

127 FERC ¶ 61,242  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

ISO New England Inc.

Docket No. ER09-1029-000

ORDER GRANTING WAIVER

(Issued June 15, 2009)

1. Numerous market participants with demand response (DR) resources<sup>1</sup> have asked for a limited waiver of section III.13.1.4.8.1 of ISO-NE's Market Rule 1<sup>2</sup> to allow them to timely submit Updated Measurement and Verification Plans (Updated Plans) to ISO-NE, as required by the Forward Capacity Market (FCM) rules. The Commission hereby grants the requested waiver.

**I. Background**

2. As detailed in numerous proceedings before this Commission, ISO-NE has recently implemented the FCM, pursuant to which capacity resources (both generators and demand resources) compete to provide capacity to New England, on a three-year-forward basis, by participating in an annual Forward Capacity Auction (FCA). ISO-NE

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<sup>1</sup> Action Energy LLC, Ameresco, Inc., Comverge, Inc., The Connecticut Light and Power Co., Connecticut Municipal Electric Energy Cooperative, Constellation Energy Resources, LLC, CPower, Inc., Energy Curtailment Specialists, Inc., EnergyConnect, Inc., EnerNOC, Inc., Freedom Logistics LLC, Hess Corporation, Holden Municipal Light Department, Linde Energy Services, Inc., Littleton Electric Light & Water Departments, Massachusetts Electric Company, Massachusetts Municipal Wholesale Electric Co., The Narragansett Electric Company, New Hampshire Electric Cooperative Inc., NSTAR Electric Company, The United Illuminating Company, Vermont Electric Cooperative Inc., Western Massachusetts Electric Company, and Z-Tech, LLC (collectively DR Market Participants).

<sup>2</sup> Section III of the ISO-NE Transmission, Markets, and Services Tariff (Tariff).

conducted its first FCA on February 4, 2008, a second FCA in December 2008, and will conduct a third FCA in October 2009.

3. On October 29, 2008, the Commission accepted proposed changes to the FCM rules and made the new tariff provisions effective December 1, 2008.<sup>3</sup> One of the proposed tariff revisions required market participants with certain real-time demand response and emergency generation resources to submit Updated Plans no later than five business days after receipt of the Qualified Capacity notification, to establish the summer and winter Qualified Capacity amounts of their resources. For the third FCA, market participants were required to submit the Updated Plans by January 20, 2009.

## **II. Request for Waiver**

### **A. Description**

4. The DR Market Participants have filed a motion for a limited waiver of Section III.13.1.4.8.1 of ISO-NE's Market Rule 1 to allow DR Market Participants to timely submit the Updated Plans to ISO-NE, as required by the FCM rules. The applicants are market participants with existing demand response resources in New England. The DR Market Participants request expedited treatment to allow ISO-NE to treat the Updated Plans as timely submitted in the qualification filing, scheduled to occur in the beginning of July, for the third FCA. ISO-NE is required to make a qualification filing with the Commission to specify the resources qualified for the third FCA no later than 90 days prior to the relevant FCA.

5. The DR Market Participants state that, as a result of administrative oversight, every supplier of demand response resources in the ISO-NE FCA failed to meet this deadline. In support of their request for waiver, the DR Market Participants state that the error was made in good faith, since all DR Market Participants failed to make a timely filing and some, if not all, mistakenly assumed that no new submissions related to qualification would be necessary for resources that had already attained qualification. The DR Market Participants also state that the waiver is of limited scope, as the DR Market Participants are committed to submitting Updated Plans to ISO-NE no later than May 29, 2009. DR Market Participants state that the waiver request is solely to allow ISO-NE to treat submissions made after January 20, 2009 as timely in its qualification determinations for the third FCA. Further, the waiver resolves a concrete problem that must be remedied. Under FCM rules, failure to submit the Updated Plan results in a permanent de-list bid. Permanently de-listing the resources would result in a loss of an

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<sup>3</sup> *ISO New England Inc.*, Docket No. ER09-5-000 (October 29, 2008) (unpublished letter order).

estimated 1,957 MW of demand resources, or seventy percent of the existing demand resources and all of the existing demand response resources in the third FCA. Finally, DR Market Participants assert that the waiver does not have undesirable consequences.

**B. Notice**

6. Notice of DR Market Participant's request for waiver was published in the *Federal Register*, 74 Fed. Reg. 20,476 (2008), with answers, motions to intervene and comments due on or before May 14, 2009. On May 14, 2009, the New England Power Pool Participants Committee (NEPOOL) filed a motion to intervene, and ISO-NE and the Electric Power Supply Association (EPSA) filed comments. NEPOOL additionally filed a Motion for Leave to Answer and Answer to the filing by EPSA on May 29, 2009.

**III. Pleadings**

**A. Comments**

7. ISO-NE states that it does not oppose this particular waiver request from DR Market Participants and also requests that the Commission rule on or before June 15, 2009, so as to provide ISO-NE with time to properly account for the demand response resources in its FCA informational filing. ISO-NE cites the large number of existing demand response resources affected by the waiver request as justification for ruling early.

8. ISO-NE concurs that the DR Market Participants' errors were inadvertent and made in good faith. However, ISO-NE also requests that the order explicitly provide that the waiver is limited to the specific and unique circumstances here and does not constitute established precedent that would allow market participants to avoid these or other terms and conditions set forth in the ISO-NE Tariff.

9. EPSA does not oppose the Commission granting the waiver, given the newness of the FCM and its various requirements. However, EPSA requests that the Commission require ISO-NE to evaluate its FCM timelines and requirement to ensure the qualification and auction process is streamlined and clear. EPSA also urges the Commission to ensure comparability of application of rules and requirements for participation by all qualified resources in order to maintain reliability and viability of the FCM.

**B. Answer**

10. In its answer, NEPOOL urges the Commission to reject the request by EPSA, arguing that all interested parties, including ISO-NE, should have the opportunity to discuss such matters alongside all other FCM efforts that are ongoing in New England. NEPOOL notes that NEPOOL, ISO-NE, and the New England Conference of Public

Utility Commissioners have recently initiated a stakeholder process aimed specifically at discussing desired improvements to the FCM. NEPOOL states that this would be the appropriate forum for EPSA to raise its concerns.

#### **IV. Commission Determination**

##### **A. Procedural Issues**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>4</sup> the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NEPOOL's answer because it has provided information that assisted us in our decision-making process.

##### **B. Request for Waiver**

12. The Commission will grant the requested waiver.

13. We note, however, that the waiver granted here is of limited scope. The Commission has previously granted waiver requests for parties that failed to follow proper procedures for participation in earlier FCAs.<sup>5</sup> The Commission has granted relief where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem must be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>6</sup>

14. The Commission finds that the request for waiver here satisfies the aforementioned conditions. DR Market Participants state that their failure to submit the Updated Plans by the deadline specified in the FCM rules was an inadvertent oversight, caused by the newness of the requirement. The fact that every demand resource in ISO-

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<sup>4</sup> 18 C.F.R. § 385.214 (2008).

<sup>5</sup> See, e.g., *ISO New England Inc. – EnerNOC, Inc.*, 122 FERC ¶ 61,297 (2008) (*EnerNOC*); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007) (*Central Vermont*); *University of New Hampshire*, 121 FERC ¶ 61,185 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007) (*Waterbury*); and *Acushnet Co.*, 122 FERC ¶ 61,045 (2008) (*Acushnet*).

<sup>6</sup> See *EnerNOC*, 122 FERC ¶ 61,297; *Central Vermont*, 121 FERC ¶ 61,225; *Waterbury*, 120 FERC ¶ 61,007; *Acushnet*, 122 FERC ¶ 61,045.

NE required to submit Updated Plans missed the deadline supports this statement. This waiver will apply solely to the submission of Updated Plans for the third FCA. The waiver addresses a single concrete problem. As to the question of whether the waiver could have undesirable consequences, we conclude that no third parties will be harmed by granting this limited waiver of the New England market rules. In fact, not granting the waiver would have undesirable consequences, because it would require ISO-NE to permanently de-list approximately 1,957 MW of demand resources, or seventy percent of the existing demand resources and all of the existing demand response resources in the third FCA.

15. Due to the specific and unique facts presented above, the Commission will grant DR Market Participants' request for limited waiver of the ISO-NE market rules. We emphasize the importance of enforcing the FCM rules in order to effectively administer the markets in New England and note that we will not automatically grant such waiver requests in the future. However, for the reasons discussed above, and the fact that ISO-NE does not oppose this request for waiver, we find that granting of waiver is appropriate.

16. However, we will not require ISO-NE to evaluate its FCM timelines and requirements to ensure the FCM qualification and auction process is streamlined and clear, as requested by EPSA. ISO-NE's FCM rules, including rules and requirements applicable to demand resources, have been approved by the Commission, and any revisions to the approved rules should be discussed in ISO-NE's stakeholder process. Further, we find that this is not the proper forum to question whether ISO-NE's rules and requirements are comparably applied to all qualified resources.

The Commission orders:

The request for waiver is hereby granted, as discussed above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.