

129 FERC ¶ 61,008
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. and
New England Power Pool

Docket No. ER09-1546-000

ORDER CONDITIONALLY ACCEPTING MARKET RULE 1 REVISIONS

(Issued October 2, 2009)

1. On August 5, 2009, ISO New England Inc. (ISO-NE) and the New England Power Pool (NEPOOL) Participants Committee (collectively, Filing Parties) submitted revisions to Appendix A of Market Rule 1 to address the market power mitigation of offers for resources that are committed to satisfy local and system-wide reliability needs (August 5, 2009 Filing). As discussed below, we accept Filing Parties' proposed revisions to Market Rule 1 to be effective October 5, 2009 and on or after January 1, 2010,¹ as requested, subject to the outcome of Docket No. ER09-1051-000, and subject to the condition that Filing Parties submit a compliance filing, as discussed below.

I. Background

2. New England market participants are eligible to receive Net Commitment Period Compensation (NCPC) payments when a resource is dispatched out of economic merit for reliability purposes and the fuel and variable operating and maintenance (O&M) costs of operating the resource, as reflected in its time-based Supply Offer, exceed the revenue paid to the market participant in the energy markets.² Under the current NCPC

¹ Filing Parties request that certain revisions become effective on or after January 1, 2010, stating that ISO-NE will provide two weeks' prior notice of the actual effective date.

² Filing Parties note that the majority of NCPC payments are associated with resources dispatched for local reliability reasons, such as local contingency reserve or voltage support. The remaining NCPC payments are associated with the dispatch of resources to meet system-wide reliability needs and marginal resources that are economic for less than all hours of the resource's dispatch over the course of an operating day.

mitigation rules, Supply Offers for a resource are evaluated under a series of conduct test thresholds that compare the financial offer parameters (start-up fee, no-load fee and energy price) to the Internal Market Monitor's estimate of that resource's fuel and variable O&M costs (i.e., the resource's Reference Level). Supply Offers are evaluated using the NCPC threshold if the resource fails the "conduct" test (i.e., one or more components exceed the applicable Reference Levels by a specified percentage or dollar value). NCPC mitigation is imposed if, under the NCPC threshold, the amount of NCPC exceeds twice the resource's Reference Level. Such mitigation is imposed after-the-fact, or *ex post*.

3. ISO-NE's current NCPC mitigation structure was approved in 2002 and implemented in 2003 as part of the implementation of locational marginal pricing for the New England markets.³ In order to ensure the availability of resources in constrained areas, the current NCPC mitigation structure permits market participants with resources that are frequently needed for reliability, the opportunity to recover both fuel and variable O&M costs and contributions to fixed costs.

II. Description of Filing

4. Filing Parties assert that, since 2003, New England has developed more robust energy, ancillary services, and capacity markets, which make it appropriate to review the current NCPC mitigation framework. Specifically, with the implementation of the Forward Capacity, Locational Forward Reserve, and Real-Time Reserve Markets, Filing Parties state that it is no longer necessary for out-of-market NCPC payments to contribute to fixed cost recovery, as market participants have the opportunity to recover their fixed costs as well as fuel and variable O&M costs through participation in the New England Markets or, for resources retained for reliability, through the "units needed for reliability" mechanisms provided for under the Forward Capacity Market (FCM) rules.⁴ Additionally, Filing Parties state that the current NCPC mitigation thresholds provide market participants with inappropriate incentives to place inflexible operating limits on their resources, which have adverse consequences on prices and system operation. Accordingly, Filing Parties propose a number of revisions to the current NCPC mitigation framework, to be implemented in two phases.

³ *New England Power Pool*, 100 FERC ¶ 61,287, at P 30-46 (2002).

⁴ In support of their statement that New England markets are more robust, Filing Parties state that in 2007, the Commission permitted ISO-NE to eliminate Peaking Unit Safe Harbor (PUSH) bidding because of these more robust markets. *ISO New England Inc.*, 118 FERC ¶ 61,018, at P 3 (2007).

5. These revisions create a new category of mitigation, called Reliability Commitment Mitigation, for the Supply Offers of resources committed to address local reliability needs. Filing Parties propose that the Reliability Commitment Mitigation replace the existing conduct and NCPC thresholds with a single test⁵ that calls for mitigation when the resource's low load cost (i.e., the cost of operating a resource at its minimum load for its minimum run time), as reflected in its Supply Offer, exceeds the resource's Reference Levels by more than the lesser of 10 percent or \$80/MW-day. In such cases, each Supply Offer parameter that is denominated in dollars (start-up fee, no-load fee and energy price) will be replaced by the Reference Level value for each such Supply Offer parameter. In support of the 10 percent threshold, Filing Parties state that the primary cause of any instance of over-mitigation would be an inter-day fuel price deviation, and the Internal Market Monitor's analysis determined that on 95 percent of days, the increase in natural gas prices was lower than 10 percent. Accordingly, Filing Parties maintain that the 10 percent threshold reflects a reasonable bound of measurement error. Regarding the \$80/MW-day parameter, Filing Parties state that this is intended to address the fact that larger resources, which are more expensive to operate, might benefit significantly using only the 10 percent offer threshold.

6. In Phase I of the implementation, the Filing Parties propose that, for resources committed for local reliability needs, mitigation would continue to occur on an *ex post* basis, but would use the more stringent thresholds contemplated by the Reliability Commitment Mitigation mechanism. By contrast, Phase I of the implementation maintains the existing rules for the mitigation of resources committed for system-wide reliability, i.e., the conduct test thresholds and NCPC impact threshold, to simplify its implementation. Filing Parties request an October 5, 2009 effective date for the Phase I revisions.

7. In Phase II of the implementation, the Filing Parties propose that mitigation would occur on a before-the-fact, or *ex ante* basis. As part of the Phase II revisions, Filing Parties propose a Physical Operating Characteristics Test to assess whether the time-based Supply Offer parameters (i.e., minimum run time, minimum down time, start time, and notification time) for a resource must be mitigated to the resource's pre-determined Reference Levels. Specifically, a resource cannot increase its time-based Supply Offer parameters above its actual operating characteristics by more than two hours for any individual time-based parameter or more than six hours for the combination of all time-based offer parameters. Because Reliability Commitment Mitigation will be implemented on an *ex ante* basis, the proposed Phase II revisions also clarify and modify how and when a market participant may consult with the Internal Market Monitor on

⁵ This test is designated in Phase I as the Commitment Offer Test and in Phase II as the Financial Offer Test.

matters relating to a resource's costs and operating parameters. Additionally, for resources needed to meet system-wide reliability needs, the Phase II revisions eliminate the use of the existing NCPC threshold and provide for mitigation of a resource when the resource's offer violates the conduct test thresholds.

8. Filing Parties contend that while the new thresholds have minimal potential for over-mitigation, the proposed Phase II rule changes include a provision⁶ that permits resource owners who believe that they have been mitigated below their fuel and variable O&M costs to file for cost recovery under section 205 of the Federal Power Act (FPA).⁷ Filing Parties request that the Phase II revisions be made effective on or after January 1, 2010, with two weeks' prior notice to be provided by ISO-NE.⁸

III. Notice of Filing and Responsive Pleadings

9. Notice of Filing Parties' filing was published in the *Federal Register*, 74 FR 41427 (2009) with interventions due on or before August 17, 2009. Northeast Utilities Service Company; Constellation Energy Commodities Group, Inc.; Dynegy Power Marketing, Inc.; and Shell Energy North America, (U.S.) LP filed motions to intervene.

10. Mystic Development, LLC; Fore River Development, LLC; Mirant Energy Trading LLC; Boston Generation LLC; Mirant Kendall LLC; Mirant Canal, LLC; and Mystic I, LLC (collectively, Indicated Suppliers) jointly filed a motion to intervene and protest. Dominion Resources Services, Inc. filed a motion to intervene out-of-time. ISO-NE and NEPOOL filed answers, to which Indicated Suppliers responded in an answer.

⁶ Filing Parties note that this provision is not needed for Phase I because mitigation is still *ex post* and the Internal Market Monitor is able to consult with the resource owner to address possible concerns with over-mitigation.

⁷ 16 U.S.C. § 824d (2006).

⁸ Filing Parties request this later effective date because implementing Reliability Commitment Mitigation on an *ex ante* basis will require substantial changes to system commitment and dispatch software, settlements software, and Reference Level calculation software. In addition, business procedures will need to be developed and implemented for the critical task of responding to market participant consultation requests regarding resource cost data and operating characteristics within the timelines required for *ex ante* mitigation.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and 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), prohibits an answer to a protest and answer to an answer unless otherwise ordered by the decisional authority. We will accept the ISO-NE, NEPOOL and Indicated Suppliers answers because they have provided information that assisted us in our decision-making process. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214(d) (2009), the Commission will grant Dominion Resource Services, Inc., late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

B. Substantive Matters

12. We accept Filings Parties' proposed revisions to its Market Rule 1 to be effective October 5, 2009 and on or after January 1, 2010,⁹ as requested, subject to the outcome of Docket No. ER09-1051-000, and subject to the condition that Filing Parties submit a compliance filing as discussed below.¹⁰ We agree with Filing Parties that the proposed revisions provide for a more effective mitigation of the exercise of market power by generators. The proposed revisions reduce the ability and incentives for such generators to inflate their bid-in operating parameters (such as their minimum run times), which in the past has resulted in inefficient dispatch. Finally, by formally establishing the ability for a resource to make a section 205 filing, the proposal provides a safeguard to ensure that generators are not over-mitigated and can recover their full low-load costs. The purpose of NCPC mitigation is to prevent the exercise of market power by resources that face no competition. When the current NCPC mitigation structure was approved, the Commission authorized bid thresholds that permitted market participants some flexibility

⁹ The Commission is approving Filing Parties' proposed revisions now, with certain revisions becoming effective on or after January 1, 2010. As noted above, ISO-NE will provide two weeks' prior notice of the actual effective date.

¹⁰ Filing Parties note that the proposed tariff sheets include revisions that are currently pending in Docket No. ER09-1051-000. Filing Parties state that, in the event the Commission does not accept some or all of the proposed revisions to Appendix A filed in Docket No. ER09-1051-000, it will submit an additional filing to ensure that the revisions filed herewith are made to the effective version of Appendix A.

in their offers, recognizing the need to balance between preventing market power and ensuring the availability of resources in constrained areas.¹¹ However, in light of the changes in ISO-NE's markets, Filing Parties have reevaluated the NCPC mitigation structure and determined that current thresholds may provide resources the opportunity to exercise market power to earn excessive NCPC payments and it is appropriate to modify the thresholds that apply when such resources have market power and must be dispatched for local reliability. Accordingly, we agree that it is appropriate for the NCPC mitigation structure to be revised at this time.

1. NCPC Mitigation

a. Protest and Comments

13. Indicated Suppliers request that we reject the proposed revisions, asserting that Filing Parties have not supported the changes to NCPC mitigation. They also argue that Filing Parties fail to explain why concerns about incentives related to resources regularly dispatched out-of-merit justify the imposition of additional mitigation on all resources. Further, the Indicated Suppliers complain that Filing Parties did not provide any evidence of resources that will be regularly receiving NCPC payments in the foreseeable future. To support their contentions, Indicated Suppliers assert that, while the bulk of NCPC payments in recent years have arisen from local reliability needs in the Southeast Massachusetts (SEMA) zone, a number of transmission upgrades have recently been implemented that “would largely eliminate out-of-merit generation dispatch and associated uplift” in the SEMA zone.¹²

14. The Indicated Suppliers argue that Filing Parties have not shown that the FCM or other locational markets are providing sufficient revenues to eliminate the need to recover fixed costs through NCPC payments. The Indicated Suppliers argue that the Filing Parties incorrectly assume that revenues from these markets reflect the locational needs and value of the resources dispatched out-of-merit for local reliability purposes. As an example, the Indicated Suppliers argue that in the first Forward Capacity Auction (FCA), no separate capacity zone was established for Connecticut despite constrained transmission capacity in that area. The Indicated Suppliers contend that, contrary to Filing Parties' statements, this demonstrates that locational payments under the FCM are not recognizing local reliability needs.

15. The Indicated Suppliers also argue that, regarding the elimination of the PUSH mechanism, the Commission determined that “both the existence of new market

¹¹ *New England Power Pool*, 100 FERC ¶ 61,287, at P 44 (2002).

¹² Indicated Suppliers Protest at 13.

mechanisms and PUSH's failure to achieve its intended results justify elimination of the PUSH mechanism," and that the Commission's order made no finding as to the adequacy of fixed cost recovery in ISO-NE markets generally.¹³

16. In its answer, ISO-NE responds that the Reliability Commitment Mitigation Rules are appropriate because all market participants have incentives to maximize NCPC payments, regardless of the frequency of the commitment of their resources to address reliability needs. ISO-NE asserts that, while a resource that is frequently committed out-of-merit may be in a better position to take advantage of the opportunity to earn NCPC revenues and exercise market power, less frequently mitigated resources can also predict reliability commitments and attempt to exercise market power. Thus, ISO-NE asserts that the market power mitigation rules are designed to prevent the exercise of market power in all circumstances.

17. ISO-NE also maintains that it is appropriate for ISO-NE to rely on the Commission's determination that the FCM and other locational market rules are just and reasonable as a basis for implementing further market improvements in market power mitigation. ISO-NE asserts that the FCM and reserve markets (forward and real-time) were found to be just and reasonable mechanisms for providing market participants with cost recovery, including fixed cost recovery.¹⁴ ISO-NE further asserts the Indicated Suppliers' concerns regarding the FCM are currently being, or have been, addressed in other proceedings before the Commission.¹⁵ ISO-NE also states that, regarding the PUSH mechanism, if new compensatory market mechanisms have been developed, it is irrelevant whether some other pre-existing NCPC mitigation mechanism is effective.

b. Commission Determination

18. We reject Indicated Suppliers' protest. As ISO-NE states in its answer, the frequency with which a resource is dispatched out-of-merit is irrelevant when proposing mitigation rules that are designed to prevent the exercise of market power in all circumstances. If bids are offered competitively, market participants will remain unaffected by the proposed mitigation framework. Also, as provided in Filing Parties' proposal, Market Participants may consult with the Internal Market Monitor regarding

¹³ *Id.* at 17 (citing *ISO New England Inc.*, 118 FERC ¶ 61,018, at P 50 (2007)).

¹⁴ ISO-NE Answer at 7 (citing *Devon Power LLC*, 115 FERC ¶ 61,340, at P 63 and 64, *order on reh'g*, 117 FERC ¶ 61,133 (2006); *ISO New England Inc.*, 128 FERC ¶ 61,135 (2009)).

¹⁵ *Id.* at 8 (citing *ISO New England Inc.*, 123 FERC ¶ 61,290 (2008); *ISO New England Inc.*, 125 FERC ¶ 61,103 (2008)).

factors that affect the Reference Levels for its Supply Offer. Additionally, to effectively implement *ex ante* mitigation, the proposed market rules permit a Market Participant to submit a filing to the Commission under FPA section 205 to seek cost recovery if the Market Participant believes that, as a result of mitigation, it will not recover the fuel and variable O&M costs of a resource.

19. We disagree with Indicated Suppliers' contentions that FCM and other locational markets do not provide sufficient opportunity for fixed cost recovery. We note that fixed-cost recovery was an important consideration and key rationale for FCM. As the Commission has stated, "if generators wish to participate in the FCM on a long-term basis, the FCM market rules give them an opportunity over time to recover not only going forward costs, but also additional fixed costs and a profit."¹⁶ To the extent Indicated Suppliers wish to raise their concerns about FCM, such issues are more appropriately addressed in another proceeding or in ISO-NE's stakeholder process. We disagree with Indicated Suppliers that mitigation thresholds should permit the exercise of market power in the energy market to offset perceived deficiencies in the FCM.

2. Transition Mechanism

a. Protest and Comments

20. Indicated Suppliers argue that, even assuming that the Reliability Commitment Mitigation proposal is otherwise just and reasonable, it would be unjust and unreasonable to implement Filing Parties' proposal without a transition mechanism. Indicated Suppliers assert that market participants may have submitted de-list and capacity bids for the first and second Forward Capacity Auctions differently if these resources had known that the threshold for NCPC revenue was likely to change. For example, the Indicated Suppliers contend that less flexible units may have relied on the existing mitigation thresholds to recover marginal costs, such as increased risk of equipment failures that result from the operational requirements of capacity resources under the FCM rules.

21. Indicated Suppliers further contend that the Commission has historically approved transition periods to mitigate large cost shifts and rate effects and should do so here.¹⁷ While the Indicated Suppliers prefer that the implementation of the Reliability Commitment Mitigation proposal be deferred until June 2012, they assert that the

¹⁶ *ISO New England Inc.*, 125 FERC ¶ 61,102, at P 42 (2008).

¹⁷ *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at P 85 (2007); *see also California Indep. Sys. Operator Corp.*, 91 FERC ¶ 61,205, at 61,725 (2000), *order on reh'g*, 104 FERC ¶ 61,062 (2003).

Commission should adopt, at a minimum, a transition mechanism that would step down the thresholds in the Reliability Commitment Mitigation until equaling the levels proposed in the August 5, 2009 Filing at the beginning of the commitment period for the third Forward Capacity Auction, i.e., June 1, 2012.

22. In its answer, 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. ISO-NE also asserts that, because the Commission has previously expressed support for market rule revisions that eliminate out-of-market payments when market-based mechanisms are developed that render those payments duplicative or otherwise unnecessary, it was unreasonable to assume that the current NCPC payment structure would remain in place, or to assume that there would be a three to four year freeze on any reforms to the market power mitigation rules.¹⁸

23. NEPOOL states that the Commission should not delay the NCPC mitigation reforms. NEPOOL asserts that it was well understood when the FCM was negotiated that there would be a future analysis to assess how all of the regional markets were working together and that changes to the markets may well occur as a consequence of that study. Moreover, NEPOOL notes that the proposed NCPC mitigation reforms specifically allow a market participant to make a section 205 filing to recover its costs if over-mitigated.

b. Commission Determination

24. We find no reason to delay the implementation of Filing Parties' proposed revisions or to adopt a transition mechanism to phase-in the revisions.¹⁹ We will not allow market participants to continue to exercise market power during a transition period just because the first and second Forward Capacity Auctions have already taken place. When the Commission accepted the existing NCPC mitigation structure, we recognized that make-whole payments such as NCPC could reflect market power, and tried to find

¹⁸ ISO-NE Answer at 14 (citing *ISO New England Inc.*, 118 FERC ¶ 61,018, at P 47 (2007)).

¹⁹ Additionally, while Indicated Suppliers contend that the Commission has historically approved transition periods to mitigate large cost shifts and rate effects, we disagree that the August 5, 2009 Filing constitutes a change of such magnitude. Filing Parties are simply refining the market power mitigation rules.

the level of mitigation that would limit market power while not undermining reliability.²⁰ With the continued development of the New England markets, the proposed revisions to the NCPC mitigation structure are prudent in order to ensure that rates remain just and reasonable and do not reflect the exercise of market power.

3. “Lower of” Mitigation Threshold

a. Protest and Comments

25. The Indicated Suppliers state that the Commission should reject Filing Parties’ proposed “lower of” mitigation threshold because Filing Parties provide no meaningful support for the \$80/MW-day element. The Indicated Suppliers note that the measurement error for generators mitigated under the \$80/MW-day formulation would be lower than the 10 percent level that the Filing Parties characterize as a reasonable measurement error.²¹ The Indicated Suppliers assert that this proposed “lower of” formulation is discriminatory, because it will have disparate impacts on different categories of generators that are apparently unrelated to the measurement error associated with the Reference Level calculation for those categories of generators. The Indicated Suppliers contend that the PJM mitigation mechanism cited by Filing Parties does not employ a “lower of” formulation, but instead offers the 10 percent criterion as one alternative to be used “as specified in advance by the Market Seller for the affected unit.”²² Additionally, the Indicated Suppliers contend that the “lower of” formulation will result in excessive mitigation, particularly because ISO-NE’s existing conduct and NCPC threshold tests, which allow for a lighter-handed approach to mitigation, is being replaced by a more stringent, single test that applies to a resource’s entire offer.²³

26. ISO-NE responds that the \$80/MW-day threshold is just and reasonable and not discriminatory. ISO-NE states that the \$80/MW-day threshold is designed to mitigate a Supply Offer despite the fact that the low load cost of the resource is less than 10 percent above the low load cost of the resource calculated based upon its Reference Levels.

²⁰ *ISO New England Inc.*, 100 FERC ¶ 61,287 at P 44.

²¹ Indicated Suppliers Protest at 21.

²² *Id.* (citing PJM Open Access Transmission Tariff, § 6.4.2, Third Revised Sheet No. 402A).

²³ Indicated Suppliers Protest at 23 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,163, at P 257 (2004), *order on reh’g*, 109 FERC ¶ 61,157 (2004)).

ISO-NE states that its objectives of reducing market power incentives and the corresponding costs to ratepayers justify this threshold cap. Additionally, ISO-NE argues that the application of the \$80/MW-day threshold does not mean that more expensive resources will be mitigated below the 10 percent allowance for measurement error. The 10 percent threshold and the \$80/MW-day cap simply serve as a trigger for mitigation; a Supply Offer that exceeds one of these thresholds will be mitigated to its Reference Levels. ISO-NE notes that, in order to address concerns over the potentially lower margin of error for the \$80/MW-day threshold raised during the stakeholder process, ISO-NE developed the section 205 filing provision that permits a resource owner to request additional compensation in the event it believes it has been unable to recover its fuel and variable O&M costs as a result of mitigation. ISO-NE also notes that, as a safeguard, the mitigation rule changes also clarify that market participants may consult with the Internal Market Monitor regarding the accuracy of a resource's Reference Level calculation. The Indicated Suppliers responded that ISO-NE has failed to meet its burden of showing that this provision is just and reasonable.

b. Commission Determination

27. We agree with Indicated Suppliers that the \$80/MW-day element of Filing Parties' proposed "lower of" 10 percent or \$80/MW-day mitigation threshold has not been fully supported. Filing Parties have justified the 10 percent threshold by explaining that this threshold was determined to reflect a reasonable bound of measurement error based on the Internal Market Monitor's analysis of inter-day fuel price variations. However, Filing Parties have not demonstrated why \$80/MW-day is an appropriate value to trigger mitigation under the "lower of" proposal. Accordingly, our acceptance of the instant filing is subject to the condition that Filing Parties submit a compliance filing within thirty days to justify why the \$80/MW-day threshold is appropriate.

4. Reference Level Calculations

a. Protest and Comments

28. The Indicated Suppliers argue that, if the Commission accepts the August 5, 2009 Filing, it should require modifications to the Reference Level calculation to account for opportunity costs, operation costs, and risks facing generators (such as overtime expenses due to O&M, costs associated with increased boiler tube and turbine failures, and increased pump and motor maintenance costs). The Indicated Suppliers assert that the Midwest ISO's market monitor "[e]stimates risk factors where relevant for certain generating resources" and also collects data to "ensure that reference levels include legitimate risk and opportunity costs."²⁴ The Indicated Suppliers further reference a

²⁴ Indicated Suppliers Protest at 25 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 FERC ¶ 61,285, at P 224-225 (2004)).

proceeding involving PJM, in which the Commission found it critical to assure that mitigation measures account for opportunity costs, thus directing PJM to permit the inclusion of such costs in offer bids.²⁵

29. ISO-NE responds that the Indicated Suppliers' proposed modifications to the Reference Level calculation are beyond the scope of this proceeding. Filing Parties are not proposing revisions to the manner in which Reference Levels for price-based Supply Offer parameters are calculated. Moreover, according to ISO-NE, the Indicated Suppliers do not attempt to demonstrate that the existing Reference Level formula is unjust and unreasonable, or that their proposed modifications *are* just and reasonable. ISO-NE also notes that Appendix A of Market Rule 1 already contains provisions that permit a market participant to consult with the Internal Market Monitor on revisions to a resource's Reference Levels to include the types of costs about which the Indicated Suppliers are concerned.

b. Commission Determination

30. The Indicated Suppliers' request to revise the Reference Level calculation is beyond the scope of this proceeding. Filing Parties are not proposing, in the August 5, 2009 Filing, to revise their formula for calculating Reference Levels. Filing Parties are simply proposing to modify the threshold that triggers mitigation to the Reference Level. Further, while the Commission previously stated that "it is critical to assure that market mitigation measures account for opportunity costs,"²⁶ we note that Appendix A already permits market participants to consult with the Internal Market Monitor on revisions to a resource's Reference Level, and Appendix A gives the market participant the opportunity to submit cost data or other information to the ISO to demonstrate that the market participant's reference levels should be changed.²⁷ Also, in its answer, ISO-NE indicates that such consultation may address the types of costs about which the Indicated Suppliers are concerned.²⁸ In fact, Appendix A specifically states that, in every case, the Internal Market Monitor will consider all available explanations of behavior that are based on a

²⁵ *Id.* (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,145, at P 42 (2009)).

²⁶ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,145, at P 42 (2009).

²⁷ See Appendix A of Market Rule 1, §III.A.3.1.4; see also Appendix A of Market Rule 1, §III.A.5.6.1(b)(iii), (including in the formula for calculating Reference Levels "such other factors or adjustments as the ISO, in consultation with the Independent Market Monitoring Unit, shall reasonably determine to be appropriate based on such data supplied by the Market Participant or otherwise available to the ISO").

²⁸ ISO-NE Answer at 16.

market participant's cost of providing any market product, including any relevant opportunity costs.²⁹ Accordingly, we find that it is unnecessary for Filing Parties to revise the Reference Level formula set forth in Appendix A.

5. Section 205 Filings

a. Protest and Comments

31. The Indicated Suppliers disagree with ISO-NE's contention that over-mitigation is unlikely and request that the Commission modify the FPA section 205 filing mechanism. The Indicated Suppliers argue that it is unlikely that making a separate FPA section 205 filing for each instance of over-mitigation will provide meaningful protection against over-mitigation if the filing must be submitted within 30 days of the receipt of the first invoice. Further, the Indicated Suppliers maintain that requiring a potentially constant string of filings is costly and unduly burdensome. The Indicated Suppliers suggest that a requirement to permit an FPA section 205 filing within 180 days of the receipt of the first invoice would balance ISO-NE's and the generator's interest of timely resolution. The Indicated Suppliers request that Filing Parties' proposed tariff provision detailing the contents of such section 205 filings be revised to account for other costs, including opportunity costs, operating costs, and risks in addition to fuel and variable O&M costs. Finally, the Indicated Suppliers assert that the Commission should allow the commercially sensitive cost data in the section 205 filings to be submitted on a confidential basis.

32. ISO-NE states that the Indicated Suppliers' proposed modifications to the section 205 filing provision are unwarranted. ISO-NE states that the thirty-day window for bringing a section 205 filing before the Commission was intended to ensure that market participants act quickly in addressing their concerns about mitigation in order to avoid the potentially large settlement adjustments that might result were a market participant to delay such a filing. Regarding Indicated Suppliers' proposed broadening of the list of costs that may be considered for a section 205 filing, ISO-NE states that this is simply a backdoor attempt to change the formula for calculating a resource's Reference Level. Additionally, ISO-NE states that the Commission's regulations provide a means by which market participants may request confidential treatment of commercially sensitive data, and it is unnecessary to add such a provision as suggested by the Indicated Suppliers.

33. NEPOOL requests that the Commission accept the August 5, 2009 Filing without condition or modification. NEPOOL states that, while the Indicated Suppliers' proposed refinements to the section 205 filing mechanism may also be reasonable, they do not

²⁹ See Appendix A of Market Rule 1, § III.A.3.1.2.

indicate that the NCPC mitigation reforms are not just or reasonable. NEPOOL states that such proposed refinements may be addressed in future stakeholder processes.

b. Commission Determination

34. We agree with Indicated Suppliers that a 30 day filing deadline may be unduly burdensome. However, ISO-NE's concerns over Indicated Suppliers proposal for a 180 day filing period could lead to delay and potentially large settlement adjustments are also reasonable. Balancing both interests, we find that a 60 day deadline would provide parties with adequate time to make the appropriate filing while limiting settlement amounts. We therefore direct Filing Parties to submit a compliance filing within 30 days to revise its section 205 filing mechanism to permit such filings to be made within 60 days of the receipt of the first invoice.

35. As we stated earlier, since the August 5, 2009 Filing does not propose revisions to the formula for calculating a resource's Reference Level, and ISO-NE's tariff already includes provisions for including opportunity costs, operating costs, fuel and variable O&M costs, as applicable for recovery, we see no need to allow changes to this formula for the purposes of a section 205 filing. Furthermore, Commission regulations already provide for treatment of commercially sensitive information.³⁰ Indicated Suppliers' request for additional provisions would be duplicative and unnecessary.

The Commission orders:

(A) Filing Parties' proposed revisions to Market Rule 1 are hereby accepted effective October 5, 2009 and on or after January 1, 2010, as requested, subject to the outcome of Docket No. ER09-1051-000, and subject to the condition that Filing Parties submit a compliance filing as discussed in the order.

(B) Filing Parties are hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁰ See 18 C.F.R. § 388.112(a) (2009).