

139 FERC ¶ 61,178  
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.

Docket No. ER12-1455-000

ORDER ACCEPTING TARIFF REVISIONS SUBJECT TO CONDITION  
AND DIRECTING COMPLIANCE FILING

(Issued June 4, 2012)

1. On April 6, 2012, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> ISO New England Inc. (ISO-NE) submitted proposed revisions to its Forward Capacity Market (FCM) rules regarding the publication of information about offers from new resources and de-list bids from existing resources prior to the Forward Capacity Auction (FCA). In this order, the Commission accepts the proposed revisions subject to condition, effective June 5, 2012 as requested, and requires ISO-NE to submit a compliance filing.

**I. Background**

2. Publication of certain offer and bid information, including de-list bids from existing resources, is addressed in section III.13.1.8 of the FCM rules. Under these rules, ISO-NE publishes detailed information about the offers and bids submitted by market participants in two primary stages prior to each FCA.

3. During the first stage, no later than three business days after the Existing Capacity Qualification Deadline (which is approximately eight months before the FCA), ISO-NE publishes the following offer and bid information: (1) for each permanent de-list bid, the resource name, quantity, price, and load zone in which the resource is located; (2) for each static de-list bid, the quantity, price and load zone in which the resources is located; and (3) for export bids and administrative export bids, the name of submitter, quantity and interface.<sup>2</sup> Three business days after the New Capacity Qualification Deadline

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> ISO-NE Filing at 4.

(which is also approximately eight months before the FCA), ISO-NE publishes the name of submitter, quantity, and interface for offers from New Import Capacity Resources.<sup>3</sup> Also pursuant to section III.13.8.1, ISO-NE must publish certain additional information approximately four months prior to the FCA. Specifically, if a permanent de-list bid above 0.8 times the cost of new entry or a static de-list bid is approved by the Internal Market Monitor (IMM), ISO-NE must publish the resource name, quantity, price, and load zone (or interface, as applicable) in which the resource is located at the time of the qualification determination notification for existing capacity.<sup>4</sup>

4. During the second stage, approximately 90 days before the FCA, ISO-NE publishes further detailed information about offers and bids in an Informational Filing. The Informational Filing details, among other things: (1) which resources are accepted and rejected in the qualification process to participate in the FCA; and (2) the IMM determinations regarding offers and bids submitted during the qualification process pursuant to the FCM rules. Consistent with these requirements, the Informational Filing also lists each new resource's type (generation, demand resource, etc.), megawatt quantity, and location, as well as the IMM's determinations regarding the amount and price of each de-list bid and the reasons for rejecting any de-list bids.

## **II. ISO-NE's Filing**

5. ISO-NE proposes changes to the FCM rules to limit the information that is published before the FCA, and instead publish the information after the FCA is complete.<sup>5</sup> It contends that detailed offer and de-list information along with certain publicly available information and information posted between the FCA rounds, allows participants to calculate the maximum total capacity remaining in the auction in each zone at the end of each round in the auction. ISO-NE explains that because auction participants know the amount of capacity needed to meet each zone's reliability requirement, knowing the amount of capacity in the auction in each zone enables a participant to calculate how much more capacity would have to be removed to conclude the auction.<sup>6</sup> ISO-NE further explains that this information would be sufficient for each participant to determine whether its capacity is needed to clear the auction – in other words, whether it has become a pivotal supplier. ISO-NE argues that armed with this knowledge, an auction participant could withdraw its capacity at a cost higher than actual

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

<sup>6</sup> *Id.* at 5.

cost, thereby setting the clearing price above a competitive level.<sup>7</sup> ISO-NE argues that the concerns become more pressing when the region is divided into more numerous, and hence smaller, zones, and where supply is tight. It argues that smaller zones have few sites for power plants or demand resources, and any single resource is likely to comprise a larger percentage of the zone's needs. ISO-NE contends that where supply is not abundant, more resources are potentially pivotal suppliers.<sup>8</sup> ISO-NE adds that beginning with the seventh FCA, four zones will be modeled in New England, including two import-constrained zones. ISO-NE argues that there is reason to be concerned that in at least one of those import-constrained zones, supply will be tight.<sup>9</sup> According to ISO-NE, if the current rules regarding publication of information are not changed, the possibility that the results of one or more future FCAs will not be competitive increases significantly.

6. ISO-NE contends that the only information that an auction participant needs in order to offer competitively into the FCA includes the rules of the auction, the terms and conditions of the product being purchased, and information about the participant's own costs and revenues. It argues that the key input for the auction participant in determining a competitive bid is its estimate of its own future costs and revenues. ISO-NE explains that this determines the minimum capacity payment that the participant requires to be profitable, and that an auction participant does not need information about its competitors to offer a competitive bid. ISO-NE contends that delaying the publication of this information until after the FCA fully satisfies the needs of transparency, and does not deprive participants of information needed to participate competitively in the auction.<sup>10</sup>

7. ISO-NE explains that the reason for publishing the information about de-list bids approximately eight months before the FCA was to encourage new entry in the auction by making public information about resources leaving the market. ISO-NE contends, however, that experience with the new resource qualification process in the first six auctions has shown that decisions about entering the market have to be made much farther than eight months in advance of the auction.<sup>11</sup> ISO-NE argues that, consequently, the publication of de-list bid information only eight months before the auction is unlikely to have a material impact on new entry for that auction.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 6.

<sup>11</sup> LaPlante Testimony at 11; Cramton Testimony at 3-4.

8. Specifically, ISO-NE proposes to revise section III.13.1.8 of the FCM rules to provide that the following information will be published after the FCA, rather than approximately eight months before the FCA: for each permanent de-list bid, the name, quantity, price and load zone in which the resource is located; for each static de-list bid, the quantity, price, and load zone in which the resource is located; for export bids and administrative export bids, the name of submitter, quantity, and interface; and for offers from new import capacity resources, the name of submitter, quantity, and interface. Also, pursuant to new subsection (f) of section III.13.1.8, limited information will be published prior to the FCA. Specifically, ISO-NE will publish the name of each lead market participant submitting de-list bids, as well as the number and type of de-list bids submitted by each lead market participant, no later than three business days after ISO-NE issues qualification determination notifications to participants.

9. The proposed changes also revise section III.13.8.1 of the FCM rules to provide the information about: which new resources are accepted and rejected in the qualification process to participate in the FCA; the IMM's determinations regarding each offer below 0.75 times cost of new entry; and the IMM's determinations regarding offers or bids submitted during the qualification process, including an explanation of the reasons for rejecting any de-list bids, will be filed confidentially with the Commission. ISO-NE will publicly release the information filed confidentially with the Commission after the FCA.<sup>12</sup>

10. ISO-NE requests that the Commission permit the proposed rule changes to become effective on June 5, 2012.

### **III. Notice of Filing and Responsive Pleadings**

11. Notice of ISO-NE's Filing was published in the Federal Register, *77 Fed. Reg.* 22,566 (2012), with interventions and protests due on or before April 27, 2012. The following parties filed timely motions to intervene: Exelon Corporation, Calpine Corporation, Massachusetts Attorney General Martha Coakley, NRG Companies, Northeast Utilities Company, GenOn Parties, Consolidated Edison Energy, Inc., Capital Power Corporation, Connecticut Attorney General George Jepson, and the New England States Committee on Electricity. The Massachusetts Department of Public Utilities filed a notice of intervention, and the Connecticut Public Utilities Regulatory Authority (CT PURA) filed a notice of intervention and supportive comments. The Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. (collectively, Public Systems) timely filed a joint motion to intervene and supportive comments. The New England Power Generators Association (NEPGA) and the New

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<sup>12</sup> *Id.* at 8.

England Power Pool Participants Committee (NEPOOL) each filed a timely motion to intervene and protest. On May 11, 2012, ISO-NE submitted an answer to the protests.

12. NEPOOL and NEPGA protest ISO-NE's Filing, arguing that the proposed changes lack stakeholder support, reduce necessary transparency, and are based on only theoretical concerns regarding market power. NEPOOL asserts that the Commission has found stakeholder consensus to be an important consideration in reviewing the justness and reasonableness of tariff changes under section 205,<sup>13</sup> while NEPGA argues that transparency is one of the core benefits of doing business within an ISO footprint, and that any move to reduce that transparency must be accompanied by sound reasoning and significant market participant support.

13. To that end, NEPOOL and NEPGA both assert that the proposed tariff revisions reduce necessary transparency from the marketplace. NEPOOL contends that the proposed tariff changes are contrary to a recent Commission order encouraging ISO-NE to explore ways to improve transparency and communication of information in future FCM qualification processes.<sup>14</sup> NEPOOL contends that the level of information provided in advance of the FCA is effective and appropriate in informing all market participants about market dynamics and has contributed to competitive outcomes in the first six FCAs.<sup>15</sup> NEPGA argues that the proposed revisions will restrict availability of relevant information to the marketplace as a whole, and thereby create uneven knowledge about supply and demand conditions in upcoming auctions.

14. Both NEPOOL and NEPGA also argue that the proposed publication changes are too broad, especially since, according to these parties, the IMM has raised only theoretical concerns about market power. NEPOOL and NEPGA argue that the proposed revisions are premature or too preemptive based on the outcomes of the FCA to date.<sup>16</sup> They contend that proposed restrictions on the availability of information should not be considered until evidence of market power is demonstrated. NEPOOL adds that even if the IMM's market power concerns are warranted, ISO-NE and the IMM have substantial tools in place to address those concerns and that the IMM has failed to explain why those existing market power mitigation processes are now insufficient.

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<sup>13</sup> NEPOOL Protest at 7 (citing, *e.g.*, *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083, at P 172 (2008) (*AEP*)).

<sup>14</sup> *Id.* at 9 (citing *ISO New England Inc.*, 138 FERC ¶ 61,196, at n.59 (2012)).

<sup>15</sup> NEPGA Protest at 6.

<sup>16</sup> *Id.*

15. NEPGA adds that publishing specific information related to the de-list bids in advance of the FCA benefits the marketplace because, based on that information, a new capacity resource may decide to lower its own price offer to ensure that it will clear in the auction.<sup>17</sup> NEPGA further contends that publication of such new information provides market participants with some ability to monitor ISO-NE and the IMM's administration of the FCM markets and an opportunity to appeal to the Commission for corrections prior to the FCA.<sup>18</sup>

16. CT PURA and Public Systems filed supportive comments. They contend that ISO-NE's Filing is an attempt to balance competing concerns, including: (1) the need to ensure market transparency through the timely release of data to market participants; and (2) the need to deny access to data that can be used to manipulate market prices and engage in anti-competitive behavior. They explain that while they generally advocate a balance in favor of market transparency, the release of certain data before an auction could enable some participants to exercise market power.<sup>19</sup>

17. In its answer, ISO-NE notes that in circumstances where market participants strongly disagree with a market rule filing proposed by ISO-NE, section 11.1.5 of the Participants Agreement allows NEPOOL to submit at the same time an alternative proposal that is approved by the Participants Committee by a vote of 60 percent or greater. ISO-NE contends that under this "jump ball" process, the Commission will review both the ISO-NE and NEPOOL's alternatives under section 205 and may adopt any or all of the alternate proposals it finds to be just and reasonable.<sup>20</sup> ISO-NE notes that NEPOOL has not submitted any such alternative proposal here and that the Commission has before it only ISO-NE's proposal submitted under section 205.

18. ISO-NE argues that its proposed rule changes do not impair transparency in the New England power markets. It explains that the purpose of transparency is to ensure that efficient markets are as free as possible from the dangers of manipulation. It contends that rather than improving market functioning, the continued release of the information at issue may present significant dangers. ISO-NE contends that the goal is not to simply publish as much information as possible, but instead to publish the right information to allow the market to function efficiently and to limit information that could be used for improper purposes. ISO-NE explains that allowing market participants to

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<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> CT PURA Comments at 3; Public Systems Comments at 4.

<sup>20</sup> Section 11.1.5 of the Participants Agreement.

have access to a competitor's bid information prior to the FCA could facilitate a withholding scheme.<sup>21</sup>

19. ISO-NE further argues that its proposed changes are neither premature nor overly broad. It contends that current market rule provisions do not address the potential dangers highlighted by the IMM. It explains that the current rules only provide for administrative pricing where there is insufficient capacity at the highest price in the FCA. ISO-NE further explains that the information about the de-list bids of existing resources at issue here can be used by new resources during subsequent rounds of the FCA, at prices below the FCA starting price, to determine with some precision when they become pivotal during the FCA.<sup>22</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

20. 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, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

21. 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 unless otherwise ordered by the decisional authority. We will accept ISO-NE's answer because it has provided information that has assisted us in the decision-making process.

##### **B. Commission Determination**

22. We find that ISO-NE has shown that its proposed tariff revisions are just and reasonable, and, accordingly, we will accept them for filing subject to condition as discussed below. We observe that transparency is needed to allow markets to function efficiently, but transparency must be balanced against the potential for the misuse of the information at issue. We find that ISO-NE's proposed changes to the FCM rules limiting the information that is published before the FCA and instead require publication of detailed information after the FCA is complete accomplishes this balancing.

23. We agree with ISO-NE that the detailed offer and de-list information at issue, when coupled with certain publicly available information and information posted between the FCA rounds, potentially allows participants to calculate the maximum total

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<sup>21</sup> ISO-NE Answer at 12.

<sup>22</sup> *Id.* at 19.

capacity remaining in the auction in each zone at the end of each round in the auction. We further agree with ISO-NE that the information may be used by potential new suppliers to estimate the supply curve in particular zones, and thereby determine whether they can successfully raise their offers because their entry will supply pivotal capacity. As ISO-NE explains, this ability of a new entrant to determine whether its capacity is likely to be pivotal increases when the region is divided into numerous, smaller zones, where supply is tight.<sup>23</sup> ISO-NE has submitted expert testimony explaining that, while publication of the de-list bids eight months before the auction was intended to motivate new entry, the first six FCAs have shown that potential entrants must take initial steps well in advance of the publication of de-list bids in order to be ready to bid in the auction.<sup>24</sup> Thus, while the de-list information does not facilitate entry as intended, it does allow potential new suppliers to estimate the supply curves in particular zones. ISO-NE's expert states that those potential new suppliers can then raise their offers and the market clearing price when they determine that their new supply would be pivotal.<sup>25</sup>

24. In addition, we disagree with NEPOOL and NEPGA that the rule changes will do substantial harm to the FCA by reducing transparency. Although transparency is an important element of open markets and permits them to function efficiently, we are not persuaded that detailed information regarding competitors' offers is required for transparency. Here, ISO-NE has shown that the release of such detailed information on the capacity value of new resources, and the capacity value and price of individual de-list bids, will create an opportunity for auction participants providing new resources to discover if they are pivotal and to profit from strategic behavior that is not a legitimate part of a properly functioning market. The information could allow new entrants to raise their offers, confident that such higher offers will be accepted because their new entry is required to meet reliability requirements. As ISO-NE explained in its filing, New England's Regional System Planning process provides detailed information about the capacity supply and demand balance in the region and in each zone.<sup>26</sup> As noted above, this information, combined with a participant's knowledge of its own resource costs, is sufficient to allow a market participant to make a fully informed decision as to whether to participate in the FCA and at what prices. Once the FCA is complete, publication of detailed information about new, qualified capacity and de-list bids will allow participants to update and refine their understanding of marketplace conditions without also providing

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<sup>23</sup> ISO-NE Filing at 5.

<sup>24</sup> Cramton Testimony at 4.

<sup>25</sup> *Id.*

<sup>26</sup> ISO-NE Filing at 8.

them the opportunity to use specific competitor information to their advantage in the FCA.

25. In addition, we disagree with NEPOOL's and NEPGA's argument that the rule changes are premature. Because the potential strategic bidding identified could affect the result of an entire FCA (which typically would have a value exceeding \$1 billion), and because the record before us reflects no convincing rationale as to why the relevant information must be published prior to each FCA, we see no reason to wait until the market is demonstrably harmed before changing the market rule. As the Commission has previously found, one function of market monitoring units is to evaluate existing and proposed market rules, tariff provisions and market design elements, and recommend proposed rule and tariff changes on a proactive basis.<sup>27</sup> The rule changes here help carry out the IMM's mission of evaluating existing market rules to remove or prevent market design flaws. Further, neither NEPOOL nor NEPGA dispute the IMM's assertion that anti-competitive outcomes could occur or provide evidence that the potential impact of the continued release of de-list bid information would not be significant. Moreover, NEPOOL concedes that "there may be an increased possibility in theory that the continued publication of detailed information could create market power issues."<sup>28</sup>

26. We also disagree with NEPOOL's contention that the proposed rules are too broad and should apply only to import-constrained zones when capacity is tight. It is not possible to know ahead of time how competitive a zone will be prior to each FCA, since new capacity can leave the auction at any time or remain until the end. For example, while there could be a large amount of new capacity in a zone at the start of an auction, it is possible that most of it could exit at the starting price, leaving the remaining resources in the zone with sufficient information to determine when they were pivotal.

27. Further, while we agree with NEPOOL that stakeholder support is a factor to consider when evaluating whether a proposal is just and reasonable, stakeholder consensus is not dispositive of our determination here. As the Commission held in *AEP*, while stakeholder support was "an important factor" in the Commission's finding that the rate design at issue was just and reasonable, "stakeholder support alone cannot ultimately prove that a rate design is just and reasonable."<sup>29</sup> Where, as here, an applicant seeks to

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<sup>27</sup> See *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

<sup>28</sup> NEPOOL Protest at 9.

<sup>29</sup> *AEP*, 122 FERC ¶ 61,083 at P 172.

change its own tariff under section 205, the Commission focuses its inquiry on whether the proposed rates are just and reasonable; the proposal “need not be the only reasonable methodology, or even the most accurate.”<sup>30</sup> Despite NEPOOL’s assertion of strong stakeholder opposition, ISO-NE’s Filing is before us pursuant to section 205, and, as discussed above, we find that ISO-NE has presented persuasive evidence in support of its proposed revisions. The record reflects a legitimate concern that continued access to the detailed information at issue here enables auction participants to calculate when they can raise their offers to increase clearing prices to uncompetitive levels in order to maximize financial advantage.

28. Finally, we note that ISO-NE’s proposed tariff revisions do not set forth a specific timeframe for publishing the information at issue subsequent to the FCA. Accordingly, we will direct ISO-NE to submit a compliance filing within 30 days of the date of this order, which includes tariff revisions clarifying when after the FCA it will publish the relevant information.

The Commission orders:

(A) ISO-NE’s proposed tariff revisions are hereby accepted for filing, subject to condition, effective June 5, 2012, as discussed in the body of this order.

(B) ISO-NE is hereby directed to submit a compliance filing within 30 days of the date of this order specifying when after the FCA it will publish the relevant information, as discussed in the body of this order.

By the Commission.

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Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>30</sup> *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 917 (1984).