

130 FERC ¶ 61,089  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

ISO New England Inc. and  
New England Power Pool

Docket Nos. ER08-1209-001  
ER08-1209-002  
ER08-1209-004

ORDER DENYING REHEARING,  
GRANTING CLARIFICATION,  
AND ACCEPTING COMPLIANCE FILINGS

(Issued February 3, 2010)

1. On October 28, 2008, the Commission issued an order accepting a filing by ISO New England Inc. (ISO-NE) and the New England Power Pool (NEPOOL) (together, the Filing Parties) proposing new rules for the treatment and compensation of resources whose de-list bids into the capacity market are rejected for reliability reasons, and requiring two compliance filings.<sup>1</sup> In this order, the Commission denies rehearing of that order, grants clarification, and accepts the two compliance filings.

**I. Background**

**A. Forward Capacity Market**

2. Under ISO-NE's Forward Capacity Market (FCM), capacity providers bid into an auction (the Forward Capacity Auction (FCA)) to supply capacity to the market, and, if they are chosen in the auction, are compensated by a clearing price set by the highest accepted offer.<sup>2</sup> Under the FCM construct, New England resources may submit bids specifying the price below which the resource is unwilling to supply capacity, referred to as a de-list bid. If the auction clears at a price below a resource's de-list bid (and the

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<sup>1</sup> *ISO New England Inc. and New England Power Pool*, 125 FERC ¶ 61,102 (2008) (October 28, 2008 Order).

<sup>2</sup> For more detail, see *ISO New England Inc.*, 119 FERC ¶ 61,045, at P 5-10 (Market Rules Order), *order on reh'g*, 120 FERC ¶ 61,087 (2007).

resource is not found to be needed for reliability), that resource will not be obligated to supply capacity during the applicable capacity commitment period, which is approximately three years after each auction. However, under the settlement that resolved the FCM proceedings, ISO-NE may reject a de-list bid (i.e., prohibit that resource from de-listing) if the resource is needed for reliability and compensate that resource at a just and reasonable rate.<sup>3</sup>

### **B. October 28, 2008 Order**

3. In the October 28, 2008 Order, the Commission accepted the proposal submitted by the Filing Parties for the compensation of reliability resources based on the type of de-list bid submitted by resources in the FCM, subject to reliability review by ISO-NE. As discussed further below, the FCM Rules provide for static, dynamic, and permanent de-list bids, as well as an additional proposal for a non-price related means for a resource to retire, “the non-price retirement option,” by which a resource can seek to retire without reference to the auction clearing price.

4. We also accepted the revisions related to tariff requirements that require ISO-NE to determine that a resource’s plan to retire or reduce capacity will not harm reliability before the resource may proceed. Further, we found that ISO-NE’s commitment to “consult” with transmission owners and other NEPOOL members during its review of reliability determinations was insufficient to ensure the retention of both procedural transparency and the opportunity for NEPOOL member participation previously afforded by the existing Reliability Committee review. Therefore, our acceptance was subject to ISO-NE re-filing the retirement provisions in Sections I.3.9 and I.3.10 within 180 days to set forth the procedure for consulting with NEPOOL members through the Reliability Committee or otherwise regarding resource capacity reductions or retirements. Finally, we accepted miscellaneous revisions related to the *pro forma* Cost of Service Agreement and required ISO-NE to make a ministerial re-filing of all the tariff sheets with a corrected effective date.

### **C. Requests for Rehearing and Compliance Filings**

5. The Mirant Parties (Mirant)<sup>4</sup> filed a request for rehearing or, in the alternative, clarification, of the Commission’s October 28, 2008 Order. The PSEG Power

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<sup>3</sup> See section H of the FCM Settlement Agreement in Docket No. ER03-563-000 *et al.* (March 6, 2006).

<sup>4</sup> Mirant consists of Mirant Energy Trading, LLC; Mirant Canal, LLC; and Mirant Kendall, LLC.

Companies (PSEG)<sup>5</sup> also filed a request for rehearing. The Connecticut Department of Public Utility Control (CT DPUC) and NSTAR Electric Company (NSTAR) filed motions for leave to answer and answers to the requests for rehearing and clarification, while Mirant filed a request for leave to answer and answer to the answers filed by the CT DPUC and NSTAR.<sup>6</sup>

6. In response to the Commission's directives in the October 28, 2008 Order, the Filing Parties made compliance filings on November 7, 2008 and April 27, 2009. Notice of the November 7, 2008 filing was published in the *Federal Register*, with motions to intervene, notices of intervention, comments and protests due on or before November 28, 2008.<sup>7</sup> No interventions or comments were filed. Notice of the April 27, 2009 filing was published in the *Federal Register*, with motions to intervene, notices of intervention, comments and protests due on or before May 18, 2009.<sup>8</sup> The CT DPUC filed timely comments. On June 2, 2009, ISO-NE filed an answer to CT DPUC's comments and NEPOOL filed a motion for leave to answer and answer.

## II. Procedural Issues

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2009), prohibits answers to requests for rehearing, and therefore we will reject the answers to the requests for rehearing filed by NSTAR and the CT DPUC, and Mirant's answer to those answers. We will, however, accept the answers to the CT DPUC's comments on the April 27, 2009 compliance filing filed by ISO-NE and NEPOOL because they have provided information that has assisted us in our decision-making process.

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<sup>5</sup> PSEG consists of PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC.

<sup>6</sup> The NRG Companies (NRG) also filed a timely request for rehearing of this order, which it withdrew on December 11, 2008. ISO-NE also asked for clarification of a procedural aspect of this order, which we granted in *ISO New England Inc. and New England Power Pool*, 125 FERC ¶ 61,324 (2008) (December 18, 2008 Order).

<sup>7</sup> 73 FR 70993 (2008).

<sup>8</sup> 74 FR 21799 (2009).

### **III. Discussion**

8. The Commission will accept the Filing Parties' compliance filings effective as requested and deny the rehearing requests, as discussed below.

#### **A. November 7, 2008 Compliance Filing**

##### **1. Filing Parties' Submittal**

9. On November 7, 2008, the Filing Parties submitted a filing to comply with the Commission's October 28, 2008 Order, which directed the Filing Parties to re-file the tariff sheets submitted in the July 1, 2008 filing so as to provide an effective date of October 29, 2008.<sup>9</sup>

##### **2. Commission Determination**

10. The Commission will accept the Filing Parties' revised tariff sheets with the corrected effective date. ISO-NE has satisfactorily complied with this requirement of the October 28, 2008 Order and the tariff sheets are accepted.

#### **B. April 27, 2009 Compliance Filing**

##### **1. Filing Parties' Submittal**

11. On April 27, 2009, the Filing Parties submitted a report of compliance to amend Section 8.2.3 of the Participants Agreement to comply with the Commission's October 28, 2008 Order as clarified in the December 18, 2008 Order. The revisions add a new subsection providing for Reliability Committee review of Non-Price Retirement Requests and a new subsection providing for Reliability Committee review of ISO-NE's determination rejecting a de-list bid submitted by a capacity resource that ISO-NE has determined is needed for reliability. The Filing Parties explain that the new subsections formally document the continuing role of the Reliability Committee in reviewing capacity resource retirements and reductions, consistent with the provisions of the FCM Market Rules, and are binding on both ISO-NE and NEPOOL. The Filing Parties request that the compliance changes become effective on or after October 29, 2008.

##### **2. Comments and Answers**

12. The CT DPUC argues that the filing proposes to give ISO-NE and NEPOOL stakeholders exclusive control over the decision process about which generation capacity

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<sup>9</sup> October 28, 2008 Order at P 115.

resources are needed for reliability and how those determinations will be made. The CT DPUC asserts that to the extent this reliability review considers resource adequacy measures, the proposal unlawfully excludes state regulators from that decision process. Citing its case on appeal,<sup>10</sup> the CT DPUC avers that the Federal Power Act (FPA) reserves jurisdiction over resource adequacy determinations to the states. As such, the CT DPUC claims the Commission has no authority to approve modifications to the NEPOOL Participants Agreement that will give stakeholders expanded authority to make reliability determinations, to the extent that these deliberations include resource adequacy determinations. Therefore, the CT DPUC states that an open, consultative process that includes the views of state regulators is the only option that is in compliance with the FPA, and the Commission should defer to Connecticut's and the other New England states' jurisdiction to determine matters of resource adequacy.

13. In its answer, ISO-NE states that the CT DPUC is factually incorrect in asserting that the April 27, 2009 Compliance Filing alters the manner in which reliability determinations are made. Rather, ISO-NE states that the changes explicitly provide for continued Reliability Committee input into reliability determinations, consistent with the role the Reliability Committee has played historically. ISO-NE argues that CT DPUC's comments are an out-of-time request for rehearing of the Commission's October 28, 2008 Order and are a collateral attack on Commission orders approving predecessor provisions, as stakeholder involvement in reliability determinations did not originate with the compliance filing. ISO-NE states that because the compliance filing does not alter the manner in which reliability determinations are made, the CT DPUC's only recourse for challenging the existing reliability review procedure is a filing with the Commission pursuant to section 206 of the FPA. Finally, noting that the CT DPUC has raised the jurisdictional argument presented here in a number of Commission proceedings, ISO-NE maintains that the Commission has repeatedly found that the determination of whether resources are needed for reliability is well within its jurisdiction.

14. In its answer, NEPOOL similarly states that the reliability review work by the Reliability Committee will be essentially the same as it has been under Commission-approved tariff provisions for decades, that the CT DPUC request amounts to a collateral, out-of-time challenge to prior orders, and that the Commission has previously addressed its jurisdiction over the FCM and the Installed Capacity Requirement. NEPOOL also argues that CT DPUC's suggestion that state regulators are not involved in the stakeholder review process is factually wrong, because state regulators and other state representatives are invited to, and do, participate in the NEPOOL process, including meetings of the Reliability Committee.

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<sup>10</sup> *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (2009) (CT DPUC).

### 3. Commission Determination

15. The Commission will accept the amended Participants Agreement. The revisions satisfactorily comply with the requirements of the October 28, 2008 and December 18, 2008 Orders, as those revisions adequately set forth the procedure for consulting with NEPOOL members through the Reliability Committee regarding resource capacity reductions or retirements. In our October 28, 2008 Order, we stated that “ISO-NE has not demonstrated that the solution it proposes here – elimination of reliability review by the NEPOOL Reliability Committee – is justified” and directed ISO-NE to refile revisions providing for Reliability Committee review of generator retirements.<sup>11</sup>

16. With respect to the CT DPUC’s position that the Commission has exceeded its jurisdiction, the Commission notes that its jurisdiction over resource adequacy (i.e., the ability of the system to meet its customers' energy needs at all times), and its authority to set a capacity requirement for the system so as to ensure an appropriate level of resource adequacy, was recently affirmed by the Court of Appeals for the D.C. Circuit.<sup>12</sup> Furthermore, we find that through the Reliability Committee review, the Participants Agreement affords CT DPUC the opportunity to participate and provide its views in an open and consultative process that includes the views of CT DPUC and other state regulators when making determinations about resource capacity reductions or retirements.

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<sup>11</sup> October 28, 2008 Order at P 104.

<sup>12</sup> See *CT DPUC, supra*, in which the court reviewed the question of whether the Commission had jurisdiction over ISO-NE's determination of the Installed Capacity Requirement (ICR), which "represent[s] the estimated amount of capacity the system as a whole will require for reliability" (569 F.3d at 480). The Commission had argued that the ICR had "a significant and direct effect on jurisdictional rates and services, [and] therefore [fell] within the Commission's jurisdiction" (*id.*, citing *ISO New England Inc.*, 122 FERC ¶ 61,144, at 61,763 (2008)). The court agreed, stating that "the Commission may directly establish prices for capacity. . . . That the Commission may do so directly would seem to include the power to do so indirectly by setting a target for capacity demand and using a market mechanism to locate the price appropriate to that quantity," *id.*, 569 F.3d at 482.

## C. Rehearing Requests

### 1. Mirant's Rehearing Request

17. Mirant first argues that the Commission erred in accepting ISO-NE's proposed modifications to the retirement provisions of the tariff without considering the potential adverse impacts on resources. Mirant states that generation resources are exposed to considerable risks during the approximately four-year time period between an FCA and the capacity commitment period (i.e., the year for which that auction is procuring capacity). Mirant maintains that the new provisions are neither just nor reasonable as they would expose resources to the risk of having to incur capital costs arising from changes in laws and regulations or market changes during the period between the FCA and the capacity commitment period, and could force resources to supply capacity without being able to recover these costs. Mirant contrasts this with ISO-NE's retirement procedures that were in place at the time of the FCM Settlement Agreement, which provided a mechanism to resources to manage such risks by retiring their units upon only 60 or 180 days notice to ISO-NE (dependent on whether ISO-NE determined that retirement of the resource would adversely affect reliability).

18. Mirant claims that the Commission accepted ISO-NE's modified retirement procedures based on the belief that no harm would result to resources because they receive just and reasonable compensation for their capacity commitments. Mirant states that the Commission apparently believed that ISO-NE's inclusion of the non-price retirement request option would help address this problem; Mirant argues, however, that this is not the case, since a non-price retirement request must be submitted *prior* to an FCA. Therefore, Mirant argues that the Commission's October 28, 2008 Order failed to consider the risks and losses that may be imposed on resources that are forced to continue to operate under such a scenario.

19. In the event that the Commission does not grant rehearing as requested, Mirant requests that the Commission clarify that resources that are needed for reliability and that are required to incur capital costs as a result of changed laws and regulations that are enacted during the time period between an FCA and the relevant commitment period, may petition the Commission for recovery of such costs. Mirant claims that the requested clarification is required in order to ensure that rates under the FCM construct are not confiscatory. In addition, Mirant states that resources that have submitted non-price retirement requests that are found to be needed for reliability have the opportunity to petition the Commission to recover their capital costs; thus, Mirant argues, its clarification request would put resources that sought to de-list but are unable to do so on the same footing as resources that submitted a non-price retirement request.

## 2. PSEG's Rehearing Request

20. According to PSEG, the October 28, 2008 Order erroneously found that the FCM Settlement contemplated that resource owners agreed to relinquish the resource's right to retire except upon giving four years' advance notice. PSEG asserts that the FCM Settlement does not provide that resource owners ever agreed to a four year rolling commitment to continue operating capacity resources regardless of intervening events and this proposal would undermine the essential market concept that similar products should be readily transferable.

21. PSEG argues that the October 28, 2008 Order failed to adequately distinguish the Commission's prior holding in the *PJM Interconnection, LLC*<sup>13</sup> case. PSEG states that in *PJM*, the Commission held that it was not just and reasonable for PJM simply to direct the owner of a plant to continue operating for an indeterminate period. PSEG asserts that the October 28, 2008 Order's distinction between ISO-NE and PJM and other regions with capacity obligations being a result of regional differences is insufficient. In addition, PSEG states that the modifications accepted in the October 28, 2008 Order impose excessive and unrealistic risks on capacity resources that provide localized security benefits, because such units are faced with an open-ended commitment to remain operational. According to PSEG, it is inconceivable that generators and other capacity resource owners would have agreed to assume these risks under the FCM Settlement, for rolling four-year terms, without any recognition of the potential costs or even a *force majeure* exemption. PSEG further asserts that, by preventing a resource from retiring as it wishes (i.e., if it cannot receive the de-list bid that it submits), ISO-NE is engaging in an unconstitutional taking of property without due process.

22. PSEG argues that, at a minimum, even if the Commission does not reinstate the previously effective retirement provisions allowing retirement in 180 days, it must at least provide some degree of flexibility to address situations of catastrophic loss or *force majeure* occurrences that render performance impracticable or impossible. Finally, PSEG states that the reliability concerns that the modifications are intended to address could be largely, if not entirely, addressed by ISO-NE's adoption of an FCM needs assessment that incorporates localized security requirements, which would provide the proper incentives for the development of new resources in the areas where they are most needed.

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<sup>13</sup> *PJM Interconnection, L.L.C.*, 110 FERC ¶ 61,053 (2005) (*PJM*).

### 3. Commission Determination

23. Mirant and PSEG argue that the Commission has erred in accepting the Filing Parties' proposed changes to the FCM provisions governing retirement of resources with a capacity obligation. We deny rehearing, and grant clarification.

#### a. Mirant's and PSEG's requests for rehearing

24. As discussed in the October 28, 2008 Order, a capacity resource that does not wish to provide capacity unless the clearing price for that commitment period is at or above a particular level has the following range of options as it approaches each FCA:<sup>14</sup>

- a) A resource can seek to de-list its resource for a single commitment period by submitting a dynamic de-list bid during the auction. As dynamic de-list bids by definition are less than 0.8 times the Cost of New Entry (CONE) parameter, the ISO-NE Market Monitor will not review the bid.
- b) A resource can also seek to de-list its resource for a single commitment period before the auction by submitting a de-list bid that is greater than 0.8 times CONE (static de-list bid). In that case, the Market Monitor will review the bid to determine whether it is consistent with that resource's going-forward costs.<sup>15</sup> If that bid is approved by the Market Monitor, the resource can submit that bid to the auction.
- c) A resource may seek to de-list permanently from the capacity market, but retain the option of either operating the unit to provide other services such as energy or ancillary services, or retiring the unit. To do so, the resource submits a permanent de-list bid prior to the auction. If that bid is greater than 1.25 times CONE, it is subject to the Market Monitor's review.
- d) If a resource wishes to retire immediately, it may submit a non-price retirement request prior to the auction. This option was first approved in the October 28, 2008 Order and allows a resource to leave the market unconditionally, outside of the de-list process.

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<sup>14</sup> See October 28, 2008 Order at P 7-12.

<sup>15</sup> If the Market Monitor determines that the bid is not consistent with the resource's costs, it will restate the bid using the Commission-approved calculation for net risk-adjusted going forward costs and opportunity costs.

25. If a resource's de-list bid is rejected because ISO-NE determines that it must retain that resource for reliability purposes, ISO-NE will compensate the resource as follows:<sup>16</sup>

- a) A resource seeking to de-list for one commitment period (dynamic or static de-list bid) is compensated at a rate equal to its de-list bid.
- b) A resource that had submitted a permanent de-list bid is compensated at a rate equal to either (i) its de-list bid or (ii) a Commission-approved cost-of-service rate.
- c) A resource that had submitted a non-price retirement request may either proceed with its retirement, or remain available. If it chooses to remain available, it can choose to be compensated at (i) the relevant auction clearing price (since it has not provided a de-list bid) or (ii) a Commission-approved cost-of-service rate. A resource that submits a non-price retirement request that remains available for reliability and must make a capital expenditure to remain available because it is needed for reliability may make a separate filing under section 205 to recover those costs.

26. The “temporary” de-list construct allows resources to leave the FCM for a single commitment period when the FCA price is below the resource’s bid, while allowing the resource to reenter the FCM at a future time if prices rise. If a resource that seeks to de-list for one year is nevertheless needed for reliability, it is compensated at its de-list bid, representing its net risk-adjusted going forward costs. By contrast, resources that seek to permanently leave the capacity market, but are needed for reliability, are provided the opportunity to choose cost-of-service recovery since once the reliability need is addressed, these resources will no longer be eligible to participate in the FCM. As we stated in the October 28, 2008 Order, this construct allows a resource to control its own economic situation by making a choice as to the type of de-list bid it offers, based on its perception of the potential for future FCM revenues.<sup>17</sup>

27. Focusing on one specific aspect of the reliability compensation construct, Mirant and PSEG argue on rehearing that the revised retirement provisions (which remove the ability for resources with a capacity supply obligation to retire upon 60 or 180 days notice) are not just and reasonable. PSEG contends that nothing in the FCM settlement specified that resource owners would commit to making particular capacity resources available regardless of intervening events, and this proposal would undermine the essential market concept that similar products (in this case, FCM obligations) be readily

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<sup>16</sup> October 28, 2008 Order at P 13.

<sup>17</sup> *Id.* at P 42.

transferable. In addition, Mirant contends that these provisions do not address the potential risks faced by generators with a forward capacity obligation – i.e., the risk of having to incur capital costs arising from changes in laws and regulations or market changes between the FCA and its corresponding capacity commitment period. Mirant avers that this could potentially obligate FCM resources to supply capacity without being able to recover these costs.

28. In our October 28, 2008 Order, we addressed these revised retirement provisions, stating that a resource that has sold its capacity into the FCM at a just and reasonable price should be required to honor its capacity commitments, as load relies on (and is paying for) the commitments made by these resources. We also noted that such resources can cover their capacity obligation by contracting bilaterally or through a reconfiguration auction, provided that the replacement resource addresses any reliability need. Further, we approved ISO-NE’s proposed Non-Price Retirement option, under which a resource may choose to retire, regardless of any reliability impact. We reiterate that it is integral to this market design that resources that have agreed to assume a forward capacity obligation not be allowed to retire upon 60 or 180 days notice. If capacity resources were allowed to “walk away” from forward capacity obligations as contemplated by Mirant and PSEG, it would undermine the fundamental FCM construct and inherent forward agreement between load and capacity resources. As we stated in the October 28 Order, “it would be unjust and unreasonable for load to have a set (and transparent) forward price obligation from the auction that cleared capacity resources (with equal obligations) could abrogate based on the auction clearing price.”<sup>18</sup>

29. Further, in contrast to PSEG’s position, we have stated previously that the FCM is a physical rather than financial market, noting specifically that “it is because resources are not fully substitutable that the Commission is properly concerned about the use of market power to toggle between the higher of the market and cost of service compensation.”<sup>19</sup> Allowing resources to retire upon 60 or 180 days notice would allow resources that are needed for reliability to exercise market power in pursuit of a “higher of” market or cost-of-service rate, a scenario that the Commission has repeatedly sought to avoid; one of the major drivers of the FCM was the fact that a significant number of resources in New England were receiving out of market compensation through RMR agreements. PSEG and Mirant benefit from the forward price signal that the FCM provides, yet seek to retain the inconsistent corollary that allows resources with a forward obligation to retire on short notice. However, recognizing that such a design would create perverse incentives, the proposal approved in the October 28, 2008 Order properly

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<sup>18</sup> October 28, 2008 Order at P 46.

<sup>19</sup> *Id.* at P 96.

limited this cost-of-service option to resources seeking to leave the FCM on a permanent basis, recognizing the Commission's concerns over toggling between market and out-of-market payments.

30. The arguments offered by PSEG and Mirant seeking to retain the current retirement provisions fail to recognize that the FCM is a forward market, and thus has the potential for risks that are associated with any forward market design. All resources with a capacity supply obligation may be exposed to risks that impede a given resource's ability to satisfy its capacity supply obligation, not just the resources needed for reliability that are the subject of this proceeding. While it may be difficult to replace the capacity that is deemed needed for reliability prior to the commitment period, any failure to do so simply requires the capacity supply obligation holder to their original capacity supply obligation that they agreed to for one commitment period (through their chosen de-list bid). The Commission recognizes that it is likely that resources with a capacity supply obligation not found to be needed for reliability can transfer that obligation more easily than those found needed for reliability. However, that fact does not mean that the Commission should allow resources that agreed to commit their capacity for a year to walk away from that obligation on short notice, particularly when we have previously expressed our concerns over capacity resources that are needed for reliability using that determination to seek the "higher of" the market or a cost-of-service rate.

31. PSEG also argues that when resources are needed for reliability, they provide a product that is distinct from other FCM resources, and as such, they should receive higher compensation. We stated in the October 28, 2008 Order that "the Commission has previously determined that location is not an adequate basis for allowing these units to receive additional compensation for providing a separate security service,"<sup>20</sup> and the Commission addressed the difference that PSEG seeks to draw here between resources that meet system capacity, and resources that meet localized reliability needs, in an earlier order regarding the FCM market rules, and rejected that distinction for purposes of implementation of the FCM.<sup>21</sup> We will not revisit this issue here.<sup>22</sup>

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<sup>20</sup> October 28, 2008 Order at P 54.

<sup>21</sup> *ISO New England, Inc.* 123 FERC ¶ 61,290, at P 26 (2008), *reh'g pending* ("Implementing the February 2008 FCA, ISO-NE properly relied on both transmission system security and resource adequacy criteria").

<sup>22</sup> In addition, as PSEG is aware, an ISO-NE working group is currently examining numerous FCM issues, including harmonizing the local capacity requirements established in the auction with those used in subsequent reliability reviews, addressing the concern that PSEG raises here.

32. PSEG further argues, as noted previously, that in *PJM*, the Commission held that it was not just and reasonable for PJM simply to direct the owner of a plant to continue operating for an “indeterminate period,” and that therefore, ISO-NE’s retirement provisions requiring a plant to continue operating until it has fulfilled its capacity obligation are unjust and unreasonable. PSEG states that the Commission’s distinction between the proposed retirement rule in ISO-NE and the existing retirement rule in *PJM* as a result of regional differences is inadequate and equates to unlawful taking of property without just compensation.

33. We disagree. PSEG’s argument fails to acknowledge the difference between the capacity market designs in ISO-NE and PJM. Under the FCM market design, a resource may make a decision about whether and how to participate in the capacity market, and choose the appropriate level of risk for itself through its choice of de-list bid in the auction. PJM’s capacity market, by contrast, does not permit capacity resources to choose the level of risk appropriate to it in this manner. As discussed above, in the FCM a resource that does not wish to take the risk of assuming a three-year forward capacity obligation at a price it considers undesirable may submit either a permanent de-list bid or a non-price retirement request. Such resources that seek to leave the FCM and are found needed for reliability may still leave the FCM. Should they choose to remain for the commitment period, these resources may choose to be compensated by: (i) the de-list bid for resources that submitted a permanent de-list bid; (ii) the auction clearing price for resources that submitted a non-price retirement request; or (iii) a cost-of-service rate for resources that submitted a permanent de-list bid or a non-price retirement request.

34. Thus, we do not agree that a three-year forward commitment under the FCM design equates to the kind of obligation to remain in service indefinitely that the Commission rejected in *PJM*. The proposal approved in the October 28, 2008 Order specifically defines the forward obligation a capacity resource chooses to accept. As such, the instant proposal is distinguishable from the retirement provisions in PJM. Further, because the resource knows prior to making its de-list bid what the potential consequences of that decision are (both in terms of how long it must stay in service, and what compensation it will receive), and is able to choose either to retire, or to commit to keeping its unit in service until the completion of its capacity commitment, this market rule does not constitute an unlawful taking of property without compensation.

**b. Mirant's request for clarification**

35. Finally, Mirant argues that resources face the possibility that, between an FCA and the capacity commitment period governed by that FCA, new laws or regulations may be enacted that will require resources to incur unforeseeable capital expenditures in order to be able to provide capacity during the capacity commitment period, which the resource will not be able to recover. But, if such broad changes in laws or regulations should occur, their impact would not be limited specifically to resources that sought to delist and were not permitted to do so for reliability reasons (i.e., the only resources whose capacity

compensation is at issue in this proceeding). Such legal or regulatory changes would be likely to affect a broad range of resources that have capacity commitments for a future capacity commitment period. We therefore clarify that, in that highly exceptional circumstance, this entire class of resources could seek extraordinary relief from ISO-NE, and, if that fails, make a filing with the Commission under section 206. The Commission would then address such a filing on its merits.

The Commission orders:

The compliance filings are hereby accepted, and the requests for rehearing are denied, and the request for clarification is granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.