capacity exceeds the entire demand for new capacity. Again, the OOM capacity may be substantially affecting price when this criterion is not satisfied.
- The APR pricing provision to set the price at the lower of CONE or the lowest-cost uncleared new supply offer may result in a price that is substantially lower than the new supply offer that would have actually cleared and set the FCA price absent OOM capacity.<sup>34</sup>

We agree with these findings, which are consistent with those of Dr. Shanker and Mr. Stoddard, and support the relief sought by this Complaint. For this reason, Mr. Stoddard proposed NEPGA’s solution to the APR, which borrows from PJM’s and NYISO’s approaches, while also picking up on some of ISO-NE’s and NEPOOL’s proposed changes.

We disagree with Dr. Patton, however, that the way to address these issues is to kick them back to the stakeholder process.<sup>35</sup> To begin with, Dr. Patton is offering his opinion as an expert economist, and he has no expertise to recommend “9-12 months” as “a more reasonable timeframe.” In any event, stakeholders already reviewed these identical issues and failed to

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<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.*

reach a consensus that did not wholly shut out the entire Generator Sector and most suppliers.<sup>36</sup>

There is no indication that the supermajority of net-purchasing interests in NEPOOL will suddenly begin voting against their short-term economic interests to restrain the impacts of buyer market power. For all of the reasons that we discussed in our Protest, the Commission should decide these issues itself, or failing that, set them for hearing. Expedited settlement talks (60 days) in lieu of hearing may be appropriate with clear Commission guidance.

*B. Dr. Bidwell*

Dr. Bidwell filed an affidavit on behalf of the Boston Gen Companies. Dr. Bidwell was the Connecticut Department of Public Utility Control's expert witness in the underlying Locational Installed Capacity trial and FCM settlement proceedings, and, with "other economists, especially Mr. Robert Stoddard, and Prof. Cramton, worked out the myriad details of what became the FCM market design."<sup>37</sup> Dr. Bidwell reviewed ISO-NE's and NEPOOL's proposed changes to the APR and concluded that "I do not disagree that most of these proposals will improve market efficiency, but they are *woefully inadequate* to address the profound problems that afflict the FCM."<sup>38</sup> "[E]ven though there is ample capacity at the moment, the FCM is in very bad health and *immediate action* is required if it is to serve its intended purpose and, over time, to provide adequacy at the least possible cost."<sup>39</sup>

Thus, to sum up the record evidence, Dr. Patton (the EMMU) and Dr. Bidwell—along with Mr. Stoddard (two of the primary architects and negotiators of the current FCM design) and Dr. Shanker (a foremost expert on the economics of RTO market design)—all agree that ISO-

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<sup>36</sup> See Protest at 35-40 (discussing stakeholder process).

<sup>37</sup> See Bidwell Aff. ¶¶ 3-4.

<sup>38</sup> *Id.* ¶ 32 (emphasis added).

<sup>39</sup> *Id.* ¶ 5 (emphasis added).

NE's and NEPOOL's proposed reforms to the APR are "woefully inadequate." Immediate action is needed to remedy the unjust and unreasonable APR currently in place and the unjust and unreasonable APR that ISO-NE and NEPOOL propose to implement.

### *III. ADDITIONAL EVIDENCE CONFIRMS THAT RELIABILITY NEEDS SHOULD BE INCLUDED IN THE MODELING OF ZONES*

Dr. Patton also discussed the modeling of zones, taking the position that "the issues that arise in evaluating the current FCM rules can be traced to the fact that capacity zones are formed only some of the time when they may be warranted."<sup>40</sup> He further concludes that as a matter of market design "it is far better to include the reliability requirements to the market by modeling the zones,"<sup>41</sup> and suggests that additional FCM rules changes may be necessitated if this goal is to be reached.<sup>42</sup> As Dr. Patton explains, however, there has been a strong reluctance against including all reliability requirements in the modeling of zones.

We agree that improving the modeling is a key component of an effective FCM design, and has the potential to decrease reliance on the APR, particularly the proposed APR-3.<sup>43</sup> The Commission, ISO-NE and NEPOOL have all already noted that resolution of the pricing impacts of rejected de-list bids is critical in the FCM.<sup>44</sup> However, to the extent that this issue cannot be

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<sup>40</sup> Patton Filing at 17.

<sup>41</sup> *Id.* at 14.

<sup>42</sup> Dr. Patton also states that "[f]rom an efficiency perspective, the market requirements should reflect the reliability requirements to the maximum extent that is feasible, although market power must be considered. . . ." *Id.* at 16; *see id.* at 16-20 (discussing same).

<sup>43</sup> *See* Shanker Aff. ¶¶ 39-41.

<sup>44</sup> *See ISO New England*, Docket Nos. ER07-546-000 and ER07-547-000, Filing Containing Revisions to Market Rules Implementing FCM Settlement Agreement at 20 (Feb. 15, 2007) ("[S]takeholders are concerned that [treating de-list bids rejected for reliability as zero price] could inappropriately depress the FCA clearing price. A proposal has been put forth that they be treated as Out-of-Market Capacity, which could result in the application of the Alternative Capacity Price Rule. . . . While the ISO's initial review of this proposal is favorable, the proposal was advanced too late in the stakeholder process to receive a full evaluation. "); *ISO New England Inc.*, 120 FERC ¶ 61,190 at PP 11-12 (2007) ("it is essential to market certainty to know the effect of . . . de-list bid[s] rejected for reliability] on the market clearing price. . . . It is therefore critical that ISO-NE meet the May 15, 2008 deadline" to

fully resolved by better modeling of reliability needs in advance of the auction, APR-3 becomes a critical backstop against residual price-distortion.<sup>45</sup>

Under the FCM Revisions, some reliability needs will continue to go unmodeled because of local market power concerns. Dr. Patton suggests what appears to be a new mitigation regime,<sup>46</sup> but ISO-NE and NEPOOL have already proposed incremental measures to permit additional types of de-list bids to set price, along with a new “pivotal supplier” test to determine which suppliers’ de-list bids can affect modeling and price formation within a zone.

ISO-NE’s and NEPOOL’s proposal would still over-mitigate and create inefficiencies in the FCM. In our Protest, we argued that *all* de-list bids should be allowed to set price, because all such bids are mitigated, either by being held to net risk-adjusted going-forward costs, subject to review by the market monitor and the Commission, or by being below the 0.8 times CONE threshold that stakeholders and the Commission agreed did not merit review by the Internal Market Monitor. If, however, the Commission determines that additional mitigation is warranted, we recommend two modifications to ISO-NE’s and NEPOOL’s proposal: *First*, the proposed “pivotal supplier” test should include all qualified new entry, as well as existing capacity, in the calculation of available supply within a zone. (ISO-NE’s and NEPOOL’s test excluded new resources.)<sup>47</sup> *Second*, the pivotal supplier test should apply only to dynamic de-list bids—and, even then, only to suppliers with more than one resource within a zone, and with a portfolio

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resolve the issue.); Peter Cramton, Memorandum to ISO-NE Markets Committee, *Why Counting Rejected De-Lists as Out of Market Capacity Benefits Rate Payers* (Apr. 26, 2007), available at [http://www.iso-ne.com/committees/comm\\_wkgrps/mrks\\_comm/mrks/mtrls/2007/apr242007/a2\\_cramton\\_memo\\_04\\_26\\_07.doc](http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2007/apr242007/a2_cramton_memo_04_26_07.doc).

<sup>45</sup> See Stoddard Aff. ¶¶ 63-67.

<sup>46</sup> Patton Filing at 19-21.

<sup>47</sup> See Protest at 61-63 (discussing proposed pivotal supplier test).

larger than some reasonable threshold size.<sup>48</sup> Absent these circumstances, the supplier lacks the ability and the incentive to raise price, and its bids should be permitted to set clearing prices.

We submit that these incremental steps would provide stringent and effective mitigation of de-list bids, which would be far better than the existing blunt force of simply denying them any role in price formation. These steps also are better than pursuing an entirely new mitigation regime.

#### *IV. RELIEF REQUESTED*

Regarding the OOM issue, we request that the Commission reject ISO-NE's and NEPOOL's proposed revisions, find our proposal to be just and reasonable, and order ISO-NE to make a compliance filing incorporating our proposal into the tariff *before* the next FCM auction in August 2010.<sup>49</sup> In addition, we request that the Commission direct the ISO-NE internal market monitor to determine whether the existing classification of resources in New England as OOM, or as "in-market" resources, is in fact supported by the underlying facts, and to make appropriate changes. Our contention is that the real level of OOM supply is much greater than the current classifications reflect, and that this underlying error will cause future FCM auction prices to be unjust and unreasonable. And we respectfully request that the Commission give specific guidance to that process, adopting the definition of OOM advocated by ISO-NE and NEPOOL in their current filing, which we support.

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<sup>48</sup> Mr. Stoddard discussed the issue of considering "market share as well as pivotal supplier status." Stoddard Aff. at ¶ 103. "When supply is very tight . . . even market participants with small shares will be deemed pivotal. In the extreme, if new capacity is required, *all* existing supply will be deemed pivotal and disallowed from setting the zonal clearing price. But when supplies are tight, capacity prices *should* be near CONE. It is not unreasonable, therefore, under these circumstances to allow Dynamic De-List Bids from suppliers with small market shares to create and price a Capacity Zone. The Commission has historically used a structural screen of 20 percent for such purposes." *Id.*, citing, e.g., *AEP Power Mktg.*, 107 FERC ¶ 61,018 at P 8 (2004) ("While the Commission did not employ a bright-line test, it looked to a benchmark for generation market power of whether a seller had a market share of 20 percent or less in each of the relevant markets.").

<sup>49</sup> See detailed discussion in Protest at 40-53.

If the Commission declines to summarily approve our APR proposal, we request that the Commission set for expedited trial-type hearings the question of which APR mechanism should be implemented. If that question is set for hearing, the Commission also should include the question, set forth above, regarding which resources are accurately classified as OOM, and which are not.

We respectfully submit that we have provided substantial record evidence to support a Commission decision in our favor without the need for a hearing. But we certainly have provided sufficient evidence to support a hearing—if a hearing is deemed necessary. The Commission recently instituted hearing proceedings in a case brought by the Richard Blumenthal, Attorney General of Connecticut, and other Connecticut state entities, finding as follows:

Connecticut Parties have made broad allegations of market manipulation. The complainants have provided little evidence in support of these allegations. Typically, the Commission looks with disfavor on poorly supported complaints. We are mindful, however, of the unique history of the allegations regarding the capacity importers' bidding strategy raised in the complaint, including the inconsistency in the ISO-NE's position regarding these allegations. Because of this unique history, we will in this instance set the complaint for trial-type evidentiary hearing before an administrative law judge. . . .<sup>50</sup>

The Commission thus set for hearing this “poorly supported” complaint. Here, there is no problem of this Complaint being “poorly supported.”

We would be willing to interpose Settlement Judge proceedings for a limited time period, such as 60 days. And again, we respectfully request that the Commission give specific guidance, requiring that the APR emerging from this process must mitigate OOM as fully as possible, consistent with the underlying principles of the FCM market design. That guidance should include an express finding that all offers at prices below a resource's long-term average costs, net of non-FCM market revenues, should be mitigated, in order “to reset the clearing price to a level

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<sup>50</sup> *Blumenthal v. ISO New England Inc.*, 128 FERC ¶ 61,182 at P 53 (2009).

that would be expected in a competitive market,”<sup>51</sup> consistent with the core design principle of FCM—that clearing prices should, over time, average the actual CONE. We are concerned that without the Commission’s guidance, stakeholders will be unable to resolve these important differences, given the broad gulf that remains between load and supplier views of the appropriate FCM design.

Alternatively, if the Commission declines to order trial-type hearings, it should order an expedited paper hearing, including expert presentations, and resolve the issues on a fast-track basis. In either case, the Commission should find that the final pricing for the next FCM auction will be subject to the outcome of such proceeding.

Finally, if the Commission, over our strong objection, accedes to ISO-NE’s request that the OOM issue be left, once again, for the stakeholder process, we respectfully request that the Commission give the same specific guidance we propose for trial-type proceedings, with strict deadlines, and on a far faster track than ISO-NE and NEPOOL propose (such as 60 days).

We also request that the Commission grant the other relief sought in our Protest. In addition, as further discussed herein, the Commission should require that all zones be modeled in the first instance. As Dr. Patton recommends, such modeling should include the modeling of local reliability needs to the fullest extent possible. All properly mitigated de-list bids should also be considered in forming zonal prices, including all static de-list bids and all dynamic de-list bids from non-pivotal suppliers (with the “pivotal” test including qualified new resources in the calculation of supply) or from a supplier with a single resource or *de minimis* portfolio within a zone. Finally, CONE should be reset to more reasonable levels.

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<sup>51</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 at P 114.

The Commission has sufficient information to grant the relief requested for these non-OOM issues without requiring further proceedings. If the Commission decides that further proceedings are necessary, we respectfully request that they be set for trial-type or paper hearings rather than punted to a repeat of the stakeholder process, for the same reasons that we raised above with respect to the OOM issues.

We anticipate responses claiming that these tasks cannot all be accomplished in time to take effect before the next auction. It is not apparent, at this point, why that would be the case. But if the Commission were to develop concerns on this front, we urge the prioritization of an effective OOM remedy. We do not see any reason why the OOM problem cannot be fully solved before the next auction, even if it means “manual” mitigation of OOM offers. And there certainly seems to be ample time to revisit prior OOM classifications. The Commission should also ensure that non-controversial aspects of the FCM Revisions are adopted without delay.

## V. *OTHER MATTERS*

### A. *Other Proceedings*

In accordance with Rule 206(b)(6),<sup>52</sup> we state that the matters raised in this Complaint are pending before the Commission in Docket No. ER10-787-000. As explained above, we are filing the instant Complaint to eliminate any argument that the Commission cannot act on the relief we request in the Protest absent a complaint.

### B. *Negotiations Among the Parties*

In accordance with Rule 206(b)(9) of the Commission’s Rules of Practice and Procedure,<sup>53</sup> NEPGA verifies that it has attempted in good faith to resolve these matters, but

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<sup>52</sup> 18 C.F.R. § 385.206(b)(6).

<sup>53</sup> *Id.* § 385.206(b)(9).

those attempts have been unsuccessful.<sup>54</sup> The parties have already undergone an extensive stakeholder process that included the assistance of a FERC-delegated mediator, Ms. Cynthia Marlette. As such, we do not believe that it would be productive to utilize the Commission's informal dispute resolution procedures.

*C. Financial Impact*

The suppression of capacity prices through OOM supply has a significant financial impact. A lower bound estimate of their order of magnitude may be obtained by multiplying the Net ICR requirement of FCA #3 (31,965 MW) by the difference between the artificially depressed auction-clearing price (\$2.951/kW-month) and its already depressed estimate of administrative CONE (\$4.918/kW-month),<sup>55</sup> or over \$750 million/year. The actual harm, likely to perpetuate itself over many years unless remedied, resulting in suppression from an equilibrium level higher than the administrative CONE, and including the other harms discussed herein, is likely to be substantially larger.

*D. Service and Form of Notice*

In accordance with Rule 206(c),<sup>56</sup> we are simultaneously serving a copy of this filing on ISO-NE and all parties listed on the official service lists maintained in connection with the proceeding in Docket ER10-787-000, which parties and regulatory agencies we reasonably expect to be affected by this Complaint. We have attached herein as Appendix D a Form of Notice suitable for publication in the *Federal Register* in accordance with Rule 206(b)(10).<sup>57</sup>

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<sup>54</sup> See detailed discussion in Protest at 35-39 (explaining the just-concluded stakeholder process and why the OOM and related issues cannot be resolved without Commission impetus).

<sup>55</sup> *ISO New England Inc.*, Docket No. ER10-186-000, Forward Capacity Auction Results Filing at 2-3 (Oct. 30, 2009).

<sup>56</sup> 18 C.F.R. § 385.206(c).

<sup>57</sup> *Id.* § 385.206(b)(10).

*E. Request for Fast Track Processing*

The issues raised in this Complaint justify Fast Track processing under Rule 206(b)(11).<sup>58</sup>

As discussed more fully in the Protest, capacity prices set in the first three FCAs have already been severely depressed by OOM supply.<sup>59</sup> The FCM Revisions are unlikely to ease this distortion<sup>60</sup> and, even in the highly doubtful case that ISO-NE proposed an effective solution in 18 months,<sup>61</sup> this solution could go into effect no earlier than FCA #6, which will set capacity prices starting on June 1, 2015. Hence, delay would result in at least five years of unjust and unreasonable capacity prices. Furthermore, if, as argued in the FCM Revisions,<sup>62</sup> applying new pricing rules to already-existing generation would be considered impermissibly retroactive—a position we oppose—all current OOM generation and all such built until FCA #6 apparently would be permitted to suppress capacity prices indefinitely.

Under these circumstances, the Commission is well justified in exercising its authority to resolve this matter on a Fast Track basis, which would permit the upcoming FCA #4 to be held under a just and reasonable tariff.

*F. Refund Effective Date*

We request the earliest possible refund effective date, which, by statute, is the date this complaint is filed. Our purpose, as explained above, is for relief, in the form of just and

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<sup>58</sup> *Id.* § 385.206(b)(11).

<sup>59</sup> *See* Protest at 26-30.

<sup>60</sup> *See id.* at 30-35.

<sup>61</sup> Filing Letter at 10.

<sup>62</sup> *Id.* at 16 & n.80 (“The amount of Carried Forward Excess Out-of-Market Capacity for the first three Capacity Commitment Periods entering the fourth FCA shall be considered zero (*i.e.*, there shall be no retroactivity in its application).”).

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reasonable tariff provisions, to be in effect before FCA #4, currently scheduled to be held in August 2010.<sup>63</sup>

*CONCLUSION*

For the foregoing reasons, the Commission should accept the proposed changes to ISO-NE's tariff discussed herein.

Respectfully submitted,

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/s/

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Association*

March 23, 2010

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<sup>63</sup> *ISO New England Inc.*, 128 FERC ¶ 61,135 at P 5 (2009).

\* NEPGA requests that all further correspondence, communications and other documents relating to this docket be served upon these individuals electronically at [aoconnor@nepga.org](mailto:aoconnor@nepga.org) and [Paul.Wight@skadden.com](mailto:Paul.Wight@skadden.com).

*APPENDIX A*

*Protest*

*APPENDIX B*

*Patton Filing*

*APPENDIX C*

*Bidwell Affidavit*

*APPENDIX D*

*Form of Notice*



The Commission encourages electronic submission of protests and interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, D.C. There is an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose  
Secretary