

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association Inc.	)	
	)	
v.	)	Docket No. EL10-50-000
	)	
ISO New England Inc.	)	
	)	
ISO New England Inc. and	)	
New England Power Pool	)	Docket No. ER10-787-000
	)	

*MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE  
NEW ENGLAND POWER GENERATORS ASSOCIATION*

The New England Power Generators Association Inc. (“NEPGA”) hereby seeks leave to submit this Answer to various comments, protests and answers in response to our protest and complaint in the captioned proceedings. We respectfully submit that good cause exists to accept this Answer as it corrects and supplements the record of these proceedings on a few critical points related to the issue of out-of-market (“OOM”) entry destabilizing the capacity markets.

Our answer to load can be summed up in three words: *res ipsa loquitur*—the thing speaks for itself (or, we might say, the market power speaks for itself). The load parties never deny that they support bidding subsidized new resources into the Forward Capacity Auction (“FCA”) *below cost*. They see nothing wrong with doing so.<sup>1</sup> They see nothing wrong with the obvious price-discriminating effect that this has on all *existing* resources.<sup>2</sup> They claim that

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<sup>1</sup> See, e.g., *New England Power Generators Ass’n v. ISO New England Inc.*, Docket No. EL10-50-000, Intervention and Comments of NSTAR Electric Company at 7 (Apr. 6, 2010) (“NSTAR Comments”) (arguing that below cost bids should only be mitigated if the buyer “acted with no reason other than for the express purpose of increasing supply in order to reduce prices.”); see also *id.* at 9 (according to NSTAR, most OOM capacity “has been elicited due to national energy policy and state mandates—not for the purpose of suppressing capacity prices”).

<sup>2</sup> See, e.g., *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Answer and Answer of the Connecticut Department of Public Utility Control, the Vermont Public Service Board, the Vermont Department of Public Service and the Northeast Utilities Companies at 9, 11 (Mar. 30, 2010) (“Joint Filing Supporters’ Answer”) (“Paying existing generators more will not enhance reliability or provide any additional benefits to customers.”); see also *New England Power Generators Ass’n v. ISO New England Inc.*, Docket No. EL10-50-000, Motion to Intervene and

“serious questions may be raised about whether continuation of the [Alternative Price Rule (“APR”)] is warranted at all.”<sup>3</sup> Some feebly assert that this price discriminatory effect is only incidental.<sup>4</sup>

Almost unanimously, the load parties sidestep the real issue—*bidding into the auctions below cost*<sup>5</sup>—erroneously claiming that existing generators are seeking a ban on subsidy programs (state procurement, renewables or demand response programs).<sup>6</sup> They argue that this type of procurement is the only way to acquire new resources, but they omit any justification for why the below-cost bids resulting from this procurement should be allowed to artificially suppress wholesale market prices.<sup>7</sup> Some claim that a state can do whatever it wants to suppress

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Protest of Eastern Massachusetts Consumer-Owned Systems at 10-11 (Apr. 6, 2010) (asserting that buyer market power is a “canard” because the “purpose of the Federal Power Act [“FPA”] is to guard *the consumer* from exploitation.”) (internal citation omitted). According to load, generators have no similar safeguards to protect themselves against exploitation by load. The Supreme Court, however, recently rejected the proposition that the FPA casts a sharper eye at rates which are “too high” than at those which are “too low.” *See Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2747 (2008) (“The standard for a buyer’s challenge must be the same, generally speaking, as the standard for a seller’s challenge . . .”).

<sup>3</sup> Joint Filing Supporters’ Answer at 15.

<sup>4</sup> *See, e.g.*, NSTAR Comments at 9.

<sup>5</sup> After reviewing all of the filings in this proceeding, it appears that the NSTAR Comments and the Joint Filing Supporters’ Answer are the only load comments to discuss the actual issue in this case—bidding subsidized new resources below cost. *See* NSTAR Comments at 7 (discussed *supra* at 1, n.1); Joint Filing Supporters’ Answer at 25-37. But even in its lengthy exposition, the Joint Filing Supporters only indirectly acknowledge the fact that Connecticut required subsidized new entry to bid into the FCA below cost: “[T]he CT DPUC denied that *by setting bids that contracted suppliers would offer in the [Forward Capacity Market (“FCM”)] the CT DPUC unlawfully fixed prices.*” *Id.* at 33 (emphasis added). It is odd that the CT DPUC would cite *itself* to say that its behavior is lawful (and, contrary to the CT DPUC’s suggestion, *id.* at 25 & n.99, we did not actually request that the Commission address whether that behavior constituted market manipulation, *see ISO New England Inc.*, Docket No. ER10-787-000, Motion to Intervene and Protest of New England Power Generators Association at 3-4 (Mar. 15, 2010) (“NEPGA Protest”). Regardless, to our knowledge, these are the only acknowledgements by load in the entire record—indirect though they are—that load was bidding subsidized new resources below cost into the FCA.

<sup>6</sup> *See, e.g.*, Joint Filing Supporters’ Answer, Ex. DPUC-1, Direct Testimony of James F. Wilson at 38:14-17 (“Wilson Testimony”); *contra* NEPGA Protest at 48-51, NEPGA Ex. 1, Shanker Aff. ¶ 6 (“Shanker Aff.”), NEPGA Ex. 3, Stoddard Aff. ¶ 28 (“Stoddard Aff.”).

<sup>7</sup> *See, e.g.*, *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Intervene Out-of-Time and Answer of the Connecticut Office of Consumer Counsel at 5-6 (Apr. 1, 2010) (“CTOCC and CTAG Answer”).

prices in a FERC-regulated market so long as it somehow is furthering state policy goals.<sup>8</sup> And some state that existing resources should shut down if they cannot keep up with the subsidized new resources.<sup>9</sup> All in all, the load parties are proud of what they have done, and trumpet again and again how healthy and successful the FCM has been, and the vast surplus of (subsidized) new entry that has come into the market.<sup>10</sup>

In sum, load sees no problem. Nevertheless, if FERC finds that there is a problem, these same parties argue that the proposals already on the table (that they supported) already go far enough to remedy it. If FERC finds that more is needed, then, in their view, *stakeholders*—meaning themselves, as the 70% supermajority of stakeholder interests—should be given another chance to address it. Load seeks this notwithstanding the fact that stakeholders just recently concluded a process on the exact same issue, but failed to reach a consensus broad enough to include net sellers (shutting out the entire Generator sector). In other words, load urges the Commission to let the parties who believe that there is no problem take another bite at solving the purportedly non-existent problem.

ISO-NE also supports an additional stakeholder process even though it recognizes the continuing serious nature of the OOM issue, while warning that a stakeholder solution to these

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<sup>8</sup> See, e.g., *New England Power Generators Ass'n Inc. v. ISO New England Inc.*, Docket Nos. EL10-50-000 and ER10-787-000, Motion to Intervene and Comments of the New England Conference of Public Utilities Commissioners at 5 (Apr. 6, 2010) (“NECPUC Comments”). The Commission should reject this attack on its authority out of hand. While FPA sections 201(f) and 201(b)(2) confirm that the Commission’s authority under Part II of the FPA does not apply to governmental entities, except as specifically provided, the Commission’s regulation of the organized markets operated by RTOs like ISO New England Inc. (“ISO-NE”) (which is a public utility) nevertheless affects governmental entities that participate in those markets and falls well within its authority under sections 205 and 206. See also *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-85 (D.C. Cir. 2009) (rejecting essentially the same arguments by same parties for the same reasons).

<sup>9</sup> See, e.g., Joint Filing Supporters’ Answer at 19-20.

<sup>10</sup> See, e.g., CTOCC and CTAG Answer at 5 (“Connecticut should be congratulated, not punished, for managing to craft contracts that allowed for financing and construction of needed new plants in the worst financing environment in seventy years.”).

OOM issues cannot be implemented any earlier than FCA #6, covering deliveries starting in June 2015.

This, we respectfully submit, will not do. FCM is at a critical juncture. The Commission has always found that “[t]he purpose of the New England FCM is to attract *and retain* sufficient capacity to maintain ISO-NE’s Installed Capacity Requirement, and to do so, FCM capacity prices will need to average out over time to the cost of new entry.”<sup>11</sup> Blatant price discrimination against existing resources obviously defeats these goals. The Commission either is going to put a stop to this nonsense and eliminate price discrimination against existing resources caused by OOM entry bidding below cost, or it can let “stakeholders” continue to debate another iteration of “compromises” (with themselves) and “balancing of interests” (their own),<sup>12</sup> while FCM—and with it the fundamental viability of the independent power producer model in New England—withers on the vine.

We highlight again that if this case involved *seller* market power instead of *buyer* market power, there would be no hesitation whatsoever.<sup>13</sup> There would be immediate and strong ISO-NE and Commission action, and certainly net *sellers* of capacity would not be put in charge of whether, when and how their own market power would be remedied.

Equally strong and immediate action is required here. The Commission should unequivocally rule 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>11</sup> See, e.g., *ISO New England Inc.*, 125 FERC ¶ 61,102 at P 43, *clarific. granted*, 125 FERC ¶ 61,324 (2008), *reh’g denied*, 130 FERC ¶ 61,089 (2010) (emphasis added).

<sup>12</sup> See, e.g., NECPUC Comments at 6.

<sup>13</sup> See *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2747 (2008), discussed *supra* at 1, n.2.

that would be expected in a competitive market.”<sup>14</sup> The APR should set the capacity clearing price, for capacity new *and* old, at the competitive measure of the cost of new entry. As we made crystal clear in our prior pleadings, this action will not have any cognizable effect on legitimate efforts to procure renewable or demand responses, or on any other type of subsidized new entry. The only effect will be to stop price discrimination against *existing* resources (everyone else) in the capacity auctions.

In addition to these broad themes, we make the following brief additional points:

*First*, we offer a supplemental affidavit from Mr. Robert Stoddard<sup>15</sup> to respond to certain claims by Mr. David LaPlante<sup>16</sup> about the thousands of megawatts of existing OOM capacity that have already entered the capacity market in the first three auctions. Contrary to claims by Mr. LaPlante—almost universally latched on to by capacity purchasers—Mr. Stoddard never claimed that prices in the first three auctions would have been different without OOM entry. The prices may well have hit the floor regardless. But this does not mean that thousands of megawatts of existing OOM that have the ability to suppress prices for many years to come are not a critical issue that the Commission should address now.<sup>17</sup>

Mr. Stoddard also responds to and clarifies certain factual points asserted by Mr. LaPlante. Mr. LaPlante could have provided additional evidence to make his points, but did

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<sup>14</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 at P 114 (2006).

<sup>15</sup> Supplementary Exhibit 2 attached hereto (“Stoddard Supp. Aff.”).

<sup>16</sup> Affidavit of David LaPlante (“LaPlante Affidavit”), attached as Ex. A to *ISO New England Inc.*, Docket No. ER10-787-000, Motion for Leave to File Answer and Answer of ISO New England Inc. (Mar. 30, 2010) (“ISO-NE Answer”).

<sup>17</sup> In addition, imagine a hypothetical where net *sellers* argued there was no need to do anything about thousands of megawatts of offers *above* cost because an auction was going to hit a *ceiling* price with or without economic withholding. We suspect that the Commission would disagree. Both situations should be carefully addressed, and steps should be immediately taken to ensure that any continuing price distortion is fully remedied. What is sauce for the goose is sauce for the gander, particularly here, where net purchasers are simultaneously arguing that subsidized new resources should be able to bid below cost at will, but that mitigated de-list bids from existing suppliers should be further mitigated and not allowed to set price.

not, and none of his points—even if correct—would reduce the urgency to correct the OOM issue as soon as possible. Notably, Mr. LaPlante has access to far more information than Mr. Stoddard on this score, and his failure to provide any substantive analysis is telling. In sum, Mr. LaPlante’s contentions miss the mark. Alternatively, they reveal a material issue of disputed fact that requires trial-type hearings to resolve.

Mr. Stoddard also responds to certain factual errors introduced in responses to his proposed Alternative Price Rule. Contrary to certain assertions, stakeholders already reviewed the NEPGA proposal in the prior stakeholder process.

*Second*, we also offer a supplemental affidavit from Dr. Roy Shanker<sup>18</sup> to respond to the only expert witness provided by any of the capacity purchasing parties: Mr. James Wilson, provided on behalf of the Joint Filing Supporters. Mr. Wilson—alone among all the many distinguished experts that have rendered their opinion of the OOM issue—has concluded that nothing more is needed to address the OOM issue. Mr. Wilson goes further, in fact, claiming that there is nothing wrong at all with OOM supply bid into the FCA below cost. That cannot be true, as Dr. Shanker points out, unless you assume, as Mr. Wilson does, that price discrimination—that is, to pay new resources something different (higher) than what is available to existing resources—is consistent with healthy competitive markets. This is the oldest argument in the book for those that oppose single-clearing-price capacity auctions, but every economist worth his salt rejects price discrimination because in the long run, it *increases* total costs.<sup>19</sup> FERC has routinely and repeatedly upheld the law of one price in a long line of cases

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<sup>18</sup> Supplementary Exhibit 1 attached hereto.

<sup>19</sup> See, e.g., *New England Power Generators Ass’n v. ISO New England Inc.*, Docket Nos. EL10-50-000 and ER10-787-000, Answer in Support of Complaint of Exelon Corp., NextEra Energy Resources, LLC, and Boston Generation LLC, Affidavit of Michael M. Schnitzer ¶ 8 (Mar. 29, 2010) (“Schnitzer Aff.”) (“While more entry and price suppression may seem like good things for customers, the reality is that uneconomic entry subsidized by ratepayers increases total electricity costs and is not compatible with efficient wholesale markets.”).

that none of our opponents has even attempted to distinguish.<sup>20</sup> Dr. Shanker also highlights some other of the most significant manifest errors in Mr. Wilson's testimony.

Mr. Wilson's lone voice is not credible and should be given no weight. The external market monitor, Dr. Patton,<sup>21</sup> as well as Dr. Shanker,<sup>22</sup> Mr. Stoddard,<sup>23</sup> Dr. Schnitzer<sup>24</sup> and Dr. Bidwell<sup>25</sup> unanimously support prompt action to take urgent additional steps to solve the OOM

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<sup>20</sup> See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 141 (2006) ("In a competitive market, prices do not differ for new and old plants or for efficient and inefficient plants; commodity markets clear at prices based on location and timing of delivery, not the vintage of the production plants used to produce the commodity. Such competitive market mechanisms provide important economic advantages to electricity customers in comparison with cost-of-service regulation. . . . This market result benefits customers, because over time it results in an industry with more efficient sellers and lower prices."); *Commonwealth Edison Co.*, 113 FERC ¶ 61,278 at P 43 (2005) (non-discriminatory single-clearing price capacity auctions "ha[ve] the benefit of encouraging all sellers to place bids that reflect their actual marginal opportunity costs" and have been "found to produce just and reasonable rates for all the energy and ancillary service markets currently operated by the independent system operators and regional transmission organizations under our jurisdiction."); *Devon Power LLC*, 110 FERC ¶ 61,315 at P 45 (2005) (paying all "generators the same market-clearing price creates incentives to minimize costs, because a generator's cost reductions are retained by the generator and thus increase its profits" while paying "different amounts to different generators based on the level of compensation needed to keep the generator in operation would create a unit-specific cost-based system and undermine the advantages of a market for capacity"); *New York Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,244 at P 65 & n.76 (2005) ("Efficient pricing requires that suppliers receive the highest market value for their resources, independent of their bids [as] [t]his gives all sellers the proper incentive to offer their resources at the marginal cost of their highest valued use."); *New York Indep. Sys. Operator, Inc.* 103 FERC ¶ 61,201 at P 81 (2003) ("all capacity suppliers, regardless of the age of their resources, are entitled to the same treatment in the ICAP market. . . . The Commission does not see how [more expensive] generators could receive ICAP revenues that were fundamentally different from those paid to other generators. Moreover, those are the types of market signals the Commission would expect to encourage new generation additions.").

<sup>21</sup> *ISO New England Inc.*, 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. at 15 (Mar. 15, 2010) ("Patton Filing") (the proposed reforms to the APR "fall well short" of the objective of "minimiz[ing] the price effects of OOM capacity").

<sup>22</sup> Shanker Aff. ¶ 4 ("The need to address OOM resources is crucial to the survival of competitive capacity markets. Net-purchaser sponsorship of new entry using revenue streams unavailable to other suppliers is, in effect, just another form of price discrimination. Absent appropriate mitigation, this price discrimination ultimately will undermine any market-based attempt to maintain adequate revenues to retain necessary existing capacity and attract new entry.").

<sup>23</sup> Stoddard Aff. ¶ 11 ("Without substantial changes in the FCM rules . . . the FCM will fail, and we will see a reversal of the successes we achieved and would lead to deactivation of some of the lowest-cost, lowest-emitting generation facilities in the region, and a shift in the fundamental investment paradigm from a merchant model back to rate-based expansion.").

<sup>24</sup> See generally Schnitzer Aff. ¶¶ 7-12.

<sup>25</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Protest and Comments of the Boston Gen Companies, Affidavit of Miles Bidwell at 32 (Mar. 15, 2010) ("Bidwell Aff.") (the proposed reforms to the APR "are woefully inadequate to address the profound problems that afflict the FCM"); see also *id.* 5 ("[E]ven though there is ample

crisis. These five renowned industry experts are right, and Mr. Wilson, whose credentials are markedly weaker (and whose views fly in the face of the Commission's repeated holdings), is wrong.

*Third*, we respectfully renew our request that the Commission reject the pleas of load, NEPOOL and ISO-NE for another round of stakeholder processes on the OOM issue. We have already highlighted the reasons why load and other net purchasers of capacity would consider the stakeholder process the ideal forum to once again address the OOM issue ("there's no problem, but if there is, let us solve it"). The results of such a process can be predicted in advance. Load will argue that the "balance" of the original "compromise" must be maintained, and will only agree to the bare minimum of measures that it calculates are necessary to forestall more sweeping reforms that would fully address the OOM market power issue. That is precisely what happened in the last stakeholder process. Again, it makes no sense to put those who benefit from market power in charge of coming up with the remedy for that market power.

NEPOOL, of course, is a stakeholder organization. A supermajority of its stakeholders (approximately 70%) are net purchasers of capacity, or the same entities that we discussed in the prior paragraph (minus the states).<sup>26</sup> Predictably, NEPOOL's supermajority supports another stakeholder process: "In the absence of a demonstrable failure of the statues [sic] quo, which is not the circumstance here, improvements achieved through education and persuasion and the NEPOOL stakeholder process is [sic] by far the best course for success."<sup>27</sup>

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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.") (emphasis added).

<sup>26</sup> NEPGA's members are all members of NEPOOL. Suffice it to say, NEPOOL's pleadings in this case were not vetted with NEPGA's members prior to filing, and NEPGA's members do not subscribe to the views attributed to NEPOOL in this case.

<sup>27</sup> *New England Power Generators Ass'n Inc. v. ISO New England Inc.*, Docket No. EL10-50-000, Motion to Intervene and Answer of the New England Power Pool Participants Committee at 8 (Apr. 6, 2010).

We agree with NEPOOL that stakeholders should almost always have the first cut at an issue. Stakeholder bodies serve an essential function to vet issues and provide a free exchange of information. This process of “education and persuasion” is appropriate and often useful. That process, however, *has already happened here*.<sup>28</sup> When stakeholders fail to take appropriate action (as they have here), they should not have multiple cuts at the *same* issue. This is called futility. At some point, the Commission and even the organization of NEPOOL itself must acknowledge that stakeholders—by definition—will ultimately vote for the position that they determine is best for their *stake* in the market. This is called reality. To return these same OOM issues to stakeholders, expecting a significantly different outcome, would be unreasonable.<sup>29</sup>

Unlike load, ISO-NE agrees that there is a significant OOM problem in the markets,<sup>30</sup> but argues that its proposed reforms go far enough to address the issue *for now*, while advocating that stakeholders should have another shot to further address the *same* issues. ISO-NE requests an 8½ month process (to conclude with a filing by December 15, 2010) to address additional OOM reforms.<sup>31</sup> ISO-NE asserts that it wants to avoid litigation,<sup>32</sup> but there is no reason to believe that stakeholders that manifestly benefit from OOM entry—all of whom have overwhelming near-term financial incentives to delay true reform for as long as possible—are

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<sup>28</sup> See Stoddard Supp. Aff. ¶ 15 (confirming that NEPOOL previously considered the same APR proposal that NEPGA supports here).

<sup>29</sup> It is arbitrary and capricious for an agency to allow consultations or regulatory comity to unreasonably delay resolving acknowledged regulatory issues. See, e.g., *Pub. Utils. Comm'n of Cal. v. FERC*, 143 F.3d 610, 612 (D.C. Cir. 1998) (reversing as arbitrary and capricious Commission delay in ordering refunds of illegal access charges to allow for comity with state processes); *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1287 (D.C. Cir. 2000) (reversing as arbitrary and capricious agency delay in remedying acknowledged regulatory error to allow for further consultation and report).

<sup>30</sup> ISO-NE Answer at 4 (“The ISO has already clearly acknowledged that serious consideration of further changes to the FCM should be undertaken right away.”)

<sup>31</sup> *Id.* at 2-3.

<sup>32</sup> *Id.* at 9.

suddenly going to see the light and change their votes on core capacity market design issues that would necessarily permit prices to rise when they should. The supermajority of capacity purchasers will never agree to fully remedy the OOM issue without a big stick forcing them to do so.

ISO-NE also raises concerns about the practicality of implementing reforms anytime soon.<sup>33</sup> Our response to this is simply that the Commission should require ISO-NE to implement as many reforms as it can as soon as it can, and to fully explain to the Commission any delays that may arise. We doubt that the timing situation is as bleak as ISO-NE posits, particularly if the Commission issues a strong order that clearly requires specific action and remedies with appropriate guidance and deadlines. The FCM settlement process itself—once ordered by the Commission—took less than six months.<sup>34</sup> The auction process and software is maintained by an outside vendor, so internal ISO-NE resource constraints should not bind. And there is no need for additional stakeholder dilly-dallying.

ISO-NE has recognized a similar need for quick action in a related context regarding market power on the supply side (as recounted by the Commission):

ISO-NE responds that a delay is unjustified and unnecessary for the mitigation rule changes and market power mitigation because the exercise of market power constitutes a type of behavior that is prohibited by the FPA and the Commission's rules. ISO-NE states that it would be contrary to the fundamental purpose of the FPA for market participants to be allowed to rely on the continued existence of a market power-driven revenue stream in formulating their revenue requirements and offers for the ISO-administered markets.<sup>35</sup>

The same reasoning applies to the need for quick action to address buyer-side market power in this case.

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<sup>33</sup> *Id.* at 8-9.

<sup>34</sup> NEPGA Protest at 36-37 & n.51.

<sup>35</sup> *ISO New England Inc.*, 129 FERC ¶ 61,008 at P 22 (2009).

*CONCLUSION*

For the foregoing reasons, the Commission should accept this pleading for filing and keep the issues raised herein in mind as it considers the underlying Protest and Complaint.<sup>36</sup>

Respectfully submitted,

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April 13, 2010

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<sup>36</sup> We are simultaneously filing this answer in both active dockets, as they involve the same issues. The comments contained in this filing represent the position of The New England Power Generators Association Inc. as an organization, but not necessarily the position of any particular member(s) with respect to any statement, concept, issue or position expressed herein.



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*SUPPLEMENTARY AFFIDAVIT OF ROY J. SHANKER PH.D.  
ON BEHALF OF NEW ENGLAND POWER GENERATORS ASSOCIATION*

1 *I. INTRODUCTION*

- 2 1) My name is Roy J. Shanker.<sup>1</sup> I have previously submitted an affidavit on behalf of the  
3 New England Power Generators Association (“NEPGA”)<sup>2</sup> to review the ISO New England  
4 (“ISO-NE”) and New England Power Pool (“NEPOOL”) filing of February 22, 2010  
5 (“FCM Revision”) addressing modifications to the ISO-NE capacity market, and comment  
6 on the results of my review (“Shanker Affidavit”).<sup>3</sup> NEPGA filed this affidavit in the  
7 above-captioned dockets in support of a protest and a complaint against the FCM-  
8 Revision.<sup>4</sup>
- 9 2) The Connecticut Department of Public Utility Control and others filed an answer  
10 (“CDPUC Answer”) in opposition to these NEPGA filings<sup>5</sup> and supported their opposition  
11 with an affidavit from Mr. James Wilson (“Wilson Testimony”).<sup>6</sup> The purpose of this  
12 supplementary affidavit is exclusively to point to several serious misstatements and errors  
13 in the Wilson Testimony. It is not intended to be an exhaustive critique (or restatement of

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<sup>1</sup> I have extensive experience with capacity market design in ISO-NE, PJM, and NYISO, and have previously offered testimony in Commission proceedings (for example, in Docket No. ER03-563) addressing the original ISO-NE capacity market design. I have also been a long-term, active participant on several committees and working groups addressing these issues of the NYISO and PJM markets. In NYISO, I have worked on the capacity market concepts since prior to the start of the market. In PJM, I participated for seven years in the work related and leading to the development of the current Reliability Pricing Model (“RPM”) markets. I have submitted testimony and participated in technical sessions before the Commission numerous times on these and related issues. A summary of my experience is attached as Exhibit 2.

<sup>2</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.

<sup>3</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Intervene and Protest of the New England Power Generators Association, Ex. 1, Aff. of Roy J. Shanker (Mar. 15, 2010) (“Shanker Aff.”).

<sup>4</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Intervene and Protest of the New England Power Generators Association; *New England Power Generators Ass’n v. ISO New England Inc.*, Docket No. EL10-50-000, Complaint Requesting Fast Track Processing (Mar. 23, 2010).

<sup>5</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Answer and Answer of the Connecticut Dep’t of Pub. Util. Control, *et al.* (Mar. 30, 2010).

<sup>6</sup> CDPUC Answer, Ex. DPUC-1, Test. of James F. Wilson (“Wilson Testimony”).

1 the original argument), but rather to emphasize what constitute the most flagrant failings of  
2 the Wilson Testimony.

3 *II. THE WILSON TESTIMONY CONFUSES (A) THE RATIONAL EX POST BEHAVIOR OF*  
4 *INDIVIDUAL MARKET PARTICIPANTS IN RESPONSE TO THE ANTI-COMPETITIVE*  
5 *BEHAVIOR OF OTHERS WITH (B) EFFICIENT MARKET OUTCOMES*

6 3) The Wilson Testimony is comprised of a series of fundamental and crucial errors about the  
7 effects of the exercise of market power by buyers via price discrimination and the  
8 introduction of subsidized Out-of-Market (“OOM”) supply and other uneconomic new  
9 entry into the ISO-NE capacity markets. The reasoning is almost tautological: The Wilson  
10 Testimony seems to be arguing that reducing short-term costs to consumers is *per se* good;  
11 therefore anything that achieves this end, including the exercise of buyer market power and  
12 price discrimination, must be good. The very idea that the exercise of such actions could  
13 be a violation of the Commission’s policy and sound long-run economics is dismissed as  
14 mere chimera.

15 4) His most material mistake is failing to distinguish the motives and rationales of sellers  
16 under OOM contracts from the actions and incentives of the purchasers who initiated the  
17 contracts. Similarly, he fails to distinguish between bilateral agreements in general, and  
18 those specifically entered into by net short buyers—targeting new resources only—during  
19 periods when the market is long on capacity and sufficient capacity to meet reliability  
20 targets is available at lower prices. Because he ignores these fundamental elements of the  
21 debate, his comments are at best irrelevant to a full understanding of the issue and, at worst,  
22 substantively misleading.

23 5) For example, the Wilson Testimony states that:

24 Capacity that is under contract or receives incentives is rationally offered into the  
25 FCA at a price that makes accepting a capacity supply obligation attractive, which

1 is generally lower than its ‘long-run average cost.’ Offering such capacity at such  
2 prices is competitive conduct.<sup>7</sup>

3 This statement is not necessarily true.<sup>8</sup> Regardless, it misses the central point of my  
4 original affidavit. The concern is *why* the purchaser under the bilateral agreement is  
5 entering into an above-market contract, not the subsequent behavior of the seller after the  
6 contract is consummated. If the purchaser under the contract is net short, and there are  
7 excess and cheaper resources available in the market, the net effect of such agreements to  
8 add new generation is to artificially suppress prices via uneconomic procurement of excess  
9 capacity. This is an exercise of market power by the purchasing counterparty to the  
10 contract. A robust APR-type mechanism is designed to remedy precisely this type of  
11 behavior.

12 6) In Mr. Wilson’s discussion, he ignores both (a) the basic question of why the purchasing  
13 party is forgoing cheaper existing resources, and (b) the fact that the selling counterparty  
14 who subsequently offers the contracted supply into the FCAs is simply the instrumentality  
15 of the party who is undertaking the exercise of market power. What Mr. Wilson has  
16 observed is akin to noting that the laws of physics apply to a bullet after it is fired, while  
17 ignoring who pulled the trigger, what they were aiming for and their reasons for shooting.

18 7) It is hard to imagine that Mr. Wilson would file comments so sanguine if the positions of  
19 buyer and seller were reversed. Consider a situation where a pivotal supplier identifies all  
20 other generation supply in the market that is barely infra-marginal (for example, those with  
21 net revenues from energy and capacity exceeding going-forward costs by \$100 a year).

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<sup>7</sup> Wilson Test. at 6:18-21.

<sup>8</sup> The correctness of this statement is solely a function of the terms of the bilateral agreement; for many plausible bilateral agreements it would not be. But perhaps the Wilson Testimony is so affixed to defending price-suppressing bilateral agreements that he fails to realize that other contracting agreements might yield different behavioral results.

1 Now assume that this pivotal supplier, who has an overall net-long position in the market,  
2 offered all of these barely profitable suppliers \$200 per year to retire their generation, thus  
3 distorting prices upward by reducing supply. Obviously it would be rational, and  
4 apparently, in Mr. Wilson's view, pro-competitive, for these marginal suppliers to take the  
5 money and retire. But the real question involves the decision to pay others to retire. I  
6 doubt that anyone on the load side would simply conclude that it was rational for some  
7 suppliers to "take the money" and retire, while ignoring the party who is paying them, thus  
8 leaving the upward price-distortion in place. Yet that is exactly what Mr. Wilson proposes  
9 here.

10 8) Equally clear from the Wilson Testimony is his desire to continue to permit OOM entry.  
11 The Wilson Testimony states that because "New England has surplus capacity at this time  
12 and is likely to continue to have surplus capacity for years to come," "there is no reason to  
13 go further with the APR rule and the protestors' experts' proposals to do so should be  
14 rejected."<sup>9</sup> In other words, having successfully suppressed prices via use of discriminatory  
15 procurements, the beneficiaries should be rewarded by the cessation of any efforts to  
16 mitigate these actions. Again, merely imagining the reverse situation, where market power  
17 was successfully exercised by sellers, and the Commission's likely reaction to such a  
18 "successful" outcome, obviates any need for further response.

19 9) All of these errors are further compounded by the Wilson Testimony's refusal to accept  
20 that the markets must, on average, be remunerative to a level that will support new entry,  
21 and retain economic existing resources without discrimination. While the clearing price in  
22 any one auction can certainly fall below the anticipated cost of new entry, no market can

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<sup>9</sup> Wilson Test. at 7:16-18.

- 1 succeed in the long run if buyer interests can ensure that market rates are paid only to hand-  
2 picked new entrants, while prices paid to others are suppressed. As I noted in my earlier  
3 comments, the Commission has repeatedly rejected attempts to justify such behavior; there  
4 is no basis to discriminate between similarly situated capacity resources.<sup>10</sup>
- 5 10) Mr. Wilson states that there is no price discrimination because all FCA participants receive  
6 the same price *in the FCA*.<sup>11</sup> This misses the point. All similarly-situated capacity  
7 resources do indeed receive the artificially-depressed FCA price. But subsidized OOM  
8 resources *also* receive side-payments or similar pecuniary benefits from their buy-side  
9 counterparties or their proxies which gross up their total revenues to a level far higher.  
10 This is price discrimination.<sup>12</sup> And it is this very fact, undisputed by Mr. Wilson, that  
11 results in uneconomic entry. This point is so fundamental that it is troubling that Mr.  
12 Wilson does not even attempt to address it.
- 13 11) The Wilson Testimony continues in the same vein, suggesting repeatedly that there is  
14 nothing wrong with the market, and that bilateral contracts are both constructive and  
15 reasonable.<sup>13</sup> Once again, he ignores the predicate: that the underlying contracts were  
16 established via a discriminatory process and that the FCM clearing is incapable of  
17 reflecting the full economic costs of those contracts due to the discriminatory behavior.

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<sup>10</sup> Shanker Aff. at 3:2, n.6 (quoting long list of the unambiguous Commission declarations to this effect).

<sup>11</sup> Wilson Test. at 29:1-5.

<sup>12</sup> For example, many of these OOM resources have explicit contracts-for-differences, guaranteeing that they receive their contract price for capacity regardless of the FCA clearing prices. Just because the *auction* price for capacity is the same does not mean the *payments* to all resources are the same.

<sup>13</sup> Wilson Test. at 21-22.

1 This demonstrates the lack of thought given by some to the exercise of buyer market power  
2 through price discrimination.<sup>14</sup>

3 12) It is useful to imagine the buyer behavior in question as if it occurred under the “old”  
4 regulated regime—which, for all its faults, had a history of parsing the equities of what  
5 should be a reasonable competitive/market-like solution. For example, if, after a regulated  
6 utility had built all of its required capacity to meet system needs, regulators subsequently  
7 decided to “add” an renewable portfolio standard (“RPS”) and the associated “excess new”  
8 capacity, this new consideration of an externality would never suddenly make existing  
9 supply no longer “used and useful,” nor would it be expected that any existing resources  
10 would be removed from rate base. Similarly, existing rate-based capacity would not be  
11 devalued if regulators decided to increase overall levels of installed capacity to create  
12 “excess” for any other reason. Yet Mr. Wilson is continually recommending exactly the  
13 opposite result in response to the exercise of market power by buyers (whether intentional  
14 or not) with respect to the procurement of excess and uneconomic capacity. His view of  
15 the world would effectively devalue existing resources and/or remove them from rate  
16 recovery, despite the underlying prudence of parties in developing or purchasing such  
17 resources, and the externalities considered by third parties in securing excess resources.

18 13) Contrast this with the uneconomic or discriminatory procurement occurring in today’s  
19 markets, and the inability of the FCM to produce price results reasonably reflective of the  
20 full long-run marginal cost of the new entrants. If not properly addressed through a robust  
21 APR-type mechanism in FCM, uneconomic or discriminatory procurement will distort the  
22 current market in the same way as in the example above occurring under the old regulatory

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<sup>14</sup> As noted above, *see* n.10, the Commission is an honorable exception, even in the present complex environment.

1 regime. FCM is a market mechanism to compensate supply/capacity based on certain  
2 competitive assumptions. FCM does not mandate any specific price, but it does mandate  
3 the elimination of the effects of the exercise of market power to distort prices via  
4 uneconomic or discriminatory procurement. In building or acquiring power plants,  
5 suppliers assumed risks regarding changes in general economics and market technology  
6 and to some extent regulation. However, they cannot fairly be burdened with the risk that  
7 load will price discriminate or, in exercising market power with respect to the impact on  
8 FCA results, bring excess uneconomic generation into the market to suppress prices.

- 9 14) The underlying conclusion has to be that the Commission should take action, including the  
10 imposition of an *effective* APR that is consistent with the underlying objective of the use of  
11 a market mechanism to attract and *retain* capacity where it is needed. This means that  
12 OOM supply, no matter what its origin or purpose might be, cannot be allowed to distort  
13 recovery by other market participants. Again, this does not mean that states cannot pursue  
14 out-of-market procurement. What it does mean is that discriminatory procurement cannot  
15 be allowed to distort price discovery via the Commission-approved capacity market  
16 construct, such that appropriate levels of compensation are unavailable.

17 *III. THE WILSON TESTIMONY IGNORES THE LONG-TERM EFFECT OF ALLOWING*  
18 *CAPACITY CLEARING PRICES TO BE DEPRESSED BELOW THE COST OF*  
19 *ECONOMIC NEW ENTRY*

- 20 15) The Wilson Testimony implies that there is no need for capacity markets to clear at any  
21 specific price related to the long-term cost of new entry, and that prices persistently below  
22 that level are appropriate. Certainly the reference technology and associated costs may  
23 change over time to reflect the cheapest source of new capacity, but the Wilson Testimony  
24 is making a separate point. Stripped to its core, it argues that “some of the time you might  
25 get the average cost of new entry, and the rest of the time you will get less.” That notion

1 renders competitive entry non-viable, and slowly but surely will kill the market itself. If  
2 this is truly how the markets will function, then the entire capacity market paradigm needs  
3 to be redesigned because it will never attract private entry (that is, entry without a long-  
4 term contract with, or ownership by, load). But even in that case, there is still no  
5 justification for the exercise of market power to suppress prices.

6 16) Perhaps unsurprisingly, the Wilson Testimony notices a trend towards new entry supported  
7 only by OOM contracts, with associated lower, stable prices.<sup>15</sup> But this simply shows that  
8 price discrimination works in the short run, and nothing more. It certainly does not prove  
9 that discriminatory behavior is appropriate. His conclusion is the equivalent of noting that  
10 people would continue to consume electricity even at higher-but-stable prices caused by  
11 economic or physical withholding, and, on this basis, concluding that withholding was pro-  
12 competitive simply because both consumption and prices remained stable. The entire  
13 argument is an example of a logical *non sequitur*.

14 17) The bottom line is that artificially suppressed prices discourage private new entry and  
15 misdirect consumption and investment. Too much new capacity is purchased under  
16 contract, and the above-market costs are passed on through retail rates. Existing efficient  
17 resources are encouraged to retire, and private entry when needed will be deemed too risky  
18 or uneconomic to proceed. Low capacity prices will suppress investment in energy  
19 efficiency measures and demand response. None of this is good for the long-run health of  
20 the New England market.

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<sup>15</sup> Wilson Test. at 17:7-20.

- 1 18) In defending the contrary position, the Wilson Testimony again misstates the problem<sup>16</sup> and  
2 continues to focus on lower prices and higher supplies brought about by uneconomic  
3 entry.<sup>17</sup> The current market design will attract new supply if the market on average clears  
4 at the true cost of new entry, whatever that is, and neither buyers nor sellers exercise  
5 market power. That is how the market was designed. Unknowable future changes, such as  
6 a paradigm shift in technology, still create risks that offerers do and must take, but only if,  
7 on a risk-adjusted average basis, spot prices are expected to average or exceed the cost of  
8 new entry over time. The only alternative is a failed market. Other options are possible,  
9 and a less efficient bilateral-only market could function, but this would require an  
10 independent mechanism to mandate that buyers have sufficient capacity. It would similarly  
11 require a redesign of supplier obligations and associated acceptable behavior, none of  
12 which is being considered within the scope of this proceeding.
- 13 19) In any event, under the existing structure, discriminatory procurement is, in effect,  
14 devaluing and effectively seizing existing capacity. The Wilson Testimony ignores all of  
15 these considerations and addresses the situation *after* market power by buyers has  
16 succeeded in artificially suppressing prices, and there is, not surprisingly, excess supply at  
17 low prices. This is not an endorsement of any success or long-term stability of the market,  
18 as he suggests, but rather a confirmation that, if unchecked, market power can impact  
19 prices. This should surprise no one.

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<sup>16</sup> *Id.* at 11:12-12:25.

<sup>17</sup> Amazingly, Mr. Wilson even goes so far as to suggest that the only mechanism for exercising market power by buyers is via withholding demand. His testimony appears entirely innocent of the basic realization that uneconomic entry by monopolists or oligopolists can suppress prices, particularly in structured markets where the parties procuring the uneconomic resources can obtain non-bypassable reimbursement via state regulatory powers. He is effectively ignoring both the original logic for the APR, and the numerous Commission findings that address this type of market power in both PJM and NYISO.

1 20) The Wilson Testimony finally suggests that such discrimination will have no impact:

2 [Q.] The experts also claim that investors will demand higher prices to build new  
3 power plants in the future, if prices remain low now and there are non-merchant  
4 capacity additions. Would this be rational conduct by investors?

5 [A.] Investors will rationally focus on anticipated market conditions and  
6 opportunities looking forward, not looking back. As long as FCM rules call for  
7 prices that clear supply and demand, investors will know what to expect from it  
8 and be able to plan accordingly.<sup>18</sup>

9 However, a more careful reading of this confirms that what Mr. Wilson is really saying is  
10 that in the presence of unmitigated buyer market power, FCM cannot support new entry.  
11 New entry will only occur via bilaterals with parties who can target and subsidize new  
12 resources. Existing facilities without such bilaterals—who supply an identical capacity  
13 product—will receive an arbitrary level of compensation determined by the level of  
14 uneconomic entry, which is, itself, exogenously determined by the parties with market  
15 power. Yes, investors will know what to expect: they will expect to transact in a market  
16 tainted by the exercise of market power and completely divorced from standard  
17 supply/demand fundamentals.

18 *IV. ENERGY AND CAPACITY ARE AMONG THE MOST HOMOGENOUS PRODUCTS*  
19 *CONCEIVABLE*

20 21) One remarkable facet of the reasoning offered by the Wilson Testimony is the suggestion  
21 that capacity in organized electric markets is not a homogenous product.<sup>19</sup> He is mistaken  
22 about this, and, again, this error steers him to erroneous conclusions. As I noted in my  
23 initial affidavit, the Commission has fully recognized that both old and new capacity

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<sup>18</sup> Wilson Test. at 30:10-15.

<sup>19</sup> Wilson Test. at 28:9-21 (explaining that consumers will consider many attributes of non-homogenous projects, besides prices, in making their choices).

1 provide an identical product (adjusted for location and reliability).<sup>20</sup> Existing and new  
2 capacity resources support adequacy and reliability in electric markets in precisely the  
3 same way. It is true that the FCM Settlement avoided tying the cost of new entry to any  
4 particular technology.<sup>21</sup> It is also true that there are other attributes (*e.g.*, renewable  
5 resources) that may exist associated with different types of generation. But neither fact  
6 implies that the capacity adequacy product itself is not homogenous. Obtaining equivalent  
7 capacity resources to meet the homogeneous adequacy function that have different  
8 attributes may indeed be a reasonable exercise of discretion by buyers; however, it is not a  
9 reasonable basis for price discrimination within the adequacy market itself.

10 22) In short, the entire Wilson Testimony is no more than an elaborate attempt to justify price  
11 discrimination—while at the same time earnestly denying that there is any price  
12 discrimination—by an alleged lack of homogeneity in the underlying capacity product that  
13 is based on a distinction the Commission already has found to be irrelevant. This premise  
14 just is not true. In meeting adequacy requirements, “old” and “new” capacity are perfectly  
15 fungible.

16 23) This concludes my affidavit.

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<sup>20</sup> See discussion, *supra* at 5:4, n.10.

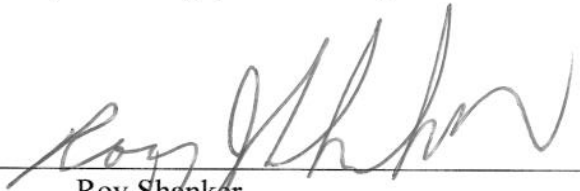
<sup>21</sup> See *Devon Power LLC.*, Docket No. ER03-563-000, Explanatory Statement of the Settling Parties in Support of Settlement Agreement at 27(Mar. 6, 2006).

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association Inc.	)	
	)	
v.	)	Docket No. EL10-50-000
	)	
ISO New England Inc.	)	
	)	
ISO New England Inc. and	)	
New England Power Pool	)	Docket No. ER10-787-000
	)	

*SUPPLEMENTARY AFFIDAVIT OF ROY J. SHANKER PH.D.  
ON BEHALF OF NEW ENGLAND POWER GENERATORS ASSOCIATION*

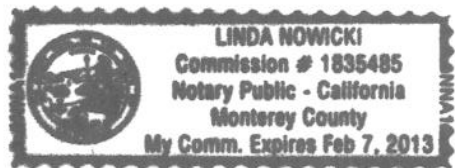
I, Roy J. Shanker, being duly sworn, depose and state that the contents of the foregoing Supplementary Affidavit on behalf of the New England Power Generators Association is true, correct, accurate and complete to the best of my knowledge, information, and belief.

  
 \_\_\_\_\_  
 Roy Shanker

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of April 2010.

  
 \_\_\_\_\_  
 (Notary Public)

My commission expires: Feb. 7, 2013



UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Generators Association Inc.	)	
	)	
v.	)	Docket No. EL10-50-000
	)	
ISO New England Inc.	)	
	)	
ISO New England Inc. and	)	
New England Power Pool	)	Docket No. ER10-787-000
	)	

*SUPPLEMENTARY AFFIDAVIT OF ROBERT B. STODDARD  
ON BEHALF OF NEW ENGLAND POWER GENERATORS ASSOCIATION*

1 *I. QUALIFICATIONS AND PURPOSE*

2 1) My name is Robert B. Stoddard. I am a Vice President and the leader of the Energy &  
3 Environment Practice of Charles River Associates (“CRA”) in its offices at 200 Clarendon  
4 Street, T-33, Boston, Massachusetts 02116.

5 2) I previously submitted testimony (“Stoddard Affidavit”) supporting the protest<sup>1</sup> of the New  
6 England Power Generators Association (“NEPGA”) as well as the associated complaint.<sup>2</sup>  
7 My background and qualifications are set forth there.<sup>3</sup>

8 3) In its reply comments, ISO New England<sup>4</sup> sponsored the testimony of Mr. David LaPlante,<sup>5</sup>  
9 its Internal Market Monitor, that disputes several points in my affidavit concerning out-of-  
10 market (“OOM”) resources. In this brief reply affidavit, I wish to clarify the record  
11 regarding my earlier testimony on that point. Further, ISO-NE’s reply comments  
12 inaccurately characterize the role of the Internal Market Monitoring Unit in my proposed  
13 APR.

14 *II. REBUTTAL OF OUT-OF-MARKET POINTS*

15 4) Mr. LaPlante goes to some length to explain that FCA #1 through FCA #3 would have  
16 cleared at the price floor under any circumstance.<sup>6</sup> I do not disagree, but my testimony was  
17 not about those auctions. I was looking at the history of the market not to attempt to revisit

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<sup>1</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Intervene and Protest of the New England Power Generators Association, Ex. 1, Aff. of Robert B. Stoddard (Mar. 15, 2010).

<sup>2</sup> *New England Power Generators Ass’n v. ISO New England Inc.*, Docket No. EL10-50-000, Complaint Requesting Fast Track Processing (Mar. 23, 2010).

<sup>3</sup> Stoddard Aff. ¶ 1-3.

<sup>4</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Motion for Leave to File Answer and Answer of ISO New England (Mar. 30, 2010) (“ISO-NE Answer”).

<sup>5</sup> ISO-NE Answer, Ex. A, Affidavit of David LaPlante (“LaPlante Affidavit”).

<sup>6</sup> *Id.* ¶ 2:3-4:23.

1 the outcomes of the first three FCAs, but rather to highlight to the Commission that a  
2 proper determination of the past surplus capacity supported by subsidies could be important  
3 as early as FCA #4. Thus, a lengthy stakeholder process to consider, yet again, possible  
4 changes to the Alternative Price Rule may deny fair compensation to capacity suppliers.

5 5) It is not critical to my conclusion, therefore, that each and every MW of the surplus be  
6 found to be subsidized, contrary to ISO-NE's contention. To the contrary, in my prior  
7 testimony I did not state that all these resources are *per se* OOM; I said that "many of  
8 [these resources] would likely have been deemed Out-of-Market"<sup>7</sup> and urged that these  
9 categories of offers should be examined by the Internal Market Monitor and, if found to be  
10 OOM, should be included in the Carried Forward Excess Capacity in FCA #4 and  
11 subsequent FCAs.

12 6) Consequently, the critiques of my testimony leveled by Mr. LaPlante do not undermine the  
13 importance of this forward-looking correction. My conclusion—that prompt action by the  
14 Commission is urgently needed—would not be altered if some of the surplus that I  
15 identified could be properly labeled as in-market. Nonetheless, Mr. LaPlante's rebuttal of  
16 my points falls wide of the mark in several ways.

17 7) First, Mr. LaPlante contends that I improperly included, as out-of-market, the 585 MW of  
18 new capacity treated as existing capacity in FCA #1, because (a) that treatment was called  
19 for by the tariff and (b) I present no evidence that the 585 MW was in fact out-of-market.<sup>8</sup>

20 I agree that the tariff provided this loophole for first-year capacity, but I disagree that this  
21 loophole, which was intended to be a limited allowance for one year, should be allowed to

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<sup>7</sup> Stoddard Aff. ¶ 10:8-10.

<sup>8</sup> LaPlante Aff. ¶ 5:10-18.

1 suppress prices in FCA #4 and beyond. That outcome would be particularly egregious  
2 because most of the resources using this loophole were either offered by a load-serving  
3 entity or explicitly subsidized. Supplementary Exhibit RBS-1<sup>9</sup> to this affidavit draws from  
4 the FCA #1 informational filing and results filing to demonstrate this point. Although I do  
5 not have the data to prove whether any or all of these resources would have been classified  
6 as OOM had they been offered as new resources, the evidence of their origin indicates to  
7 me that, at a minimum, 103.5 MW of these resources (those that were under long-term  
8 contracts under state initiatives) would be OOM, and that the remaining portion appears  
9 highly likely to be OOM and should therefore at least be reviewed.

10 8) Second, Mr. LaPlante suggests that all of the 2,778 MW of Demand Resources was in fact  
11 economic.<sup>10</sup> His testimony, however, directly affirms only that 189 MW of those resources  
12 were examined by the Internal Market Monitoring Unit and found to be economic on a  
13 customer-specific basis. He does not directly state that, in prior FCAs, the remaining 2,589  
14 MW were also examined—a critical ambiguity. In any event, even if I assume that these  
15 MW were examined, Mr. LaPlante’s testimony is, to the best of my knowledge as a close  
16 observer of this process, the first time that the Internal Market Monitoring Unit has clearly  
17 enunciated its standard of review for Demand Resources. If I understand his testimony, the  
18 economic benefits considered are *solely* limited to the energy portion of *each specific end-*  
19 *use customer’s* bill, rather than including indirect benefits from reduction in energy or  
20 capacity prices to other end-use customers of the utility or retail service provider. In  
21 particular, Mr. LaPlante would have had to perform the task of also calculating the lost

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<sup>9</sup> In addition to two new Exhibits, this Supplementary Affidavit also includes one Exhibit inadvertently omitted from the original Stoddard Affidavit, RBS-7.

<sup>10</sup> LaPlante Aff. ¶ 5:19-7:5.

1 opportunity cost of production lost to curtailment, as well as the definite, but numerous,  
2 expenses of metering, telemetry, and the other requirements of effective curtailment. Only  
3 if this detailed level of review has been in fact been performed for all 2,778 MW of  
4 Demand Resources that have cleared in the first three FCAs, and if this standard of detailed  
5 review is to be applied going forward, would my concern have been addressed. If not, then  
6 my request—for such a re-review and potential reclassification *going forward* as part of the  
7 Carried Forward Excess Capacity pool—stands.

8 9) Third, although Mr. LaPlante correctly notes that the “563 MW reduction in the [Net  
9 Installed Capacity Requirement] from FCA #2 to FCA #3 *reduces* the surplus going into  
10 FCA #3,”<sup>11</sup> he again misses the real point of Exhibit RBS-2. I do not argue that some  
11 change is warranted in the FCA #3 outcome; rather, I introduced this evidence to support  
12 NEPGA’s call for changes to be implemented by FCA #4. Recessions are short-lived, and  
13 the forecast dip in the Net Installed Capacity Requirement is unlikely to be a permanent  
14 downward shift in demand. As the Federal Reserve Bank of Boston reports: “Economic  
15 conditions continue to show improvement in the First District. Respondents in the  
16 manufacturing, software and IT services, staffing, and residential real estate sectors  
17 indicate that demand continues to strengthen, with several manufacturing contacts citing  
18 better-than-anticipated increases.”<sup>12</sup> So, looking forward, it is insufficient to declare that  
19 the surplus from FCA #3 is so large that it is obvious that no change to the APR could have  
20 an effect on FCA #4. As economic conditions improve and, with it, demand for electricity,  
21 the need for new capacity—but for the substantial overhang of subsidized capacity—could

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<sup>11</sup> LaPlante Aff. ¶ 7:6-7.

<sup>12</sup> The Federal Reserve Board, *The Beige Book* (Mar. 3, 2010), available at <http://www.federalreserve.gov/FOMC/BeigeBook/2010/20100303/1.htm>.

1 be near. Thus, the ISO-NE’s conclusion—that “the significant amount of surplus capacity  
2 in the first three FCAs clearly demonstrates that the clearing prices in each auction would  
3 have reached the floor even with the presence of OOM capacity,”<sup>13</sup> while *certainly*  
4 *possible*—does not refute NEPGA’s claim that immediate action is needed.

5 *III. ISO-NE CONTENTIONS REGARDING THE NEPGA APR PROPOSAL*

6 10) ISO-NE’s reply incorrectly characterizes two important points of NEPGA’s proposed APR  
7 revision. The concerns it raises are entirely without basis.

8 11) ISO-NE states that “[i]nstead of just determining whether an offer from a new resource  
9 should be allowed below 0.75 times CONE without being categorized as OOM, under the  
10 NEPGA proposal the Internal Market Monitor would need to determine a competitive offer  
11 for each resource below 0.75 times CONE and that offer would directly affect the pricing  
12 in the FCA” and avers that “would result in far more dependence on administrative offer  
13 determination than in current versions of the APR and warrants at least discussion with  
14 stakeholders.”<sup>14</sup> This argument fails on at least three grounds.

15 12) First, the proposed APR could, in one form I describe, replicate the current level of  
16 “administrative offer determination.” All OOM offers are already implicitly repriced when  
17 the APR is triggered to a level equal to CONE, setting a cap at that level.<sup>15</sup> That option is  
18 one of the four I offer in my testimony. Although it is the least precise of the options, its

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<sup>13</sup> ISO-NE Answer at 7.

<sup>14</sup> ISO-NE Answer at 22.

<sup>15</sup> Mechanically, repricing all OOM offers at CONE has the same effect as a price cap at CONE, both in the FCA mechanics of today and in the APR mechanism I discussed in my earlier affidavit.

1 continued use is certainly an option, and would not increase “dependence on administrative  
2 offer determination[s]”<sup>16</sup> one iota.

3 13) Second, ISO-NE has no basis to support its apparent belief that the level of “administrative  
4 offer determination” in the current tariff is the only reasonable level. As I described in my  
5 earlier affidavit, however, the Commission has approved analogous rules in PJM and  
6 NYISO that call for a much higher level of administrative offer determination.<sup>17</sup> Therefore,  
7 an increase in the level of involvement by the Internal Market Monitor does not establish  
8 that the NEPGA proposal is unreasonable.

9 14) Third, the only alternative to the greater involvement of the Internal Market Monitor is to  
10 allow prices to continue to be suppressed below their competitive level. As Dr. Patton  
11 makes clear in his statement:

12 The APR pricing provision to set the price at the lower of CONE or the lowest-  
13 cost uncleared new supply offer may result in a price that is substantially lower  
14 than the new supply offer that would have actually cleared and set the FCA price  
15 absent OOM capacity.<sup>18</sup>

16 Such systematic mis-pricing of capacity is, in my view, a far more serious issue than an  
17 increase in the role of the Internal Market Monitor in the APR operation.

18 15) ISO-NE also suggests to the Commission that the NEPGA proposal has not been vetted by  
19 stakeholders, and therefore should be sent back to a stakeholder process, rather than the  
20 Commission judging for itself the merits of the proposal. Further, ISO-NE hints that  
21 “concerns were raised that the revised APR proposed by NEPGA at that time would

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<sup>16</sup> *Id.*

<sup>17</sup> Stoddard Aff. at 30:4–31:10.

<sup>18</sup> *ISO New England Inc.*, Docket No. ER10-787-000, Motion to Intervene and Comments of Potomac Economics on Revisions to FCM Rules at 15 (Mar. 15, 2010).

1        increase the incentives for large suppliers to strategically de-list.”<sup>19</sup> These calls for delay  
2        are not factually well grounded. Regarding the second point, at no point during the course  
3        of the FCM Working Group meetings did any participant ever demonstrate, or even attempt  
4        to demonstrate, such an incentive; nor did Dr. Patton, who was provided the presentation I  
5        made to the FCM Working Group as part of his review of the APR. In addition, I disagree  
6        with ISO-NE’s claims that NEPGA’s APR proposal has changed from the one proposed in  
7        the FCM Working Group so materially that any analysis conducted on that early version is  
8        uninformative.<sup>20</sup> The presentation I made on the APR is attached as Supplementary  
9        Exhibit RBS-2. There is no material difference between that proposal, made on August 31,  
10       2009, and the one offered in my testimony. ISO-NE’s confusion on this point apparently  
11       arises because my description of the “between” rule at the FCM Working Group did not  
12       explicitly set forth a demand curve, but the formulation of the rule at the bottom of page 11  
13       of Supplementary Exhibit RBS-2 is identical in effect to the constant-cost demand curve  
14       proposed by ISO-NE in its APR-3 formulation. Moreover, my testimony discusses why  
15       such a rule is actually consistent with truthful revelation of each bidder’s reservation price,  
16       and ISO-NE has not offered any testimony rebutting that analysis.

17 16) This concludes my reply affidavit.

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<sup>19</sup> ISO-NE Answer at 22.

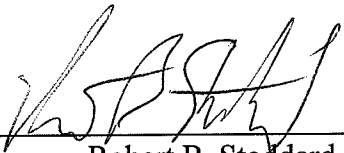
<sup>20</sup> *Id.*

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

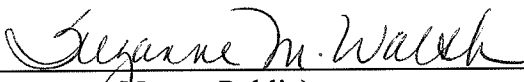
New England Power Generators Association Inc.	)	
	)	
v.	)	Docket No. EL10-50-000
	)	
ISO New England Inc.	)	
	)	
ISO New England Inc. and	)	
New England Power Pool	)	Docket No. ER10-787-000

*SUPPLEMENTARY AFFIDAVIT OF ROBERT B. STODDARD  
ON BEHALF OF NEW ENGLAND POWER GENERATORS ASSOCIATION*

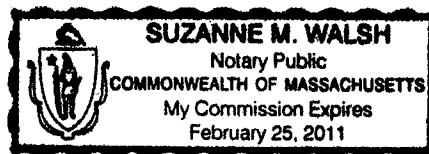
I, Robert B. Stoddard, being duly sworn, depose and state that the contents of the foregoing Supplementary Affidavit on behalf of the New England Power Generators Association is true, correct, accurate and complete to the best of my knowledge, information, and belief.

  
\_\_\_\_\_  
Robert B. Stoddard

SUBSCRIBED AND SWORN to before me this 13 day of April 2010.

  
\_\_\_\_\_  
(Notary Public)

My commission expires: 2/25/11



*Supplementary Exhibit RBS-1*

**Supplementary Exhibit RBS-1  
New Resources Claiming Treatment as Existing in FCA #1**

RESOURCE TYPE	ASSET PROJECT NAME	ASSET ID	SUMMER	Cleared MW	Utility	RFP MW
DEMAND	CL&P - CONSERVATION & LOAD MANAGEMENT (CL&M) - DEMAND	12580	17.282	17.282	17.282	
DEMAND	CL&P - CONSERVATION & LOAD MANAGEMENT (CL&M) - ENERGY	12581	99.866	99.866	99.866	
DEMAND	CL&P DISTRIBUTED GENERATION FCM 2010	12583	17.091	17.091	17.091	
DEMAND	CONSERVATION AND LOAD MANAGEMENT PROGRAM	12584	6.923	6.923	6.923	
DEMAND	UI DEMAND RESPONSE WITH CURTAILMENT PROGRAMS	12592	9.876	9.876	9.876	
DEMAND	UI CONSERVATION AND LOAD MANAGEMENT PROGRAMS	12600	24.737	24.575	24.575	
DEMAND	NGRID_NEMA_FCA1_EEODR	12670	22.343	22.343	22.343	
DEMAND	NGRID_NH_FCA1_EEODR	12671	2.839	1.605	1.605	
DEMAND	NGRID_RI_FCA1_EEODR	12672	31.849	31.849	31.849	
DEMAND	NGRID_SEMA_FCA1_EEODR	12673	30.244	30.244	30.244	
DEMAND	NGRID_WCMA_FCA1_EEODR	12674	39.872	39.872	39.872	
DEMAND	BRIDGEWATER CORRECTIONAL COMPLEX COGENERATION	12749	1.613	1.613		
DEMAND	NORFOLK/WALPOLE CORRECTIONAL COMPLEX COGENERATION	12752	1.527	1.508		
DEMAND	MA SEMA STATE COLLEGES	12753	0.168	0.168		
DEMAND	TEWKSBURY STATE HOSPITAL COGENERATOR	12754	0.904	0.904		
DEMAND	NHEC ENERGY EFFICIENCY PROGRAMS	12757	0.43	0.43		0.43
DEMAND	UNIVERSITY OF RHODE ISLAND - ENERGY SAVING PERFORMANCE	12805	1.234	1.234		
DEMAND	WMECO - CONSERVATION & LOAD MANAGEMENT (CL&M) - ENERGY	12806	11.696	11.696	11.696	
GENERATOR	COMERFORD	380	7.868			
GENERATOR	MILLSTONE POINT 3	485	80			
GENERATOR	VERNON	599	11.21			
GENERATOR	LAKE ROAD 1	1342	6.262			
GENERATOR	LAKE ROAD 2	1343	14.996			
GENERATOR	THOMAS A. WATSON	12500	105.2	105.2	105.2	
GENERATOR	UNH POWER PLANT	12509	2	2		
GENERATOR	LOWELL POWER REACTIVATION	12521	72	72		
GENERATOR	COS COB 13&14	12524	34	34		
GENERATOR	CMEEC GAS TURBINE	12526	75	75		75
GENERATOR	CMEEC CAT DIESEL	12528	1.9	1.9		1.9
GENERATOR	DFC-ERG MILFORD	12549	7.8	7.8		7.8
GENERATOR	BRIDGEPORT FUEL CELL PARK	12550	14.3	0		0
GENERATOR	COVANTA HAVERHILL LANDFILL GAS ENGINE	12553	1.6	1.6		
GENERATOR	ANSONIA GENERATING FACILITY	12555	60	60		
GENERATOR	WATERBURY GENERATION FACILITY	12564	95.7	95.7		95.7
INTERMITTENT	HOOSAC WIND	12529	7.7	0		
INTERMITTENT	SHEFFIELD WIND FARM	12530	10	10		

**Load-owned Resources**      **495.752**  
**RFP/Subsidized Resources**      **103.5**  
**Total Potential OOM Resources**      **599.252**

Notes:

1. Funded by Connecticut Clean Energy Fund. <http://www.greenjobs.com/public/industrynews/inews04203.htm>
2. Funded by Connecticut Clean Energy Fund. <http://www.allbusiness.com/fabricated-metal/fabricated-manufacturing-other/4103293-1.html>
3. Under contract pursuant to Connecticut RFP. <http://www.firstlightpower.com/generation/documents/QuestionsAndAnswers-PublicMeeting1.pdf>

*Supplementary Exhibit RBS-2*

# NEPGA Initial Proposal for Alternative Price Rule Reforms

Robert Stoddard  
FCMWG August 31, 2009

**CRA** Charles River  
Associates

## Role of APR

- Ensure that capacity prices will reflect the price needed to elicit new entry when new capacity is needed.
- In the absence of the APR, the price in the FCA could be depressed ... if enough new capacity is self-supplied (through contract or ownership) by load.
- If owners of these two categories of resources control more new capacity than the amount of new capacity needed in a capacity zone, their low bids could artificially depress the price in the FCA.
- It is reasonable to reset the clearing price to a level that would be expected in a competitive market that needs new capacity.

*Devon Power LLC, Order Accepting Proposed Settlement Agreement, 115 FERC ¶ 61,340 (2006) PP 113-114*

## Principal Weaknesses of Current APR

- Out-of-Market Capacity definition is too narrow
- Large quantity of OOM can have a delayed and/or multi-year effect
- *Any* market-based entry causes APR not to trigger
- Reset price may not reflect economic cost of the required capacity
- Treatment of cleared De-List Bids fails the “no regrets” test

## Out-of-Market Capacity Definition

- “New as Existing” exemption for FCA1
  - Allowed 585 MW of new resources to be exempt from OOM treatment
  - No proposed change for FCA1 results
  - But include this capacity in Past Excess OOM capacity
- Rejected De-List Bids
  - Has effect of artificially shifting supply stack and lowering clearing price
- State-Mandated or -Subsidized Resources
  - May include DR or Renewables
  - Entry decision largely independent of clearing price in FCA
- Proposal:
  - Expand definition for of OOM beginning with FCA4
  - Reclassify resources cleared in FCA1—FCA3 for use in the Past Excess OOM metric in the revised APR trigger

## Managing Past Excess OOM

- Current APR did not contemplate OOM of such scale that it could meet many years' New Capacity Requirement (NCR)
  - $NCR = NICR - \text{Existing Capacity}$
- Capacity Carry-Forward Rule was designed as a multi-year mechanism to count over-purchases of new capacity in one year towards price-setting in subsequent years, as it is deployed
- A parallel mechanism is needed for OOM Capacity
- **Proposal:**
  - Accept INTMMU proposal to modify 2<sup>nd</sup> APR trigger
    - $NCR + \text{Cleared Permanent Delist Bids} + \text{Past Excess OOM} > 0$
  - Also exclude Non-Priced Retirements from Existing Capacity

## Required Scale of OOM

- OOM Capacity necessarily displaces other market-based new entry
- Displaced entry results in some degree of price suppression
- But current APR only corrects if 100% of market-based new entry
  - If 900 MW NCR is met with 899 MW of OOM and 1 MW from a plant upgrade, APR does not trigger
- **Proposal:**
  - Eliminate 3<sup>rd</sup> trigger of APR, so any amount of OOM can trigger APR
  - Modify price reset rule so that price increase reflects scale of OOM
    - Small amount of OOM → small effect of APR

## Reset price may not reflect market cost of required capacity

- APR was intended to “reflect the price needed to elicit new entry”
- But since the supply curve is not flat, the price needed to elicit *all* the NCR should vary with the quantity OOM Capacity
- Current APR looks only to the next available MW of market-based new supply
  - Too high? OOM Capacity deters competing offers of new supply
  - Too low? 1 MW may be available cheaply, but to meet the ICR served by OOM Capacity with market-based capacity likely requires a higher price
- **Proposal:**
  - Reconstruct the supply stack with competitive offers imputed to OOM Capacity

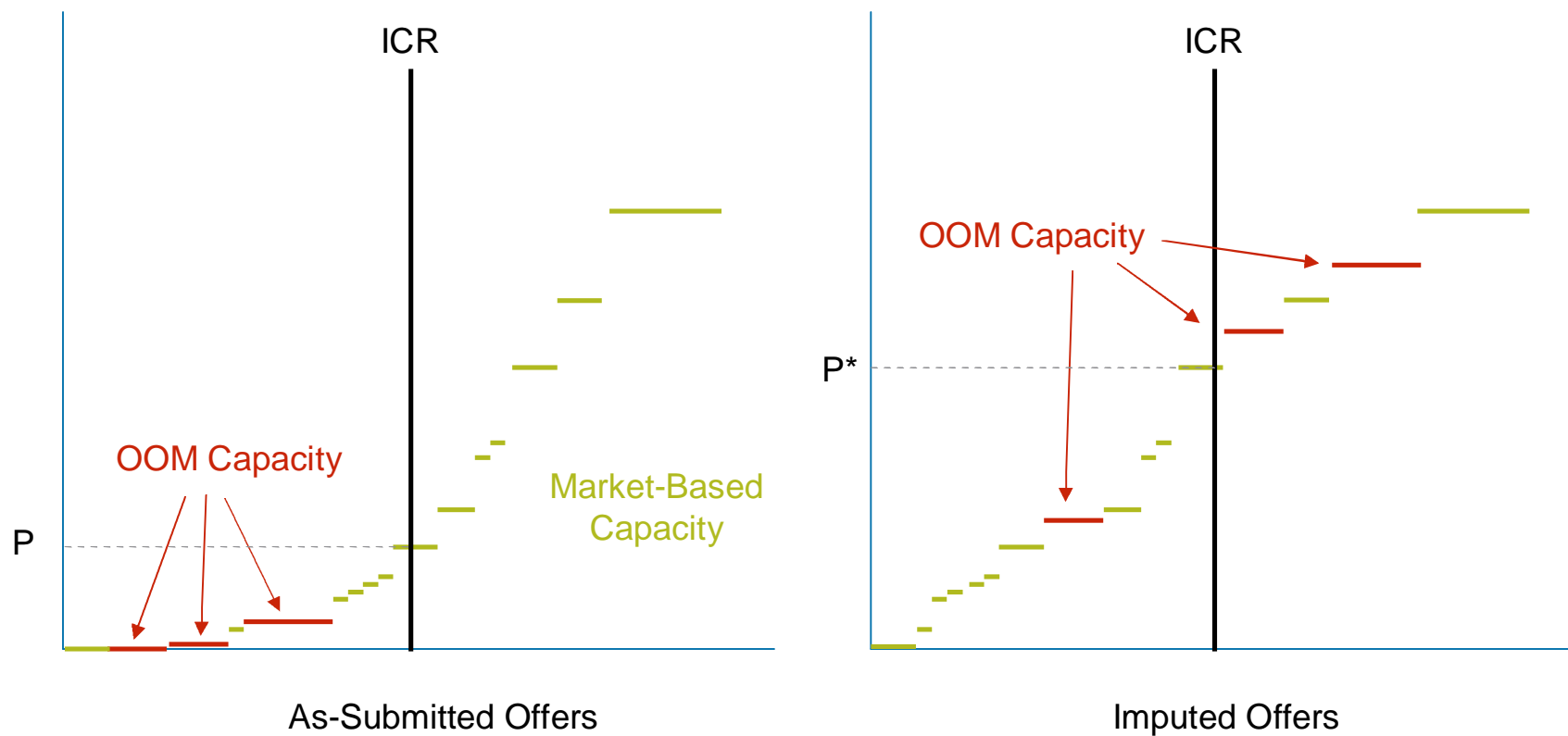
## Imputing Prices to OOM Capacity

- INTMMU would develop estimated of competitive capacity offer price for all OOM Capacity
- Estimate based on best available information; in sequence:
  - Resource-specific cost and revenue projections
  - Competitive offers from similar, market-based resources
  - Technology-specific cost and revenue projections
  - CONE (only if no other approach is possible)

## Clearing the FCA with Imputed Offers

- Capacity Supply Obligations assigned by FCA conducted with as-received offers
- Auction Manager notes price at which the FCA would have cleared had each OOM Resource exited at its imputed offer
- Final Capacity Clearing Price set to this “but for” price

# Graphical Example of Re-Cleared FCA



## Treatment of “Between” De-List Bids

- Current APR has no treatment for “between” De-List Bids
  - Bids from existing resources that are accepted, but at a price below the final clearing price after action of APR
- Results in distorted incentives for bidding
  - De-List Bid should reflect going-forward costs net of expected earnings
  - But if APR *might* be invoked, existing resources want to stay in to get the APR-set price
  - Could lead to *insufficient* de-list bids offered to clear the FCA
- **Proposal:**
  - Borrow pro-rationing rule from the Transition Period
    - Total capacity payments fixed at  $ICR \times P^*$
    - De-List Bids cleared below  $P^*$  are reinstated at owners' option (adding quantity  $Q$ )
    - Effective price set at  $(ICR \times P^*) / (ICR + Q)$

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**CRA** Charles River  
Associates

*Exhibit RBS-7*

# Uses & Associated Values of CONE



	FCA #1	FCA#2	FCA#3	FCA#4	FCA#5
CONE	\$7.50	\$6.00	\$4.92	\$4.92	???
Floor	\$4.50	\$3.60	\$2.95	n.a.	n.a.
Clear Price	\$4.50	\$3.60	\$2.95		
Auction Start Bid	\$15.00	\$12.00	\$9.84	\$9.84	???
Delist Bid of 2xCONe Required for Existing Summer Capacity in Excess of Winter Capacity	\$15.00	\$12.00	\$9.84	\$9.84	???
Allowed Static Delist Bid for Capacity at Risk Between 90F and 100F	\$15.00	\$12.00	\$9.84	\$9.84	???
Price at Which DR must offer to Permanently Delist Unverified Capacity Cleared in the Prior Auction	\$15.00	\$12.00	\$9.84	\$9.84	???
Price at Which ISO Offers to Purchase Capacity in an ARA to Replace a Cleared Delist Bid That was Rejected for Reliability	\$15.00	\$12.00	\$9.84	\$9.84	???
Price at Which ISO-NE Offers to Buy Replacement Capacity for A New Generator that, by the 3rd ARA, Is NOT Expected to be Available to Full Awarded Capacity Supply Obligation	\$15.00	\$12.00	\$9.84	\$9.84	???
Price at Which ISO-NE Offers to Buy Replacement Capacity to Cover a Significant Decrease in Capacity That Has No Viable Plan to Achieve Ability to Cover Full CSO.	\$15.00	\$12.00	\$9.84	\$9.84	???
Permanent Delist Bid Threshold Above 125% CONE Subject to IMMU Review	\$9.38	\$7.50	\$6.15	\$6.15	???
Price Above Which Static or Permanent Delist Capacity in a Constrained Zone Will not be Replaced	\$9.00	\$7.20	\$5.90	\$5.90	???
If System has Inadequate Supply but Zone has Adequate Supply, Zone Price Capped at 1.1x CONE	\$8.25	\$6.60	\$5.41	\$5.41	???
If the an Auction has Insufficient Competition, Payments to Existing Resources Capped at 1.1x CONE	\$8.25	\$6.60	\$5.41	\$5.41	???
Collateral Required, per KW, Before Demonstration of Commercial Operations Capability	\$7.50	\$6.00	\$4.92	\$4.92	???
Static Delist Bid Threshold @ or above 80% CONE	\$6.00	\$4.80	\$3.93	\$3.93	???
Dynamic Delist Bid Threshold @ 80% CONE	\$6.00	\$4.80	\$3.93	\$3.93	???
Price Below Which 100% of Static or Permanent Delist Capacity in a Constrained Zone will be Replaced	\$6.00	\$4.80	\$3.93	\$3.93	???
New Capacity Bid Review to Determine if OOM for APR if Below 75% CONE	\$5.63	\$4.50	\$3.69	\$3.69	???
Price Threshold Below Which New Generation, DR, or Imports may not offer more capacity than submitted in Qualification Package	\$5.63	\$4.50	\$3.69	\$3.69	???