124 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

ISO New England Inc. Docket No. ER08-538-001

ORDER DENYING REHEARING

(Issued September 11, 2008)

1. In this order, the Commission denies rehearing of an order issued in this proceeding on April 4, 2008[1] regarding the market rules governing ISO New England Inc. (ISO-NE's) Day-Ahead Load Response Program (DALRP).

I. Background

A. The DALRP

2. Under ISO-NE's DALRP, Market Participants may offer a price and firm amount of load reduction that they are prepared to deliver in real-time, if day-ahead locational marginal prices (LMPs) clear at levels that equal or exceed the price in a Market Participant's offer. If the day-ahead LMP ultimately clears at a level at or above the price in the Market Participant's offer, that Participant is paid the day-ahead LMP for the amount cleared.[2] If the Participant reduces more in real time than the amount cleared in the DALRP as measured against its Customer Baseline, it is paid for the excess at the real-time LMP. If the Participant reduces less in real-time than its cleared day-ahead offer, it must buy back the difference at the real-time LMP.

3. To determine the actual quantity of load reduction, a demand response asset's actual consumption is compared to a Customer Baseline, which is intended to estimate an asset's normal daily consumption pattern in the absence of demand response behavior.

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[1] *ISO New England Inc.*, 123 FERC ¶ 61,021 (2008) (April 4 Order).

[2] The DALRP hours are from 7:00 AM to 6:00 PM on non-holiday weekdays.

The Customer Baseline is a 10-day rolling average of interval meter data from days on which no load response event has occurred for the asset. The purpose of a rolling average is to ensure that the asset's Customer Baseline is continually updated to reflect its normal daily consumption pattern as this pattern changes over the course of the year. Days on which load response events occur, including days on which an asset's DALRP offer was accepted, are excluded from the calculation of the asset's Customer Baseline, because consumption during those days is assumed to reflect an intentional load reduction.

4. The DALRP is based on the premise that if the cleared DALRP offers are delivered in real-time, they will reduce real-time LMPs. Payments made to DALRP assets are therefore funded through uplift, on the basis that all consumers will benefit from real-time electricity demand response during high-price hours. The intent of the program is to encourage load response during high-price hours to improve market efficiency.[3]

B. April 4 Order

5. In February 2008, ISO-NE made a filing with the Commission in the instant docket, alleging that it had uncovered a flaw in the program rules that allowed DALRP participants to exaggerate the load reductions from their demand response assets by overstating their assets' Customer Baseline. According to ISO-NE, several DALRP participants had deliberately established a high Customer Baseline in one time period – the summer peak season – and then locked in that high Customer Baseline during lower load seasons by submitting offers into the DALRP at a Minimum Offer Price of $50/MWh for each day thereafter. The $50/MWh minimum offer was established in Market Rule 1 of ISO-NE's Transmission, Markets and Services Tariff (Tariff) before the recent increase in fuel prices, and in the current market was virtually guaranteed to clear during the DALRP hours.[4] ISO-NE also pointed out that many assets were offering only the minimum amount (100 kW) into the DALRP, when those assets would be capable of providing significantly greater load reduction. Because these small amounts offered at the $50/MWh price were certain to clear, the asset's Customer Baseline would not update,

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[3] *See New England Power Pool*, 101 FERC ¶ 61,344, at P 44 (2002) (explaining that the DALRP is intended to "encourage reduced consumption during peak periods when demand is high relative to supply and energy prices rise").

[4] ISO-NE stated that when the $50/MWh Minimum Offer Price was introduced in 2002, natural gas prices were less than $4.00/MMBtu and wholesale energy prices exceeded $50/MWh less than 12 percent of the time. By comparison, ISO-NE noted, a Market Participant offering to reduce load during eligible program hours at $50/MWh would have cleared *every* eligible day since January 1, 2007.

and remained static, so that even in winter, an asset's baseline might be set by 10 days of summer use. The result was that DALRP payments were made to assets to compensate them for load reduction, even though these assets were consuming at levels that would, in fact, be normal for that lower load season. Moreover, the participants were not paid solely for the 100 kW offered into the DALRP but for the net difference between their actual consumption and the Customer Baseline – thus, all perceived reductions over 100 kW were paid at the real-time LMP.

6. In its February filing, ISO-NE also offered evidence that other DALRP participants were intentionally inflating their baselines when they first registered to participate in the DALRP, either by increasing consumption or decreasing the output of behind-the-meter generation that is normally on-line during known DALRP measurement hours. In this way, the participant's asset would consume abnormally large amounts during the period that would establish its initial baseline, and once the baseline was established, the asset's consumption would drop to normal levels. The inflated static Customer Baseline in combination with offers at the Minimum Offer Price guaranteed that these participants would receive daily payments for reductions in consumption that they were not, in fact, providing.[5] ISO-NE stated that during the previous four months, 75 percent of the cleared MW in the DALRP (from 26 out of 46 assets) had a static Customer Baseline. Further, total DALRP payments had grown almost tenfold in the past year – DALRP payments totaled $1.74 million in 2006 and $16.81 million in 2007 and the number of assets offering into the DALRP had more than doubled since August 2007. ISO-NE observed that the trend at that time was that all DALRP participants were offering to reduce consumption at the floor price every eligible hour of every weekday.

[5] For example, ISO-NE has identified an asset that had consistently flat consumption and a Customer Baseline of approximately 12 MW for the period June 2006 through early July 2007, during which the asset's load and Customer Baseline were relatively flat. Up through early July 2007, this asset was not participating in the DALRP, but in early July it retired from the Load Response Program and then, on July 25, 2007, re-enrolled in the Load Response Program. By retiring and then re-enrolling, the asset was required to re-establish its Customer Baseline. The load data submitted after July 25, 2007 to re-establish this baseline shows a distinctly different profile than the data submitted before retirement – namely, an increased load during the DALRP eligible hours. The asset's load was flat before and after these hours. The profile was also flat during program hours, but at a level that is approximately 4 MW higher than hours before 7:00 a.m. or after 6:00 p.m. After establishing the new Customer Baseline, this Market Participant entered an offer in the DALRP for the August 1, 2007 operating day of 3 MW at $50/MWh and began clearing every weekday. As a result, the new Customer Baseline has remained almost static since it was first created on July 31, 2007.

7. ISO-NE argued that the impact of this behavior went beyond excessive energy payments. It stated that an asset's overstated Customer Baseline also affected operations and planning. Since assets in the DALRP must also participate in the Real-Time Load Response Program, planners assume that the same amount of demand response that occurs in the DALRP is also likely to be available for interruptions in real time, if an emergency occurs. However, when DALRP participants artificially inflate their baselines, planners cannot rely on this assumption. Thus, ISO-NE asserted that this illusory amount of load that appeared to be available for interruption in fact distorted planning and threatened resource adequacy.[6]

8. To address the flaw in the DALRP, ISO-NE proposed in its February 2008 filing to revise its Tariff so that the Minimum Offer Price would be set at a monthly indexed level based on fuel prices, rather than a flat $50/MWh. When the DALRP was originally created, the Minimum Offer Price had been based on an implicit heat rate of 12,920 MMBtu/kWh. Thus, ISO-NE proposed to develop an indexed price based on that same implicit heat rate.[7] ISO-NE stated that this change would ensure that offers from DALRP participants would clear only on high price days, rather than every day. ISO-NE argued that the indexed Minimum Offer Price would thus restore the intent of the program to encourage load response during high-price hours, rather than providing a daily additional income stream for participants. Raising the Minimum Offer Price would also cause the Customer Baselines of DALRP assets to update much more frequently and eliminate the strategic behavior of bidding at the Minimum Offer Price to create a static Customer Baseline, since offers at the revised Minimum Offer Price would no longer be guaranteed to clear.

9. In the April 4 Order, the Commission approved ISO-NE's proposed Tariff revisions, finding that the proposed changes would restore the DALRP to its intended

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[6] ISO-NE further noted that an inflated Customer Baseline also resulted in excess capacity payments, since the transitional capacity payments for ISO-NE's Forward Capacity Market (FCM) are also based on the Customer Baseline.

[7] As an example, the basis for the calculation as shown below for February 2008:

DALRP Minimum Offer Price set in 2002 = $50/MWh

Average Daily Spot price for gas in NY in 2002 = $3.87/MMbtu

Dividing the Minimum Offer Price by the daily spot = 12,920 MBtu/kWh

February 2008 Fuel Price Index = $9.35/MMBtu

Multiplying the current fuel price ($9.35) by the implicit heat rate from above (12,920 MBtu/KWh), the Minimum Offer Price for the DALRP for February 2008 would be $121/MWh.

purpose – to provide benefit to the system when LMPs are high – and protect customers from being charged for services not provided. The Commission also cited ISO-NE's commitment to review the issue with stakeholders and to make a subsequent filing by April 15, 2008 that would either inform the Commission regarding ISO-NE's findings, or propose additional Tariff changes. The April 4 Order also noted that the Office of Enforcement (OE) was conducting a non-public investigation into whether any participants in the DALRP violated the Commission's rules.

C. Docket No. ER08-830-000

10. In compliance with the aforementioned commitment and after a stakeholder process addressing the DALRP, ISO-NE filed proposed Tariff revisions on April 15 in Docket No. ER08-830-000. With these revisions, ISO-NE sought to change the effective heat rate upon which the DALRP Minimum Offer Price was based from 12.92 MMBtu/MWh (as approved in the April 4 Order) to 11.37 MMBtu/MWh, which would allow for increased participation in the DALRP. ISO-NE noted that during the stakeholder process, alternative DALRP proposals from Constellation NewEnergy (Constellation), EnerNOC, Inc. (EnerNOC), and the Industrial Energy Consumer Group (IECG) were considered and rejected.

11. ISO-NE retained Dr. Miriam Goldberg of KEMA Consulting (KEMA) as an independent expert to assist in evaluating the competing proposals. Dr. Goldberg's work analyzed the impact of alternative heat rate (i.e., Minimum Offer Price) assumptions on the accuracy of the Customer Baseline, as well as the alternative proposals submitted by stakeholders. ISO-NE stated that Dr. Goldberg's analysis shows that the effective heat rate can be reduced to 11.37 MMBtu/MWh using ISO-NE's present Customer Baseline methodology, since this lower effective heat rate would increase the number of days that DALRP offers would clear the Day-Ahead Energy Market "without overly sacrificing baseline accuracy."[8] ISO-NE argued that the proposal would still maintain fidelity to the principle of maximizing Customer Baseline accuracy in order to detect whether load reductions are real. ISO-NE also explained that the KEMA analysis demonstrated that the instant proposal was superior to the alternatives proposed by EnerNOC, Constellation, and IECG.

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[8] ISO-NE transmittal letter in Docket No. ER08-830-000 at 5. ISO-NE stated that based on 2007 Day-Ahead Energy Market prices, this change would increase the percentage of DALRP hours that would clear at the Minimum Offer Price from 11 percent to 21 percent, providing additional opportunities for assets to submit offers that would clear in the DALRP, while continuing to appropriately limit the availability of the payments for demand response to high-demand periods.

12. ISO-NE further stated in its filing that the DALRP is one of the price-sensitive demand response programs that are set to expire on May 31, 20l0 upon the commencement of the first Capacity Commitment Period under the Forward Capacity Market (FCM). As such, ISO-NE stated that a decision on the future of the price-response programs is needed by the second quarter of 2009, as at least a year will be required to develop and implement software changes if the programs are extended and changes are agreed upon. Thus, ISO-NE stated, in support of the future stakeholder process to provide input on this decision, it planned to initiate the process of evaluating the Load Response Programs in October 2008, including the appropriate customer baseline methodology for those programs.[9] ISO-NE stated that it planned to make a subsequent report to the Commission by February 16, 2009 regarding its decision to either terminate or continue the current Load Response Programs.

13. In an order in Docket No. ER08-830-000 issued on June 13, 2008,[10] the Commission approved ISO-NE's proposed Tariff revisions, noting that under the current DALRP construct, there will always be a trade-off between baseline accuracy and participation in the DALRP – i.e., as the number of days in which DALRP offers are rejected increases, by default the Customer Baseline will be more accurate, at the expense of short term (and potentially long-term) DALRP participation. As such, the Commission maintained that a reasonable judgment has to be made concerning an acceptable baseline error rate so as not to discourage participation in programs like the DALRP. The Commission found that ISO-NE's proposal, which was based upon KEMA's analysis of baseline error rates for different heat rate values, achieved an appropriate balance between baseline accuracy and DALRP participation, while continuing to restrict DALRP payments to periods of high LMPs to protect customers from being charged for services that are not provided. Last, the June 13 Order required ISO-NE to file a report with the Commission by February 16, 2009 detailing its decision to either terminate or continue the Load Response Programs, and including a review of the current Customer Baseline methodology.

D. <u>Rehearing Request</u>

14. In the instant request for rehearing of the Commission's April 4 Order in this docket, EnerNOC argues that the April 4 Order was flawed in two aspects. First, consistent with its original pleading in this docket, EnerNOC states that the Commission erred by limiting the participation of demand response resources in the DALRP to peak demand periods. EnerNOC maintains that this design is inconsistent with the Commission's policy that demand response resources be treated on a comparable basis

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[9] *Id*. at 7.

[10] *ISO New England Inc*., 123 FERC ¶ 61,266 (2008) (June 13 Order).

with other resources.[11] Specifically, EnerNOC argues that by approving ISO-NE's proposed changes in the April 4 Order, FERC has allowed the adjustment of the threshold Minimum Offer Price in a way that limits the role of demand response resources in the DALRP, and that other types of resources are not placed under comparable restrictions.

15. Citing the $130 Minimum Offer Price in the DALRP for April 2008 under the revisions approved in the April 4 Order, EnerNOC maintains that the increased threshold heat rate index restricts demand response participation to a narrow number of program hours throughout the year. EnerNOC contends that this change is misguided because demand response resources bidding into the DALRP can provide benefit to the system at prices below ISO-NE's proposed threshold since these resources place significant downward pressure on real-time prices. EnerNOC argues that the April 4 Order failed to consider these benefits. Further, EnerNOC states that the Minimum Offer Price construct discourages investment in demand response and discourages demand response participation in the DALRP.

16. In response to the Commission's concerns about participants receiving payments for apparent (rather than real) load reductions, EnerNOC argues that this issue could be resolved through an appropriate Customer Baseline methodology. EnerNOC maintains that a corrected Customer Baseline methodology will provide for accurately measured load reductions, address the potential gaming concerns that ISO-NE has identified, and result in only real and accurate load reductions being credited. EnerNOC states that the alternative proposals to address the Customer Baseline methodology developed in the stakeholder process to consider alternatives to the DALRP construct were not seriously considered by ISO-NE or stakeholders. As such, EnerNOC contends that on rehearing the Commission should order ISO-NE to reform its Customer Baseline methodology.

17. Second, EnerNOC contends that the Commission erred in the April 4 Order by failing to require ISO-NE and its stakeholders to develop a methodology to accurately calculate Customer Baselines and to report to the Commission on the results. While EnerNOC states that it supports the Commission's actions to address the potential for gaming in the DALRP, it contends that the proposal from ISO-NE approved in the April 4 Order is only a temporary step to address potential gaming problems. EnerNOC argues that on rehearing, the Commission should expressly require ISO-NE and its stakeholders to address the Customer Baseline methodology, which EnerNOC considers to be the fundamental problem in this proceeding. EnerNOC argues that on rehearing the Commission should require an iterative stakeholder process that promotes flexible

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[11] In support of this argument, EnerNOC references, *inter alia*, *Wholesale Competition in Regions with Organized Electric Markets*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,617, at P 35 (2007), which explained the Commission's policy of affording demand response resources comparable treatment.

solutions to improve the accuracy of the Customer Baseline methodology, while not restricting the participation of demand response resources and treating such resources on a comparable basis to generation.

II. Discussion

18. EnerNOC contends that in approving the revised Minimum Offer Price, the Commission erred by limiting the participation of demand response resources in the DALRP to peak demand periods. We deny rehearing on this issue.

19. First, as we discussed extensively in the April 4 Order, EnerNOC's argument disregards the fact that the Minimum Offer Price construct already existed and was not established by the Commission's approval of ISO-NE's proposed revisions. In support, we pointed to two separate orders where the Commission had previously addressed the fundamental basis for the Minimum Offer Price in the DALRP.[12] Our analysis noted that "contrary to IECG's and EnerNOC's arguments, our approval of the Minimum Offer Price was based on our view that in the DALRP, demand response was desirable, and should be financially supported, during peak periods when demand was high relative to supply, i.e., not at all levels of supply and demand."[13]

20. We also pointed out that the recent significant increase in DALRP payments was an unintentional by-product of a $50 Minimum Offer Price that was no longer relevant due to the rapid increase in fuel prices.[14] As we noted in the April 4 Order, we became

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[12] April 4 Order, 123 FERC ¶ 61,021 at P 51-52 & nn.50-51, *citing New England Power Pool,* 101 FERC ¶ 61,344, at P 44 (2002) ("The program is intended to encourage reduced consumption during peak periods when demand is high relative to supply . . . and energy prices rise. . . . Establishing a suitable bid floor or minimum triggering price, as proposed by ISO-NE, is one way to target the incentives to these tight-supply periods") and *New England Power Pool*, 105 FERC ¶ 61,211, at P 21 (2003) (the Commission rejects request to remove $50/MWh floor from the DALRP, on the basis that this Minimum Offer Price will "encourage reduced consumption during peak periods" and reasonably "limit payment, as an incentive for reducing demand, when supply is ample, relative to demand").

[13] April 4 Order, 123 FERC ¶ 61,021 at P 52 (footnote omitted).

[14] We noted that when the $50/MWh Minimum Offer Price was proposed in 2002, natural gas prices were less than $4.00/MMBtu and wholesale energy prices exceeded $50/MWh less than 12 percent of the time while according to ISO-NE, natural gas prices are now typically in the range of $7.00 to $10.00/MMBtu and day-ahead LMPs exceed $50/MWh approximately 84 percent of the time. *Id*. P 53.

aware of the need to change the Minimum Offer Price when ISO-NE brought to our attention the fact that all of the DALRP participants were offering to interrupt load at the $50/MWh floor price every eligible hour of every weekday.[15] Thus, our approval of the revised Minimum Offer Price was based on the fact that ISO-NE's proposal was just and reasonable and returned the DALRP to its original intent.

21. Further, in the April 4 Order, we observed that the parties opposed to ISO-NE's proposed revisions (and to the Minimum Offer Price construct in general) failed to address the Commission's prior orders setting forth the reasons for a Minimum Offer price[16] and did not address the Commission's concerns over customers being charged for services that are not in fact provided. Participants in the DALRP are required also to participate in the Real-Time Load Response Program. Many of these participants who had shifted their load to non-DALRP hours were receiving payments under a false Customer Baseline since their load did not exist during the DALRP hours. As we stated in the April 4 Order, "it is not clear what these participants are being paid for, nor what demand response they could provide when called upon, since they are not operating during these hours."[17] In addition, besides examples of inflated Customer Baselines, we highlighted concerns over the fact that, without a relatively high Minimum Offer Price in the DALRP, a participant that is not in service nevertheless could be paid in all program hours for demand response that it is not providing.[18]

22. In its rehearing request, EnerNOC again fails to address these concerns. EnerNOC argues that the Commission should require the development of a Customer Baseline Methodology that would account for ISO-NE's concerns about payment for actual load response, without restricting the ability of demand resources to participate in the DALRP. However, EnerNOC's rehearing request does not offer any support for removing the Minimum Offer Price construct in light of the previously noted issues.

23. Instead, EnerNOC cites the Commission's stated preference that demand response resources be treated on a comparable basis with other resources as a basis for removing

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[15] *Id*. P 8.

[16] *See supra* note 12.

[17] April 4 Order, 123 FERC ¶ 61,021 at P 58.

[18] As an example, ISO-NE provided evidence of a factory that was shut down between Christmas Eve and New Year's Eve in 2007, but that offered $50/MWh into the DALRP for each non-holiday weekday during that period. All of these offers were accepted and the participant was paid for providing "demand response" during a scheduled outage period. *Id.* P 54 n.54.

the Minimum Offer Price construct from the DALRP. However, the Commission's requirement that the treatment of demand resources and other types of resources be "comparable" is not equivalent to a requirement that any potential demand response offers into the DALRP (or any other program) must be accommodated. "Comparable treatment" does not mean that all resources must be treated identically.[19]

24. The Commission's comparability policy must be exercised within the context of the Commission's obligation under the Federal Power Act to ensure that rates are just and reasonable. Here, ISO-NE has offered evidence that certain participants were manipulating their baselines to create the appearance of providing load reduction when, in fact, they were not, and those participants were receiving payments for services that they were not providing. This situation undermined the legitimacy of the DALRP. Thus, the Commission's action here to restore the Minimum Offer Price to its original intent was necessary to fulfill the Commission's obligation to ensure that rates are just and reasonable. By contrast, EnerNOC's proposal to remove the Minimum Offer Price entirely, arguing that "demand response resources place significant downward pressure on real-time prices, and provide benefits to the real-time energy market by routinely offering viable load reductions into the DALRP,"[20] would only exacerbate the potential for abuse in the DALRP.

25. Moreover, as we noted in the April 4 Order, the issue before the Commission in this proceeding is whether the proposed Tariff changes are just and reasonable and not

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[19] As the Commission stated in a recent order involving the participation of non-traditional resources (including batch load demand resources) in ancillary service markets operated by the New York Independent System Operator (NYISO), "non-traditional suppliers . . . are entitled to comparable but not preferential treatment, and . . . no resource should be subsidized by any other resource." *New York Independent System Operator*, 123 FERC ¶ 61,203, at P 35 (2008). The Commission has similarly ruled, with regard to comparability between demand resources and transmission resources, that "[w]here demand resources are capable of providing the functions assessed in a transmission planning process, and can be relied upon on a long-term basis, they should be permitted to participate in that process on a comparable basis." *Xcel Energy Services*, 124 FERC ¶ 61,029, at P 26 (2008), *citing* Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 471-79, *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008).

[20] Request for rehearing at 6, *citing to* Affidavit of Daniel F. Kozikowski, Attachment A to EnerNOC's Supplemental Protest in Docket No. ER08-538-000, at 4.

whether the proposal is more or less reasonable than other alternatives.[21] Thus, we find EnerNOC's proposal to address the Customer Baseline methodology in some undefined manner to be outside the scope of our review here. We also dispute EnerNOC's contention that the proposal from ISO-NE approved in the April 4 Order is only a temporary step to address potential gaming in the DALRP. As we stated in the June 13 Order, there is no provision in section 205 that allows the Commission to approve filings on an interim basis.[22] Instead, we reiterate that the proposal is just and reasonable on its merits.

26. EnerNOC asserts that the Commission erred by failing to require ISO-NE and its stakeholders to develop a methodology to calculate Customer Baselines accurately and report to the Commission on the results. In fact, ISO-NE conducted a stakeholder process, and presented the Tariff changes resulting from that process to the Commission in Docket No. ER08-830-000, and the Commission accepted those proposed changes in its June 13 Order,[23] which has now become final and non-appealable. Thus, EnerNOC's concerns with ISO-NE's current administration of the Customer Baseline Methodology (including any concerns with KEMA's analysis to support the effective heat rate upon which the current DALRP Minimum Offer Price is based, such as the assertion that KEMA's analysis showed that, after an initial period, EnerNOC's proposed baseline calculation methodology would be just as accurate as ISO-NE's proposal[24]) should have been more appropriately raised in a request for rehearing of the June 13 Order, rather than in this docket.[25] Therefore, we will not consider EnerNOC's objections to it here.

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[21] April 4 Order, 123 FERC ¶ 61,021 at P 65, citing *ISO New England Inc.*, 114 FERC ¶ 61,315, at P 33 & n.35 (2006), *citing Pub. Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201, 1211 (10th Cir. 1987) and *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).

[22] June 13 Order, 123 FERC ¶ 61,266 at P 28.

[23] In the June 13 Order, we also held ISO-NE to its commitment to file a report with this Commission by February 16, 2009 to review the future status of the current Load Response Programs (which are scheduled to terminate in May 2010), including an assessment of the current Customer Baseline methodology.

[24] Request for rehearing at 10.

[25] No party has sought rehearing of the June 13 Order.

<u>The Commission orders</u>:

The Commission hereby denies EnerNOC's request for rehearing.

By the Commission. Commissioner Kelly concurring with a separate statement attached.
(S E A L) Commissioner Wellinghoff concurring in part and dissenting in part with a separate statement attached

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc. Docket No. ER08-538-001

(Issued September 11, 2008)

KELLY, Commissioner, *concurring*:

This order addresses a rehearing request of the Commission's April 4, 2008 Order[1] regarding the market rules governing ISO New England Inc. (ISO-NE's) Day-Ahead Load Response Program (DALRP). I concurred with the underlying order, arguing that the methodology for calculating customer baselines should be as accurate and flexible as possible. I further encouraged ISO-NE and its stakeholders to study how such a methodology could be designed and to provide the Commission with a report on the reasonable costs thereof within the next 6 months.

I agree with EnerNOC that the fundamental issue in the proceeding is the customer baseline methodology and I continue to believe that the methodology for its calculation should be as accurate and a flexible as possible. I also believe that the resources required to enable that accuracy and flexibility are a key consideration. This order notes that ISO-NE will be filing, in February of 2009, a review of the current Customer Baseline methodology. While not on my preferred timetable, I support this effort and expect that ISO-NE and its stakeholders will have considered the reasonable costs of developing an accurate and flexible baseline methodology.

For these reasons I respectfully concur.

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Suedeen G. Kelly

[1] *ISO New England Inc*., 123 FERC ¶ 61,021 (2008).

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FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc. Docket No. ER08-538-001

(Issued September 11, 2008)

WELLINGHOFF, Commissioner, concurring in part and dissenting in part:

I dissented in part from the April 4 Order[1] because I believe that approval of the proposal from ISO New England Inc. (ISO-NE) to increase the minimum price at which a demand response provider may offer to the Day-Ahead Load Response Program (DALRP) left unresolved the fundamental problem as to how an individual customer's baseline load should be determined so that demand response providers are paid for their service and New England consumers pay only for the service provided.

I continue to believe that issues related to accurate customer baselines are important and need to be addressed. EnerNOC makes a valid point that resolving the design of customer baselines would also address other issues such as potential gaming and accurately measured load reductions.[2] I am pleased that the Commission has subsequently taken positive steps to address these matters.[3]

Although I generally supported approval of ISO-NE's modification to the DALRP, consistent with my prior statement noted above, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

[1] *ISO New England Inc.*, 123 FERC ¶ 61,021 (2008) (April 4 Order).

[2] Request for Rehearing of EnerNOC at 4.

[3] *ISO New England Inc.*, 123 FERC ¶ 61,266 (2008). In this order, the Commission required that ISO-NE include as part of its February 2009 report a review of the current Customer Baseline methodology and a timetable for implementing any changes necessary for demand resources to participate in its markets on a comparable basis to generating resources.