

138 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

ISO New England Inc. and
New England Power Pool Participants Committee

Docket No. ER12-953-000

ORDER ON TARIFF REVISIONS TO THE FORWARD CAPACITY MARKET

(Issued March 30, 2012)

1. On January 31, 2012, ISO New England Inc. (ISO-NE) and the New England Power Pool (NEPOOL) Participants Committee (collectively, the Filing Parties) submitted proposed revisions (January 31 Filing) to the ISO-NE Transmission, Markets and Services Tariff (Tariff) related to the Forward Capacity Market (FCM). In this order, the Commission accepts the January 31 Filing, effective April 1, 2012, as requested.

I. Background

A. FCM

2. ISO-NE administers a forward market for capacity, in which resources compete in an annual Forward Capacity Auction (FCA) to provide capacity on a three-year-forward basis. Providers whose capacity is taken in the FCA acquire Capacity Supply Obligations, which they must fulfill approximately three years later.¹ ISO-NE held the first two FCAs in 2008, the third FCA in October 2009, the fourth FCA in August 2010 and the fifth FCA in June 2011. The sixth FCA will be held in April 2012 and the seventh FCA is scheduled to take place in February 2013.

¹ The Commission accepted a portion of the market rules that implemented the FCM on April 16, 2007 (*ISO New England Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007)), and the remainder on June 5, 2007 (*ISO New England Inc.*, 119 FERC ¶ 61,239 (2007), *reh'g denied*, 122 FERC ¶ 61,171 (2008)).

B. Instant Filing

3. By order issued April 13, 2011, the Commission required ISO-NE to make significant changes to the FCM market rules, and, by order issued January 19, 2012, accepted ISO-NE's compliance filing that would have implemented the required revisions in two stages.² ISO-NE proposed that in Stage 1, it would implement a new buyer-side market power mitigation mechanism, eliminate the price floor, and model four capacity zones "all the time." ISO-NE stated that it would be able to implement Stage 1 in time for FCA 7. In Stage 2, ISO-NE proposed to review the existing eight energy zones and identify the appropriate zones for capacity purposes, and to implement the appropriate zonal configuration.³ However, in the instant filing, the Filing Parties propose Tariff revisions that extend the currently effective FCM rules through FCA 7 with only two changes. First, the Filing Parties propose to extend the auction floor price for an additional FCA at the level of \$3.15/kW-month.⁴ Second, the Filing Parties propose to implement the Stage 1 zonal modeling changes – that is, modeling four specified zones all the time – as described in ISO-NE's August 22, 2011 Updated Schedule Filing.⁵

4. The Filing Parties state that the January 31 Filing reflects a broadly supported compromise that provides time for the region to explore longer-term improvements to the FCM as per the April 13 and January 19 Orders. They state that, although ISO-NE and its stakeholders diligently attempted to address the Commission's directives, substantial differences remain as to how to implement them.⁶ The Filing Parties point to the fact that, at a NEPOOL Markets Committee vote on proposed tariff revisions to implement the Commission's directives, only 2.45 percent voted in favor. They further state that

² *ISO New England Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 (2011) (April 13 Order), *order on reh'g and clarification*, 138 FERC ¶ 61,027 (2012) (January 19 Order).

³ January 19 Order, 138 FERC ¶ 61,027 at P 154.

⁴ Absent the proposal to place the price floor at \$3.15/kW-month, by operation of the price floor mechanism in the market rules, the price floor would have been \$3.60/kW-month. *See* Tariff, section III.13.2.7.3

⁵ *ISO New England Inc.*, Compliance Filing Update, Docket Nos. ER10-787-000; EL10-50-000; EL10-57-000; ER10-787-004; EL10-50-002; and, EL1057-002 (filed August 22, 2011) (Updated Schedule Filing).

⁶ Transmittal at 2.

ISO-NE and its stakeholders agree that, given more time, it might be possible to reach consensus regarding design changes to improve the long-term functioning of the FCM (both those directed by the Commission and others).⁷ The Filing Parties assert that by improving zonal modeling and extending the floor price at a lower level, the January 31 Filing represents an incremental improvement to the currently effective FCM rules. They state that the NEPOOL Participants Committee supported this approach with a vote of more than 93 percent in favor, with support from all sectors, and that the New England States Committee on Electricity (NESCOE) indicated that a majority of the six states support these two changes.⁸ The Filing Parties further note that it is preferable for the parties to engage in cooperative efforts to improve the FCM design for future FCAs than to engage in costly and time-consuming litigation over the earlier proposal to address the Commission's requirements that was opposed by almost all market participants.

II. Procedural Issues

5. Notice of the January 31 Filing was published in the *Federal Register*, with interventions and protests due on or before February 21, 2012.⁹ The Maine Public Utilities Commission and Massachusetts Department of Public Utilities filed notices of intervention. Electric Power Supply Association; GenOn Parties;¹⁰ Calpine Corporation; Consolidated Edison Solutions, Inc. and Consolidated Edison Energy, Inc.; Massachusetts Attorney General; Dominion Resources Services, Inc.;¹¹ NESCOE; HQ Energy Services US; Capital Power Corporation; Brookfield Energy Marketing LP; and, Northeast Utilities Service Company filed timely motions to intervene or notices of intervention.

⁷ The Filing Parties state that, together with considering the changes to the FCM directed by the Commission, the stakeholders are also considering other design changes, including those raised by ISO-NE's ongoing strategic planning efforts. Transmittal at 2, n.7.

⁸ *Id.* at 3.

⁹ 77 Fed. Reg. 6553 (2012).

¹⁰ The GenOn Parties are GenOn Energy Management, GenOn Canal, LLC, and GenOn Kendall, LLC.

¹¹ Dominion Resources Services Inc. has filed its motion on behalf of Dominion Energy Brayton Point, LLC, Dominion Energy Manchester Street, Inc., Dominion Energy Marketing, Inc., Dominion Energy New England, Inc., Dominion Energy Salem Harbor, LLC, and Dominion Nuclear Connecticut, Inc.

6. Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, and the New Hampshire Electric Cooperative, Inc. (collectively, Public Systems); and, NSTAR Electric Company (NSTAR) each filed a motion to intervene and comments. Exelon Corporation (Exelon) and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (Constellation) each filed a timely motion to intervene and, together, filed comments. TransCanada Power Marketing Ltd. (TransCanada) and Granite Ridge Energy, LLC (Granite Ridge) (together, Joint Protesters) each filed a timely motion to intervene and, together, filed a joint protest.

7. On February 22, 2012, Potomac Economics, ISO-NE's external market monitor (EMM), filed an untimely motion to intervene and comments. On February 28, 2012, GDF Suez Energy North America, Inc. (GDF Suez) filed an untimely motion to intervene.

8. On March 7, 2012, ISO-NE and NEPOOL filed answers. On March 16, 2012 TransCanada filed a motion to lodge an excerpt from the minutes of the February 10, 2012 NEPOOL Participants Committee meeting.

III. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and timely-filed unopposed motions to intervene serve to make the entities that filed them a party to this proceeding. We will grant the motions to intervene out-of-time by Potomac Economics and GDF Suez given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answer filed by ISO-NE and NEPOOL, and grant TransCanada's motion to lodge an excerpt from the Participants Committee meeting minutes, because ISO-NE's and NEPOOL's answers and the excerpt from the Participants Committee meeting minutes have provided information that has assisted us in our decision-making process.

B. Procedural Challenges to the Filing**1. Comments and Protests**

11. Joint Protesters argue that the January 31 Filing (a) is a collateral attack on the Commission's April 13 and January 19 Orders, and (b) should have been filed under section 206 of the Federal Power Act (FPA),¹² rather than section 205,¹³ which would require the Filing Parties to show that currently effective tariff provisions (including the timeframe for implementation) are unjust and unreasonable.

12. Joint Protesters assail the January 31 Filing as potentially, "a collateral attack on the April 13 and January 19 Orders."¹⁴ Joint Protesters state that the Commission made clear (a) what rules would remain in place, and (b) that out-of-market (OOM) mitigation measures must be developed and implemented in a timely manner. Joint Protesters note that in previous May 13, 2011 and August 22, 2011 compliance filings, ISO-NE indicated that revisions to the market rules would be implemented in time for FCA 7, and that "[e]ssentially, all of the revisions required by the April 13 Order will be implemented for the seventh FCA, except for modeling all eight energy zones in the capacity market."¹⁵ Thus, according to Joint Protesters, "the January 31 Filing could be considered a collateral attack on the April 13 and January 19 Orders."¹⁶

13. Joint Protesters additionally assert that the January 31 Filing falls within section 206 of the FPA, rather than section 205, and that, the Filing Parties have failed to meet their section 206 burden of proof, showing that currently effective rates are unjust and unreasonable. They state that "[j]ust four weeks ago the Commission reaffirmed that the rates ordered in its April 13 Order are just and reasonable. ... In that context, one could argue that for ISO-NE to implement rates that are different from those just recently approved and reaffirmed would first require a Commission determination under section 206 that the rates derived under the April 13 and January 19 Order are unjust and

¹² 16 U.S.C. § 824e (2006).

¹³ 16 U.S.C. § 824d (2006).

¹⁴ Joint Protest at 4.

¹⁵ *Id.* at 6 n.12 (citing ISO-NE August 22, 2011 Compliance Filing Update, at 3).

¹⁶ Joint Protest at 8.

unreasonable. Under FPA Section 206, ISO-NE would have to make a prima facie showing that the rates it is challenging are unjust and unreasonable.”¹⁷

2. Answers and Lodged Material

14. NEPOOL and ISO-NE respond that neither the April 13 Order nor the January 19 Order imposed a deadline for the implementation of Tariff revisions; instead, the April 13 Order required only that a compliance schedule be filed.¹⁸ The parties state that ISO-NE has complied with this directive and therefore, any assertion that the January 31 Filing is a collateral attack on the April 13 or the January 19 Order is without merit.

15. ISO-NE and NEPOOL further note that the April 13 Order explicitly recognized that the price floor might need to be extended beyond FCA 6.¹⁹ ISO-NE asserts that because it and a large majority of stakeholders believe more time is needed to develop a well-functioning offer-floor mitigation and related mechanisms, they have filed for such an extension.

16. In the excerpt from the February 10, 2012 meeting of the NEPOOL Participants Committee, TransCanada highlights that ISO-NE’s chief executive officer Gordon van Welie stated that ISO-NE is developing documents that will address long-term FCM and transmission planning issues, and it anticipates presenting these changes, in draft form, to the Committee “in the April time-frame,” following review by the NEPOOL Board, with subsequent presentations in May and July.²⁰ Mr. van Welie further stated that ISO-NE “was a developing a concept [for FCM re-design] that ... would not be ready in time for FCA 8,” but that “over the next 6-9 months there might be some elements of a desired long-term design that could be implemented in the current capacity market in time for FCA 8.”²¹

3. Commission Determination

17. We reject the notion that the January 31 Filing represents a collateral attack on prior Commission orders. As the Commission has previously recognized, a collateral

¹⁷ *Id.*

¹⁸ April 13 Order, 135 FERC ¶ 61,029 at PP 22, 368, and ordering para. (F).

¹⁹ April 13 Order, 135 FERC ¶ 61,029 at PP 22, 213, and n.150.

²⁰ Minutes Excerpt, attached to TransCanada March 16 Motion to Lodge, at 2685.

²¹ *Id.* at 2687.

attack is “[a]n attack on a judgment in a proceeding other than a direct appeal,” and is “generally prohibited.”²² The January 31 Filing does not assail a previous judgment. In the April 13 Order, the Commission directed ISO-NE to file a timetable for development of new FCM rules, but the Commission did not direct that the new rules be filed or implemented by a specific date. ISO-NE submitted a timetable in its May 13, 2011, and August 22, 2011, compliance filings, and, in the January 19 Order, the Commission accepted those filings in satisfaction of the directive that a timetable be filed. In accepting the timetable, the Commission did not discuss or mandate any specific implementation dates, and nothing about the January 31 Filing is inconsistent with any judgment in that regard; there was none.

18. Moreover, in this proceeding, the Filing Parties do not contest the Commission’s previous determination that new market rules are required; the proposal here simply addresses when those new rules must be filed – a question on which, as discussed above, the Commission previously has not issued a judgment.

19. We also disagree with Joint Protesters’ view that “for ISO-NE to implement rates that are different from those just recently approved and reaffirmed would first require a Commission determination under Section 206 that the rates derived under the April 13 and January 19 Order are unjust and unreasonable.”²³ As an initial matter, we note that the previously-accepted implementation timetable reflected anticipated milestones toward fulfilling required changes to the FCM. It did not reflect proposed effective dates for specific tariff revisions. However, even assuming, *arguendo*, that the previously-accepted implementation timetable constitutes part of a filed rate, Joint Protesters erroneously conflate the standards of section 205 and 206 of the FPA. Where, as here, a utility seeks to modify its own tariff, it may submit proposed tariff revisions under section 205 of the FPA, and the Commission can accept those revisions upon a finding that the revisions are just and reasonable. Section 206 applies to investigations, requiring a complainant or the Commission upon its own motion to show that a utility’s existing rates are unjust and unreasonable. Here, there is no formal complaint before us, and seeing no reason to initiate an investigation, section 206 is simply inapposite.

20. As discussed below, the Filing Parties have demonstrated why the tariff changes they propose, which are part of, and consistent with, the process of fulfilling the Commission’s directives, are just and reasonable, and we will accept them on that basis.

²² *New England Conf. of Pub. Utils. Commrs. v. Bangor Hydro-Electric Co.*, 135 FERC ¶ 61,140, at P 27 (2011) (citing *Wall v. Kholi*, 131 S. Ct. 1278, 179 L. Ed. 2d 252, 2011 U.S. LEXIS 1906 at *12 (2011)).

²³ Joint Protest at 8.

C. Price Floor

21. The Filing Parties state that, in the April 13 Order, the Commission found that the price floor should remain in effect until implementation of the new buyer-side market power mitigation mechanism, and that ISO-NE would be required to make a filing with the Commission to extend the price floor beyond FCA 6.²⁴ They state that the extension of the floor price to FCA 7 is appropriate, and propose revisions to section III.13.2.7.3 of the Tariff to implement this extension. Additionally, the Filing Parties propose to modify the level of the price floor for FCA 7: instead of the price floor being set at “below 0.6 times [cost of new entry] (CONE)” as is currently applicable to FCAs 4, 5, and 6, the price floor will be set to “below \$3.15” for FCA 7 only. The Filing Parties state that:

This value is well within the zone of reasonableness and represents a just and reasonable amount that was necessary to achieve an outcome that an overwhelming majority (though admittedly not all) of both load and suppliers can accept or not oppose in the interim.²⁵

1. Protests and Comments

22. Joint Protesters argue that the Commission should reject the January 31 Filing’s price floor proposal because it provides no evidentiary support for reducing the price floor, or for the particular price of \$3.15/kW-month. Joint Protesters state that, per the currently approved tariff, the price floor for FCA 7 would be approximately \$3.60/kW-month. Joint Protesters state that to the best of their knowledge, \$3.15/kW-month is simply an arbitrary number that was voted on at a stakeholder meeting. Joint Protesters argue that, when a party – including ISO-NE – proposes any rate change or tariff modification, it must provide evidentiary support for the proposal, which is not present in the record here.²⁶ Joint Protesters also request that, once the price floor has been removed, the Commission monitor the effectiveness of OOM mitigation and whether resulting market prices are just and reasonable.²⁷

²⁴ Transmittal at 10 n.45 (citing April 13 Order, 135 FERC ¶ 61,029 at PP 22, 213).

²⁵ Transmittal at 11.

²⁶ Joint Protest at 10.

²⁷ *Id.* at 17.

23. Other commenters support the price floor proposal on the grounds that it is part of a short-term compromise. NSTAR favors the extension of the price floor mechanism because it will “provide a measure of revenue certainty that would otherwise be lost.”²⁸ The EMM states that it does not oppose the extension of the floor price because it serves to address, albeit imperfectly, concerns with regard to the vertical demand curve.²⁹

24. Exelon opposes price floors in general, stating that they prevent the market from operating in an efficient manner to allow prices to elicit supply responses, but states that it does not formally oppose this price floor proposal under these circumstances, where it is an element of a compromise agreement. Exelon requests that the Commission preclude any extension of the price floor beyond FCA 7.³⁰

2. Answers

25. NEPOOL states that the extension of the price floor at the agreed upon \$3.15/kW-month for FCA 7 is just and reasonable, arguing that both the Commission and the courts have long recognized there is a range of just and reasonable outcomes.³¹ ISO-NE agrees that the floor is “well within the zone of reasonableness,”³² noting that the Commission has approved higher values for recent FCAs, and that a price floor that is lower than the price floors approved for earlier FCAs represents less of a constraint on the clearing of the auction and moves toward the Commission’s mandate to remove the price floor altogether.

26. NEPOOL notes that the original price floor was worked out in a broadly supported settlement, and that settlement did not require precision as to the percentage of CONE at which the price floor was set for any reason other than to achieve broad support.³³

²⁸ NSTAR Comments at 4.

²⁹ EMM Comments at 9.

³⁰ Exelon Comments at 4.

³¹ See *Louisville Gas & Electric Co.*, 114 FERC ¶ 61,282, at P 29 (2006) (finding that “the just and reasonable standard under the FPA is not so rigid as to limit rates to a ‘best rate’ or ‘most efficient rate’ standard. Rather, a range of alternative approaches often may be just and reasonable”).

³² ISO-NE Answer at 9.

³³ NEPOOL Answer at 6 (*citing Devon Power LLC*, Explanatory Statement in Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues, Docket

NEPOOL also argues that the modest reduction to the price floor here enjoys even broader stakeholder support and falls well within the range of a just and reasonable floor, particularly in light of the push to eliminate the floor price altogether.³⁴ Both NEPOOL and ISO-NE note that in the January 19 Order, the Commission put into place provisions that address Joint Protesters' concerns regarding the treatment of OOM entry in FCA 6 and beyond; ISO-NE notes that the January 31 Filing does not implicate this holding.³⁵

3. Commission Determination

27. We accept the Filing Parties' proposal to extend the price floor to FCA 7 at the reduced level of \$3.15/kW-month. The Commission has stated that the price floor should be eliminated coincident with the implementation of a revised buyer-market power methodology.³⁶ While revised buyer-side market power mitigation has not yet been implemented in New England, the Commission's most recent FCM order largely accomplished the objective of mitigating all OOM resources going forward, by ruling that all OOM resources, beginning in FCA 6, would be treated as "new" once the minimum offer rules are in effect. Thus, potential OOM resources beginning in FCA 6 are likely to be deterred from entering the market because they are on notice that they will be subject to the offer floor (and thus, will not likely clear the auctions) once the MOPR goes into effect.³⁷ Moreover, the proposal before us to extend the price floor at a reduced level is an interim step that enjoys broad stakeholder support pending the implementation of this revised methodology. In these circumstances, while the region awaits implementation of a full offer-floor mitigation regime, we accept the Filing Parties' proposal to temporarily continue and set the price floor at \$3.15/kW-month for

Nos. ER03-563-000, -030, -055 (filed Mar. 6, 2006)). The FCM Settlement provided for a price floor of 0.6 times CONE, *see* FCM Settlement, section III.G.4, attached to the Explanatory Statement.

³⁴ NEPOOL Answer at 6.

³⁵ January 19 Order, 138 FERC ¶ 61,027 at P 47.

³⁶ *ISO New England Inc.*, 131 FERC ¶ 61,065, at P 97 (2010) (April 23, 2010 Order) ("the Commission finds it appropriate to extend the price floor as a transitional measure pending ... revisions [to tariff provisions preventing OOM entry]. As stated above, however, we anticipate that in the Commission's final order accepting an appropriate ... mechanism [to prevent OOM entry], we will terminate the price floor coincident with the implementation of that new mechanism").

³⁷ January 19 Order, 138 FERC ¶ 61,027 at PP 45-49.

only FCA 7, as a transitional mechanism until the price floor is eliminated altogether.³⁸ As noted above, the original price floor was itself a part of the settlement that established the FCM that included concessions and compromises by all parties. The original price floor in the FCM settlement did not represent a finding as to the costs of providing capacity; rather, it simply served to assure suppliers that there would be a limit to their downside risk. In the January 31 Filing, the Filing Parties have similarly limited suppliers' downside risk by providing for a continuation of the price floor.³⁹ The Commission may approve a proposal as just and reasonable; it need not be the only reasonable or even the most accurate proposal,⁴⁰ and in light of the transitional nature of

³⁸ The Commission has previously accepted transitional proposals that are put into place to protect parties until a definitive resolution of a rate issue is reached, as just and reasonable. *California Independent System Operator Corporation*, 131 FERC ¶ 61,148, at P 16 (2010) (“we find that the CAISO’s proposal to apply the internal resource adequacy availability standard is just and reasonable on a temporary basis until the CAISO has collected and evaluated sufficient data to determine a more appropriate availability standard for these resources”); *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,174, at P 94 (2010), footnote omitted (“we disagree ... that the Commission needed to find that the existing license plate zonal rates under the PJM tariff were too low before it could fix a higher rate. Rather, the Commission found that, for power moved through one of the [Regional Transmission Organizations (RTOs)] for delivery to the other RTO, the pre-existing pancaked rates were unjust and unreasonable. And the Commission found that a license plate rate, with a transitional mechanism to avoid abrupt and significant cost shifting, was just and reasonable. That is all the Commission needed to find, and that is what it did find”); *California Independent System Operator Corporation*, 126 FERC ¶ 61,150, at P 44 (2009), footnote omitted (“the Commission finds Exceptional Dispatch, as accepted herein, to be a just and reasonable method of procuring these services until such time as the CAISO can implement an alternative mechanism”).

³⁹ In accepting this proposal, we note that the NEPOOL Participants’ Committee supported ISO-NE’s proposal with a vote of more the 93 percent in favor, with support from all sectors, and the Filing Parties state that the “overwhelming majority” of both load and suppliers can accept or do not oppose this proposal. Transmittal at 11.

⁴⁰ The Commission may approve a proposal as just and reasonable; it need not be the only reasonable proposal or even the most accurate. *See, Oxy USA, Inc. v. FERC*, 64 F.3d 679, 691, 314 U.S. App. D.C. 175 (D.C. Cir. 1995); *City of Bethany v. FERC*, 727 F.2d 1131, 1136, 234 U.S. App. D.C. 32 (D.C. Cir. 1984).

this filing, and the progress that it represents toward full zonal modeling and the elimination of the price floor, we find it just and reasonable.

28. As to Joint Protesters' argument that, once the price floor has been removed, the Commission should monitor the effectiveness of OOM mitigation for possible reinstatement of the price floor, the Commission has the power to take appropriate action if future OOM mitigation is ineffective. We note, however, that simply instituting a price floor if the market price is lower than what Joint Protesters would like would not necessarily, in and of itself, bring a just and reasonable result.

D. Modeling of Zones

29. The Filing Parties propose modifying section III.12 of the Tariff to implement the modeling of four zones all the time.⁴¹ Specifically, the new Tariff language will indicate that exactly four Capacity Zones will be modeled for each FCA as follows: 1) the Maine Load Zone will be modeled as a separate export-constrained Capacity Zone; 2) the Connecticut Load Zone will be modeled as a separate import-constrained Capacity Zone; 3) the Northeastern Massachusetts Load Zone will be modeled as a separate import-constrained Capacity Zone; and, 4) the remaining Load Zones (Western/Central Massachusetts, Southeastern Massachusetts, Vermont, New Hampshire, and Rhode Island) will be modeled together as the Rest of Pool Capacity Zone.

1. Protests and Comments

30. Public Systems and Exelon support the proposed zonal reforms.⁴² NSTAR argues that the implementation of dynamic modeling of capacity zones needs to be immediately accompanied by appropriate market power mitigation measures. While NSTAR supports the Filing Parties' zonal proposal, it requests that the Commission explicitly recognize that the instant zonal modeling proposal is short-term, for FCA 7 alone, and that any long-term zonal modeling proposal must contain adequate market power mitigation measures.⁴³

31. The EMM asserts that while modeling local capacity requirements in all FCAs is a significant improvement in the FCM, doing so also raises significant potential market power concerns, particularly if one or more suppliers are pivotal. The EMM contends

⁴¹ The Filing Parties also propose changes to section III.13 of the Tariff in conformance with the changes to III.12.

⁴² Public Systems Comments at 4; Exelon Comments at 5.

⁴³ NSTAR Comments at 6.

that because a pivotal supplier's resources are needed, it has the ability to raise prices by withholding a portion of its resources, even when surplus capacity exists in the local area. The EMM argues that when market-wide capacity prices are relatively low, the pivotal supplier will have a strong incentive to withhold because otherwise, the local capacity constraint will not bind and the local capacity price will be equal to the market-wide price. The EMM notes that under the current rules that do not provide for dynamic modeling, this form of market power is more difficult to exercise because the local zone would not be separately modeled if sufficient capacity is available to satisfy the local capacity requirement.⁴⁴ The EMM observes that this market power concern is somewhat ameliorated by the existing de-list bid threshold, set at 80 percent of CONE, which creates a "safe harbor" offer level, above which it is not possible to raise prices. However, because this safe harbor level is still 45 percent higher than the proposed price floor, the EMM recommends that the Commission require the Filing Parties to amend their proposal for FCA 7 to include the previously proposed and approved changes to market power mitigation measures.

2. Answers

32. ISO-NE requests that the Commission reject the EMM's recommendation that the Commission require the implementation of seller-side market power mitigation measures for FCA 7. ISO-NE asserts that at this point, there is not enough time for it to submit revised FCM rules and for the Commission to issue an order that would provide market participants with sufficient time to prepare their de-list bids for FCA 7.

3. Commission Determination

33. We accept the Filing Parties' proposal to implement modeling of four zones for FCA 7. As the Commission stated in the April 13 Order, increased zonal modeling permits greater market transparency and reduces the likelihood of rejecting de-list bids and relying on out-of-market solutions.⁴⁵ Our earlier order accepted the proposal then before the Commission to model eight zones all of the time in conjunction with lowering the de-list bid threshold down to \$1. In this order, we accept an interim proposal to model only four of the eight zones all of the time, and will not require an immediate change to the \$1/kW-month de-list bid threshold.

⁴⁴ EMM Comments at 9-10.

⁴⁵ April 13 Order, 135 FERC ¶ 61,029 at P 272.

34. We understand the EMM's concern about the greater potential for market power when more zones are modeled. However, while this interim proposal could result in some increase in the ability to exercise market power, we believe there is less concern about market power than when all eight zones are modeled all the time. That is because with only four zones modeled, the remaining four potential zones will be modeled as a single area, known as the "Rest of Pool" zone. The auction will consider that every resource within the Rest of Pool can substitute for any other resource in the Rest of Pool. Thus, every resource in the Rest of Pool zone can compete with every other resource in the Rest of Pool. By contrast, if all eight zones are modeled all the time, the Rest of Pool zone would be divided into four smaller zones. In that case, a resource in any one zone within this area could not be substituted for a resource in another zone on the other side of any transmission constraint that developed, so there would be less competition among resources in different zones.⁴⁶ If we accept the Filing Parties' proposal without lowering de-list bid thresholds, we face the possible risk that prices in the import-constrained zones could rise due to the exercise of market power. But, if we reject the Filing Parties' proposal (or accept it only on condition that the de-list threshold be reduced, something that ISO-NE asserts cannot be accomplished in sufficient time), there is a possible risk that prices in the import-constrained zones could fail to efficiently rise above the price floor when the cost of providing capacity in the import-constrained zones is genuinely higher than that of neighboring zones. On balance, we conclude that it is reasonable to accept the Filing Parties' proposal without requiring a reduction in the de-list threshold.

35. In the past, prices in the import-constrained zones of NEMA and Connecticut have failed to separate from their neighbors because they have not been modeled as separate capacity zones under the prior market rules, despite the fact that some de-list bids have been rejected for reliability reasons. This suggests that the marginal costs of providing capacity in the import-constrained zones have genuinely been higher than in neighboring zones, but the prior market rules have prevented efficient price separation. The proposal accepted here to model four capacity zones addresses this issue, because NEMA and Connecticut would be among the four zones that would be modeled in all auctions going

⁴⁶ Moreover, while lowering the de-list bid threshold down to \$3.15 (the new, temporary price floor) could result in review of additional de-list bids, lowering the threshold below \$3.15, down to \$1, would not result in any additional review of bids below the review resulting from a \$3.15 threshold. That is because the price floor would prevent the market price from falling below \$3.15, so no resources would submit de-list bids below \$3.15. On the high end of the spectrum, as noted by the EMM, the existing de-list bid threshold of .8 times the FCA 6 CONE will set an upward bound on the ability to raise prices, *see* EMM Comments at 10. (As the EMM notes, the CONE for FCA 6 was \$5.72; thus, the de-list bid threshold for FCA 6 was \$4.57.)

forward. Additionally, the current de-list threshold will be in place for only one more FCA; as stated elsewhere in this order, we are requiring ISO-NE to file tariff changes that would, among other things, model eight zones all of the time, reduce the de-list bid threshold to \$1, and remove the price floor in time for FCA 8.⁴⁷

E. Timeline and Content of Stakeholder Proceedings

36. As noted previously, Filing Parties assert that the approval of the instant filing will provide ISO-NE and stakeholders additional time to address the issues identified by the Commission in this proceeding as well as other possible modifications. Filing Parties do not provide a date certain by which they commit to file these further rule revisions.

1. Timeline

a. Protests and Comments

37. Joint Protesters argue that the Filing Parties have provided no evidence to support the delay in the implementation of the Commission's directives and argue that it is particularly unjust and unreasonable because of the Commission's expressed concerns about OOM capacity. Joint Protesters, therefore, request that the January 31 Filing be rejected and that the Commission require ISO-NE to implement OOM mitigation measures as previously ordered and to do so in time for FCA 7.⁴⁸ Additionally, to support Joint Protesters' request that ISO-NE implement OOM mitigation measures in time for FCA 7, TransCanada asserts that the excerpt from the NEPOOL Participants Committee February 10, 2012 meeting that it lodged with the Commission demonstrates that ISO-NE will not be able to implement modifications to the FCM in time for FCA 8.⁴⁹

38. The EMM argues that because of the difficulty achieving consensus regarding market rule changes, the Commission should require the parties to complete their negotiations and file proposed revisions by November 2, 2012 for implementation prior to FCA 8. The EMM argues that continued uncertainty and instability regarding the design and rules governing the FCM undermine the market's ability to foster efficient

⁴⁷ In addition to the foregoing, we note that the zonal modeling proposal enjoys strong stakeholder support.

⁴⁸ Joint Protest at 2-3.

⁴⁹ TransCanada March 16 Motion to Lodge at 3-4.

investment in the region.⁵⁰ Exelon also urges the Commission to condition its approval on the implementation of reforms prior to FCA 8.⁵¹

b. ISO-NE Answer

39. ISO-NE disagrees with the EMM, stating that the Commission should not impose FCA 8 as a firm deadline for FCM revisions. ISO-NE states that “it is uncertain whether, and if so to what extent, the ISO and stakeholders will make significant process in modifying FCM to address the risks set forth in the ongoing strategic planning process and accomplishing the requirements set forth [by the Commission].”⁵² ISO-NE states that, instead, the Commission should require that ISO-NE file a status report no later than December 1, 2012.⁵³

c. Commission Determination

40. We recognize that, as the Filing Parties state, it would be preferable for the parties to come to consensus as to how to implement the Commission’s directives, and we therefore accept this filing. We stress, however, that the Commission has already made a finding that the existing tariff provisions are not just and reasonable,⁵⁴ and that they remain in place solely until just and reasonable provisions can be implemented. ISO-NE has not yet filed market rules to implement the Commission's directives from the April 13 Order. In compliance with this order, ISO-NE has filed two proposed timelines, which have been accepted by the Commission. The timeline in the first of these filings would have had rules in place for FCA 8; the second would have had rules in place for FCA 7. We are now informed that this earlier deadline will not be met. ISO-NE remains under the obligations of the April 13 and January 19 Orders, and until it fully implements new market rules, ISO-NE has not fulfilled those compliance obligations. We therefore direct that ISO-NE comply with the later of its proposed timelines -- that is, ISO-NE must file

⁵⁰ EMM Comments at 11.

⁵¹ Exelon Comments at 7.

⁵² ISO-NE Answer at 13.

⁵³ *Id.* at 2.

⁵⁴ See April 13 Order, 135 FERC ¶ 61,029 at P 48 (“... [w]e find certain aspects of [the original filing] to be unjust and unreasonable. We will next review alternative proposals, including the [ISO-NE’s subsequent proposal] under FPA section 206”).

rules completing its compliance obligations -- in time for implementation by FCA 8, i.e., by December 3, 2012.⁵⁵

2. Content

a. Comments and Protests

41. The EMM states that the Commission should require ISO-NE and its participants to address what it considers to be the most significant flaw in the current FCM – the vertical demand curve – during the stakeholder process.⁵⁶ The EMM notes that when low-priced supply offers clear against a vertical demand curve, two general outcomes are possible: (1) “if the market is not in a shortage, the price will clear very low;” and, (2) “if the market is in shortage, the price will clear at the deficiency price.”⁵⁷ The EMM argues that this pricing dynamic will result in significant volatility and uncertainty for market participants. In addition, the EMM states that this can hinder long-term contracting and investment by making it difficult for potential investors to forecast the capacity market prices and revenues. The EMM argues that this can undermine the effectiveness of the capacity market in maintaining adequate resources.⁵⁸

42. Public Systems argue that the FCM market design must accommodate load-serving entities’ decisions to meet their capacity needs through new self-supplied resources, whether owned or contracted-for. Public Systems contend that such decisions

⁵⁵ As to the excerpt from Mr. van Welie’s statements at the February 10, 2012 NEPOOL Participants Committee meeting that TransCanada seeks to bring to our attention, we do not agree that those statements show that ISO-NE cannot or will not file the revisions to the FCM market rules that we required in our April 13 and January 19 Orders in time for FCA 8. At the Participants Committee meeting, Mr. van Welie spoke in general terms of broad changes that ISO-NE is contemplating to the capacity market, in particular a greater integration between FCM and ISO-NE’s long-term planning process. Additionally, he referred specifically to the possibility of implementing some FCM changes within the next six to nine months. Minutes Excerpt, attached to TransCanada March 16, 2012 Motion to Lodge, at 2687.

⁵⁶ EMM Comments at 4.

⁵⁷ *Id.* at 6.

⁵⁸ EMM Comments at 7.

balance multiple considerations besides price and must be left to load-serving entities' business judgment.⁵⁹

43. Exelon argues that the Commission should condition its acceptance of the Filing Parties' proposal on a compliance filing requirement implementing reform of the supply curve, addition of a demand curve, adoption of effective buyer and supply side mitigation, and elimination of the price floor, all prior to FCA 8.⁶⁰

b. ISO-NE Answer

44. ISO-NE agrees that the issues raised by commenters should be explored during the stakeholder process, and submits that any changes to the FCM need to be aligned with its own list of guiding principles, including the creation of differentiated capacity products and improved locational differentiation, among others.

c. Commission Determination

45. The market rule revisions to be filed prior to FCA 8 must satisfy the directives and objectives of the April 13 Order, and any additional proposed modifications must be shown to be just and reasonable. To the extent parties have raised other arguments, they are free to pursue them further in the stakeholder process.

The Commission orders:

(A) The Commission hereby accepts the instant filing, effective April 1, 2012 as discussed in the body of this order.

⁵⁹ Public Systems Comments at 5-6.

⁶⁰ Exelon Comments at 1 and 2.

(B) As noted in the body of this order, ISO-NE must file rules fulfilling its compliance obligations under the April 13 and January 19 Orders in time for implementation by FCA 8, that is, by December 3, 2012.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.