

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc. and New England Power Pool)	Docket No. ER10-787-000
)	
New England Power Generators Association Inc.)	
)	
v.)	Docket No. EL10-50-000
)	
ISO New England Inc.)	
)	
PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC)	Docket No. EL10-57-000
)	
v.)	
)	
ISO New England Inc.)	

*REQUEST FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING
OF THE NEW ENGLAND POWER GENERATORS ASSOCIATION*

The New England Power Generators Association hereby requests clarification, or, in the alternative, rehearing, of the Commission’s Order of April 23 in the above-captioned dockets. *Order on Forward Capacity Mkt. Revisions & Related Complaints*, 131 FERC ¶ 61,065 (2010) (“Hearing Order”). In so doing, NEPGA also responds herein to ISO-NE’s request for rehearing or clarification of the Hearing Order. *ISO New England Inc.*, Request for Clarification or, in the Alternative, Rehearing (May 5, 2010) (“ISO-NE Request”). In sum, we ask the Commission to clarify that (1) the value of CONE for *future* FCAs is at issue in the paper hearing, (2) the new FCM emerging from the hearing will be in effect no later than FCA #5, notwithstanding any request for further delay, and (3) the Commission did not mandate the elimination of the price floor without first considering the reforms to be adopted in the paper hearing. To the extent that

these clarifications are denied, we seek rehearing. We also seek disclosure of certain information related to OOM entry in the first three auctions, and will be filing a separate motion to that effect. If this relief is not granted, then it would be an abuse of discretion for the Commission to order a paper hearing, with no discovery, on this issue, instead of trial-type hearings or other procedures that would allow necessary access to underlying data in the sole position of ISO-NE.

BACKGROUND

The current proceedings were triggered when ISO New England (“ISO-NE”) filed a set of proposed revisions to the tariff governing its Forward Capacity Market (“FCM”). *ISO New England*, Docket No. ER10-787-000, Various Revisions to FCM Rules Related to FCM Redesign (Feb. 22, 2010) (“FCM Revision”). The FCM Revisions were an attempt to correct several unjust and unreasonable parts of the FCM, among them: (a) the Alternative Price Rule (“APR”) which plainly failed to achieve its goal—to prevent the price distortion through uneconomic Out-of-Market (“OOM”) bids; (b) the corresponding plummeting of the FCM’s measure of the Cost of New Entry (“CONE”); and (c) the related failure to model capacity zones adequately.

In response to the FCM Revisions, the New England Power Generators Association (“NEPGA”)¹ filed a protest under Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, noting how they failed to fully identify or adequately correct the problems of the FCM, *ISO New England*, Docket No. ER10-787-000, Motion to Intervene and Protest of the New

¹ 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.

England Power Generators Association (Mar. 15, 2010) (“Protest”),² and a separate but substantially similar complaint under Section 206, 16 U.S.C. § 824e, seeking modification and redress on these same issues, *New England Power Generators Association v. ISO New England*, Docket No. EL10-50-000, Complaint Requesting Fast Track Processing (Mar. 23, 2010) (“Complaint”).³ The Commission, while accepting the FCM Revision, set issues raised by NEPGA and others for hearing. Hearing Order at P 1. In response, ISO-NE requested that the Commission alter the Hearing Order to extend its tariff for an additional year, delaying reforms until Forward Capacity Auction (“FCA”) #6. ISO-NE Request at 1.

LIST OF ERRORS/STATEMENT OF ISSUES

We seek clarification or rehearing on three issues:

1. The value of CONE underlying future FCAs is at issue in the paper hearing, and certain underlying evidence concerning past OOM determinations should be disclosed.
2. The Commission should offer further guidance to ensure that the reformed FCM emerging from the hearing can be implemented as scheduled for FCA #5.
3. The Commission did not mandate in advance that the price floor must be eliminated, but will decide this issue when the package of reforms arising out of the paper hearing is before it.

To the extent that clarification on these issues is denied, we respectfully seek rehearing.

² Attached to our Protest were supporting affidavits from two leading capacity market experts. *Affidavit of Roy J. Shanker on Behalf of New England Power Generators Association*, attached as Exhibit 1 to our Protest (“Shanker Aff.”); *Affidavit of Robert B. Stoddard on Behalf of New England Power Generators Association*, attached as Exhibit 3 to our Protest (“Stoddard Aff.”).

³ In addition we filed an answer to several parties, *New England Power Generators Association v. ISO New England*, Docket No. EL10-50-000, Motion for Leave to Answer and Answer of the New England Power Generators Association (Apr. 13, 2010) (“Answer”), supported by two supplementary expert affidavits, *Supplementary Affidavit of Roy J. Shanker Ph.D.*, attached as Supplementary Exhibit 1 to our Answer (“Shanker Supp. Aff.”); *Supplementary Affidavit of Robert B. Stoddard*, attached as Supplementary Exhibit 2 to our Answer (“Stoddard Supp. Aff.”).

REQUESTS FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING

I. THE COMMISSION SHOULD CLARIFY THAT THE PROPER VALUE OF CONE FOR FUTURE FCAS WAS SET FOR HEARING

The Commission “require[d] the Filing Parties and others to address in their First Briefs in the paper hearing ... the issue of the proper CONE value” because it “is intrinsically tied to the OOM determinations that are part of the APR Issue.” Hearing Order at P 151. Under this language, there should be no doubt that the value of CONE to be used in any FCA held under the tariff emerging from the hearing is subject to discussion in the upcoming filings and Commission determination thereafter.

The sole reason we ask for reaffirmation of this plain language is out of an abundance of caution. It is possible that the preceding paragraph in the Hearing Order might create confusion on this issue. There the Commission “note[d] that the specific value of CONE is not part of the instant filing” and that “the CONE 70/30 update mechanism was agreed to in the FCM settlement.” *Id.* at P 150. Insofar as this language merely reasserts that the results of the first three FCAs, based on past CONE values, are not to be disturbed, we agree and merely seek reassurance that, as the Commission noted, the value of CONE and its manner of adjustment in future FCAs is subject to the hearing.

The Commission also expressed skepticism with respect to the need to investigate the impact of market power on past CONE values, insofar as it affects future values, noting that “arguments that OOM entry has triggered the current CONE value appear to be flawed” according to ISO-NE’s IMM, and “to the extent that the generator parties contend that the IMM analysis fails to properly consider all of the OOM capacity in its analysis, we note that they have not supported such an allegation.” Hearing Order at P 150. This statement wrongly overlooks the fact that, at this point, only ISO-NE has the data needed to prove that OOM capacity has not

been fully and accurately mitigated in past auctions. We plan to file a motion seeking disclosure of relevant evidence from ISO-NE and its IMM regarding offers which were not deemed OOM.

We conditionally seek clarification and alternatively rehearing on this point as well. It would be arbitrary, capricious and an abuse of discretion for the Commission to require NEPGA and other parties to explore, in the paper hearing, which historic new entry is OOM, and which is not, without access to the underlying information needed to resolve that issue—data that is in the sole possession of ISO-NE and its IMM. If our motion is granted, then there is no need to address this issue on rehearing and clarification. If it is denied, then we request that the Commission remedy this outcome by granting rehearing or clarification.

II. THE COMMISSION SHOULD REAFFIRM THAT IT INTENDS TO APPROVE NEW MARKET RULES BY MARCH 1

The Commission correctly required changes resulting from the paper hearing process to be implemented by FCA #5, and established procedures to ensure that its deadline would be met. Hearing Order at PP 20-23. It stated that “[i]t is our intention that, if practicable, we will issue an order terminating the transitional market rules and *accepting longer-term market rules* before March 1, 2011.” *Id.* at P 23 (emphasis added). While we would have preferred all such reforms to be in place by FCA #4, the Commission took the position that a year’s delay would allow sufficient time for the paper hearing to resolve necessary changes to the market rules. We are not seeking rehearing of that one-year delay. Rather, we are requesting that the Commission stand by its decision to implement reforms by FCA #5 and to offer some additional guidance on scheduling—both its own and ISO-NE’s—in order to reach this target.

ISO-NE, however, has already filed for an *additional* year’s delay. *See* ISO-NE Request. ISO-NE requests that no changes emerging from the hearing process should go into effect any earlier than FCA #6. *Id.* This request should be rejected. The Commission was right to order

changes no later than FCA #5, and it is premature to retreat from that order without exploring every available option to expedite implementation of new rules. Another year of capacity payments that are not just and reasonable is not an acceptable outcome.

Nor is it, ISO-NE's protestations to the contrary notwithstanding, a necessary outcome. ISO-NE raises two principal concerns that it claims prevent an expedient resolution here: (1) the October 1, 2010, deadline for Existing Capacity Qualifications; and (2) the lead time for zonal modeling. ISO-NE Request at 6-8.⁴ As set forth below, neither issue justifies delaying reform beyond FCA #5. In fact, there are multiple measures which ISO-NE or the Commission could take which, standing alone or in combination, would assure both an orderly transition and just and reasonable rates in effect for FCA #5:

First, the stakeholder process need not further delay implementation of reforms beyond FCA #5. The Commission stated its intent to "accept[] longer-term market rules before March 1, 2011." ISO-NE appears to envision some additional stakeholder process after March 1, 2011, to finalize market rules. ISO-NE Request at 8. Any further stakeholder process, however, even if necessary, would have to occur well before March 1, 2011 for the Commission to approve "market rules" (*i.e.*, tariff language) by that date.

It is not clear that any additional stakeholder process will be required after the order on the paper hearing if, as the Commission has decided, its decision on or before March 1, 2011 will approve market rule language. Once the Commission rules on market rule language, there will be little left to discuss and the only remaining task will be implementation.

⁴ ISO-NE states that "[t]hese examples serve only to illustrate the problem—there are certainly others." ISO-NE Request at 8. However, assuming that these unstated additional problems are no more difficult to overcome than the ones ISO-NE chose to make its point, it seems unlikely that they would prove fatal to ISO-NE's joint efforts to implement the Commission's decisions.

We intend to submit concrete tariff language for Commission approval during the paper hearing. The Commission should encourage ISO-NE and other parties to do the same. Given these various alternatives the Commission may then choose one or craft another of its own making. In any case, the tariff language would be chosen by the Commission and could be implemented immediately, just as it was under similar circumstances when the PJM RPM was designed under the Commission's supervision and guidance. *See PJM Interconnection*, 117 FERC ¶ 61,331 (2006) (approving tariff rules developed in RPM filing as revised during settlement); *see also PJM Interconnection*, Docket Nos. ER05-1410-000 and -001, EL05-148-000 and -001, Settlement Agreement and Explanatory Statement of the Settling Parties Resolving All Issues, (Sept. 29, 2006) (requesting "that the Commission approve the Settlement Agreement, including the enclosed revised sheets of the" OATT, the Operating Agreement and the RPM, as set forth in attachments to the Settlement Agreement). There would be no need (or room) for a stakeholder process to tinker with the Commission's decision.

In the event that there remains any room for discretion, even after the Commission's decision on the paper hearing, there should be rapid resolution of whatever points remain. Without endorsing any particular procedure, one potential process would be for the Commission to order the parties to this proceeding to negotiate the remaining issues under the supervision of a Commission-appointed settlement judge. If at the end of a brief negotiation period (for example, 30 days) the parties could not reach agreement on the outstanding issues, the settlement judge would be authorized to impose a resolution on the issues left open by the Commission.

And nothing prohibits ISO-NE from undertaking its stakeholder process in parallel with the Commission proceedings.

The paper hearing will overlap with the 18-month stakeholder process that the Filing Parties state that they propose to commence In light of our order to

participate in this paper hearing, it is possible that the Filing Parties may think it appropriate to suspend or in other ways alter their intention to resolve these issues through an internal stakeholder process; that decision, however, is in the hands of the stakeholders and we express no opinion on that question.

Hearing Order at P 21 n.15. If the stakeholders take advantage of this opportunity afforded by the Commission, they can discuss the various proposed forms of market rules in advance of the Commission decision.

Second, the Commission could issue an expedited order on key issues, such as the level of CONE, some time soon after the September 1, 2010 filing deadline for Second Briefs. The Commission likely does not need the entire seven-month period between the September 1 filings and the March 1, 2011 deadline to provide guidance on key issues. The Commission could issue a preliminary order during that period, and still issue a final order accepting market rules on March 1, 2011.

Third, auction deadlines may need to be adjusted, but such adjustments are permitted by the tariff. ISO-NE Tariff § III.13.2.1. In both examples cited by ISO-NE, reasonable accommodations would permit implementation to go forward in time for FCA #5. The October 1 deadline for Existing Resource Qualification and the following events is entirely within ISO-NE's discretion. A brief delay would not impose insurmountable logistical obstacles on ISO-NE. The Existing Resource Qualification deadline for FCA #1, when ISO-NE's administrative resources must have been stretched far thinner in anticipation of the very first auction, was on April 30, 2007 or, relative to the commitment period, seven months later than the currently scheduled for FCA #5. ISO-NE Tariff § III.13.1.10. Moving the FCA #5 Existing Resource Qualification to be as far ahead of the capacity commitment period as it was in FCA #1 would result in a date of April 30, 2011.

Similarly, the time line for zonal modeling can easily be met by the Commission or slightly modified by ISO-NE. FCA #5 is currently scheduled for June 2011. ISO-NE Tariff § III.13.1.10. According to the ISO-NE Request, offers are due to be submitted four months earlier, that is February 2011. ISO-NE Request at 7-8 (footnotes omitted). The Commission's own target for approving the new tariff is March 1, 2011. While both ISO-NE and market participants understandably need some time to evaluate their bids and offers in light of a reformed FCM and CONE, it seems impossible that such a narrow gap of a few days could not be bridged by a combination of slight adjustments in ISO-NE's schedule or a slightly more expeditious ruling by the Commission.

There likely are other steps that could be taken to ensure that the Commission's intention to have reforms in place in time for FCA #5 is met. There is no justification to decide now—before any filings have even been made—that *two* more auctions (FCA #4 and FCA #5) should be run under the current flawed FCM design. Instead, the Commission should clarify that every step should be taken to ensure prompt resolution of issues in time for FCA #5.⁵

Delay jeopardizes the markets. ISO-NE itself has recognized a similar need for quick action when the issue was seller market power, rather than buyer market power. As the Commission recounted:

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.

⁵ ISO-NE also asks that the price floor should remain in place while implementation of reforms to FCM is delayed. See ISO-NE Request at 9. We discuss these issues further in the next section.

ISO New England, 129 FERC ¶ 61,008 at P 22 (2009). The same urgency for quick action applies when the issue is, as here, buyer market power.

III. THE COMMISSION SHOULD NOT PRE-JUDGE THE ELIMINATION OF THE PRICE FLOOR

The Commission stated that “we *anticipate* that in the Commission’s final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with the implementation of that new mechanism.” Hearing Order at P 97 (emphasis added); *see also id.* at P 19 & n.13 (“We *expect* . . . that in the Commission’s final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with implementation of the new APR.”) (emphasis added). We seek clarification that the Commission did not mandate in advance that the price floor must be eliminated, but instead that it will review the status of the price floor at the same time that it considers the reforms that arise out of the paper hearing process.

To date each FCA has had a clearing price floor of $0.6 \times \text{CONE}$ (which itself has been automatically adjusted downward). ISO-NE Tariff § III.13.2.7.3(b). NEPGA agrees entirely with the Commission that this pricing is far from ideal. Ordinarily, the capacity market should be expected to oscillate within a limited band around the level of CONE. In times of shortage, it would induce new entry into the capacity market by offering revenues above cost. In times of surplus, it would discourage new entry into the capacity market by offering revenues below cost. And in the long run it would justify economical entry—no less and no more—by averaging out to CONE.

However, this is not what has happened. Due to the flaws of the FCM which are the subject of the pending hearing, every FCA so far has hit the floor of $0.6 \times \text{CONE}$. While the floor should be a rarely significant administrative safety net, it has instead become the *de facto*

administratively set capacity price. Given the continued overhang of OOM capacity, this situation is unlikely to change any time soon.

This was not how the FCM was supposed to function. As the Commission put it:

Generally speaking, the Commission would prefer that the market be allowed to clear naturally, which has not happened to date under the Commission-approved price collar; all three FCAs have reached the price floor with excess capacity.

Hearing Order at P 97. *See also id.* at P 19 (“[t]he Commission generally does not approve of price floors, but recognizes that as a transitional mechanism to offset the flaws in the existing APR, an extension of the price floor in this case may be appropriate.”). We agree entirely with the Commission: In a properly functioning, competitive forward capacity market, prices should be set by auction and equilibrate around CONE, and price floors (or, for that matter, ceilings) should be both unnecessary and of little effect, as they would so rarely be hit. In a well-functioning market, low prices would signal a genuine surplus of competitive capacity. In response to this price signal, producers with marginal costs above the clearing price would leave. That is, efficient exit would restore the market to competitive balance.

While we agree entirely with the underlying principle expressed by the Commission, we fear that some may attempt to interpret the Hearing Order to issue a mandate to eliminate the price floor after FCA #4 without regard to the extent, form and timing of other FCM reforms. *See* Hearing Order at PP 19, 97. We think any such interpretation would be in error. The Commission thus should clarify that no definitive decision has been made concerning the price floor until such time as the reforms that are developed through the hearing process are reviewed. Much as we are encouraged by the Commission’s optimism that a properly functioning FCM will emerge from the hearing process and render a floor unnecessary, it nevertheless would be premature to require elimination of the price floor without first considering the reforms to be filed in the paper hearing.

In short, while we hope that the price floor will no longer be necessary as a result of the corrections to be approved in the paper hearing, it would be an error to require the elimination of the price floor without first reviewing those reforms. For example, one of the key issues set for hearing is the treatment of “historic” OOM entry from the first three auctions, which led to the current 7-year surplus in supply. Protest at 28-29. If all such OOM entry is not fully mitigated in future auctions, then it is almost certain that prices will remain at the floor. If there is no floor, and a substantial surplus of unmitigated OOM capacity, prices likely will fall to near-zero levels.

The better course of action would be to review the status of the price floor when the Commission has the revised FCM design before it and when it can confirm that the revised rules effectively and fully account for all OOM entry, including historic OOM from the FCA #1 through FCA #4. The Commission should so clarify that this is what it intended in the Hearing Order.

Finally, we are also concerned by the Commission’s statement that an “increase in the price floor would provide the wrong economic signal at this time.” Hearing Order at P 98. Given that the price floor is $0.6 \times \text{CONE}$, and that ISO-NE’s CONE is significantly below the real-world cost of new entry as well as the CONE figures used in neighboring regions, this statement could be misinterpreted by those who oppose FCM reform to justify a long-term regime that results in capacity prices at or near the current floor. Long-term pricing at this level, which is below the demonstrable Operations and Maintenance costs of many required generators, Protest at 77-79, Stoddard Test. ¶ 112, is almost by definition unjust and unreasonable. The Commission should clarify that it did not pre-judge appropriate levels of compensation.

CONCLUSION

For the foregoing reasons, the Commission should clarify the Hearing Order or, in the alternative, grant rehearing.

Respectfully submitted,

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May 24, 2010

* NEPGA requests that all further correspondence, communications and other documents relating to these dockets be served upon these individuals electronically at aoconnor@nepga.org and Paul.Wight@skadden.com.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served copies of the foregoing document upon each person designated on the official service list as compiled by the Office of the Secretary in the captioned proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.2010.

Dated at Washington, D.C., this 24th day of May, 2010.

/s/ Carl Edman
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