

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

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

ISO New England Inc. and New England Power Pool      Docket No. ER09-873-000

ORDER ACCEPTING AND SUSPENDING TARIFF REVISIONS

(Issued June 11, 2009)

1. On March 20, 2009, as corrected on May 6, 2009, ISO New England Inc. (ISO-NE) and New England Power Pool (NEPOOL) (collectively, the Filing Parties) filed revised tariff sheets regarding the use of competitive offer requirements for energy transactions associated with installed capacity (ICAP) import contracts and related penalty provisions, pursuant to section 205 of the Federal Power Act (FPA).<sup>1</sup> As discussed below, the Commission accepts the revised tariff sheets and suspends them for a nominal period, to be effective on July 1, 2009, subject to refund.

**I. Background**

2. Under the existing market rules in New England, market participants with ICAP import contracts must submit a supply offer or self-schedule for the energy-equivalent of the import contract amount for each operating day.<sup>2</sup> Currently, the only limit on the energy price component of supply offers associated with ICAP import contracts is the overall \$1,000 per megawatt-hour (MWh) energy offer cap.<sup>3</sup> Since the commencement of the ICAP transition period in December 2006,<sup>4</sup> market participants with ICAP import

---

<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> See ISO-NE, FERC Electric Tariff No. 3, Transmission, Markets and Services Tariff, Market Rule 1, Section III.8.3.7.1(c) (Market Rule 1).

<sup>3</sup> Market Rule 1, Section III.1.10.1A(d)(ix).

<sup>4</sup> Because of the forward nature of the Forward Capacity Market (FCM) in New England, the 2010-2011 Power Year is the first year for which capacity will be auctioned. The transition period bridges the gap between December 2006 and the 2010-2011 Power Year.

contracts have typically submitted high-priced supply offers over the Northern New York AC Interface, with most of these offers approaching the offer cap.

## II. March 20 Filing

3. The Filing Parties seek to apply competitive offer requirements to energy transactions associated with ICAP import contracts. They state that ISO-NE's Internal Market Monitoring Unit identified three key concerns regarding the market rules governing energy transactions associated with ICAP import contracts. The first concern is that the current market rules do not provide an incentive for market participants to offer energy from capacity imports at competitive prices. The second concern is that the existing penalty structure for failing to deliver energy when requested by ISO-NE does not recognize the unique characteristics of energy associated with ICAP import contracts.<sup>5</sup> The final concern is that the lack of incentives to offer energy competitively and the limited incentives to deliver energy when requested means that the current capacity market does not establish a meaningful obligation to competitively offer and deliver energy during the ICAP transition period.

4. In its March 20 filing, the Filing Parties stated that during the period of January 2005 to January 2009 every market participant that submitted a supply offer above \$660/MWh over the Northern New York AC Interface failed to perform every time it was dispatched, for a total of 108 such instances, and for which they alleged that these market participants had been paid a collective \$85.8 million in capacity payments.<sup>6</sup>

5. The Filing Parties propose several rule changes to address their concerns. First, they propose to establish a new requirement that market participants must submit energy offers associated with ICAP import contracts at prices that are deemed competitive. In order to determine what constitutes a competitive offer level, the Filing Parties also propose rule changes that establish a methodology to calculate competitive offer levels for energy transactions associated with ICAP import contracts. The methodology considers two values: an *ex ante* daily value based on historical data and an hourly value based on hourly market outcomes. The final competitive offer level is the maximum of these two values. The Filing Parties state that this methodology is appropriate because it

---

<sup>5</sup> The Filing Parties explain that performance penalties for ICAP import contracts are currently assessed only when the energy associated with an ICAP import contract fails to be delivered for a threshold number of hours tied to the designated resource's EFORd (i.e., Demand Equivalent Forced Outage Rate). This threshold number of hours is often higher than the number of hours during which the capacity import is called upon due to the high price of the bids, thus allowing these imports to avoid a penalty.

<sup>6</sup> These statements were later corrected, as explained more fully below.

uses the best available data to timely calculate threshold prices that are expected to reflect the costs of delivering energy to the New England border, and it minimizes the impact of unexpected cost increases through the integration of the market outcome component used in the settlement process.<sup>7</sup>

6. In addition, the Filing Parties propose to revise the penalty structure of section 8 of Market Rule 1 so that market participants importing capacity into New England are subject to performance penalties during the transition period based on the hours that requested energy was delivered relative to the hours that energy was requested. They state that this revised penalty structure will also apply to control area-backed capacity imports, which, under the current rules, are not subject to any failure-to-deliver penalty. The Filing Parties also propose certain exemptions from failure-to-deliver penalties for energy transactions associated with ICAP import contracts with the New York control area in the hours that the real-time energy market price at the source location is higher than the real-time Locational Marginal Price at the associated New England control area external node.<sup>8</sup>

### **III. May 6 Corrected Filing**

7. On May 6, 2009, ISO-NE filed a correction in which it states that, in fact, none of the 108 offers referenced in the March 20 filing cleared the real-time energy market, nor did ISO-NE confirm next-hour delivery of these transactions, i.e., they were not dispatched.<sup>9</sup> While ISO-NE admits it made errors in describing past market behavior concerning these transactions and the financial impact these transactions would have had if they originally had cleared the market, i.e., had been dispatched, ISO-NE states that the three key concerns with the existing ICAP import contract market rules remain. Specifically, in the May 6, 2009 corrected filing, ISO-NE deletes references to “persistent performance problems” that they had alleged occurred during the period of January 2005 to January 2009. ISO-NE withdraws its statements that every market participant that

---

<sup>7</sup> March 20 Filing at 6.

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

<sup>9</sup> ISO-NE incorporated in the May 6 corrected filing its answers to a complaint filed by the Attorney General for the State of Connecticut (Connecticut Attorney General) in Docket No. EL09-47-000 and to a complaint filed by the Connecticut Office of Consumer Counsel (CT OCC) and the Connecticut Department of Public Utility Control (CT DPUC) in Docket No. EL09-48-000. The Filing Parties explain that the premise for both complaints rests on erroneous statements in the March 20 filing, which they state have now been corrected in the May 6 corrected filing.

submitted a supply offer above \$660/MWh over the Northern New York AC Interface failed to perform every time it was dispatched, for a total of 108 such instances.<sup>10</sup>

8. ISO-NE explains that the Market Monitor has determined that, in fact, the energy associated with the capacity imports was not needed in those 108 hours to meet reliability or economic needs.<sup>11</sup> It states that the original testimony was based on the assumption that ISO-NE's inability to confirm a corresponding energy export from New York meant that the capacity importers had failed to deliver energy.<sup>12</sup>

9. It states that the error had its source in a review of archived data from the Enhanced Energy Scheduler – Market Operator Interface (EES-MOI) software that focused on high-priced imports into New England over the Roseton Node. According to ISO-NE, “the archive of the EES-MOI scheduling algorithm may indicate, erroneously, that high-priced energy imports are expected to be in economic merit for New England purposes.”<sup>13</sup> It explains that, in the absence of further examination of other data, this archive thus can indicate, erroneously, that ISO-NE attempted to but could not confirm the high-priced import transactions for delivery.<sup>14</sup>

10. ISO-NE concludes that absent “unconditional acceptance” by June 11, 2009, ISO-NE would have to delay implementation of these proposed tariff revisions until September 1, 2009.

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

11. Notice of the March 20 filing was published in the *Federal Register*, 74 Fed. Reg. 14,120 (2009), with interventions and protests due on or before April 10, 2009. H.Q. Energy Services (U.S.), Inc.; Northeast Utilities Service Co. (Northeast Utilities); Dynegy Power Marketing Inc.; Brookfield Energy Marketing Inc. (Brookfield); NRG

---

<sup>10</sup> See, e.g., May 6 Corrected Filing, Attachment A at 4-5.

<sup>11</sup> *Id.*, Attachment C at 17-19; see also *id.* at 22-23. Their review concluded that the “highest actual real-time energy [locational marginal price] during any of the 108 hours was \$284.43/MWh, which is much lower than the \$660.00/MWh threshold that Messrs. LaPlante and O’Connor used to define ‘high-priced energy offer’ in the March 20 Testimony.” *Id.* at 22.

<sup>12</sup> *Id.* at 21.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 19-20.

Companies,<sup>15</sup> Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; and Exelon Corporation filed timely motions to intervene. The Electric Power Supply Association and The United Illuminating Company (United Illuminating) filed motions to intervene out-of-time. The Massachusetts Department of Public Utilities and the Maine Commission filed notices of intervention.

12. NEPOOL Industrial Customer Coalition (NICC), CT OCC, the Connecticut Attorney General, and Boralex Industries Inc. (Boralex) filed timely motions to intervene and comments. CT DPUC filed a timely notice of intervention and comments. The New England Conference of Public Utilities Commissioners (NECPUC) filed a motion to intervene out-of-time and comments.

13. Notice of the May 6 corrected filing was published in the *Federal Register*, 74 Fed. Reg. 22,921 (2009), with interventions and protests due on or before May 13, 2009. NSTAR Electric Company (NSTAR) and TransCanada Power Marketing Ltd. filed motions to intervene. NSTAR separately filed comments. CT DPUC filed additional comments. Subsequently, the New England Power Generators Association, Inc. filed a motion to intervene out-of-time. United Illuminating filed a motion to intervene out-of-time and comments. NEPOOL and Northeast Utilities submitted comments out-of-time. And CT DPUC, CT OCC, and the Connecticut Attorney General (together, Connecticut Parties) jointly filed supplemental comments out-of-time.

14. Subsequently, Brookfield submitted a response to comments from Northeast Utilities, United Illuminating, the Connecticut Parties, and NSTAR. United Illuminating and NSTAR submitted responses to NEPOOL's out-of-time comments. ISO-NE filed an answer on June 1, 2009. Subsequently, the Royal Bank of Scotland filed a motion to intervene out-of-time and comments.

15. CT DPUC states that the proposed rule changes should apply to all market participants unless a more extensive analysis demonstrates justification for exempting a market participant from penalties for failure to perform energy delivery obligations undertaken through ICAP import contracts in the transition period. It also asks the Commission to order the Filing Parties to file similar rule changes, to be in effect at the end of the transition period, to eliminate any similar flaws to ICAP import contract rules that may currently exist in the rules that will apply after the transition period.

16. Further, in light of the Filing Parties' statements in the March 20 filing, CT DPUC requests that the Commission order ISO-NE to make a compliance filing that discloses

---

<sup>15</sup> For purposes of this filing NRG Companies are: NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC.

further information related to the \$85.8 million paid to market participants who failed to deliver energy when called upon. It argues that state regulators and consumer advocates are entitled to more information so that they may determine whether seeking further relief is appropriate. In this compliance filing, CT DPUC requests the following information: (1) the identities of the market participants that received the \$85.8 million in payments, including the amount of the payments received by each and details about how many of the 108 failures to deliver each participant was responsible for; (2) the date, time and manner in which ISO-NE first became aware that the market participants at issue were repeatedly failing to deliver energy when called upon to do so, including names and job titles of ISO-NE personnel involved in the discovery and who were informed of the situation after it was discovered; and (3) a description of all actions ISO-NE considered taking and actually did take to address the situation in addition to the proposed changes at issue here.

17. CT OCC states that it supports ISO-NE's rule changes in principle but notes that it reserves the right to seek stricter remedies in this or other proceedings. CT OCC further states that it supports the CT DPUC's comments, including the demand that ISO-NE produce the information necessary to identify the market participants who have engaged in the behavior that necessitated the instant filing.

18. The Connecticut Attorney General urges the Commission to approve the proposed rule changes in order to eliminate what it calls "fatally flawed loopholes" in the current market rules.<sup>16</sup> It also states that the systemic and long-term pattern of the "egregious violations," identified by the Filing Parties in the March 20 filing, raises serious concerns over the ability and will of ISO-NE and the Commission to police these energy markets and protect the ratepayers.<sup>17</sup> The Connecticut Attorney General argues that all entities receiving compensation related to ICAP import contracts or other capacity contracts should be held to the proposed rule changes, and it urges the Commission to ensure that any entity that receives capacity payments is subject to strong penalties for any failure to perform the energy obligations it has undertaken.

19. NICC urges the Commission to examine a potential violation of the Federal Power Act. In particular, it refers to a situation in which the change in behavior of one market participant explains a price increase toward the end of 2008 and in 2009;<sup>18</sup> this market participant offered portions of its energy associated with capacity imports at prices near the \$1,000/MWh offer cap. Further, NICC asks the Commission to examine whether

---

<sup>16</sup> Connecticut Attorney General Comments at 4.

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

<sup>18</sup> NICC Comments at 5-6 (citing to March 20 Filing at 12).

New England customers are entitled to a refund, in whole or in part, of the capacity payments made for capacity and energy benefits that were not provided.

20. Boralex supports the proposed rule changes but notes that there may exist another gaming opportunity with respect to ICAP import contracts. This potential gaming opportunity involves what it suspects is an inconsistency in the treatment of transmission priority for grandfathered transmission service agreements with respect to capacity and energy imports. According to Boralex, ISO-NE has advised Boralex that its grandfathered transmission service agreement with Maine Electric Power Company, Inc. gives it transmission priority with respect to energy imports but not with respect to capacity imports at the New Brunswick interface. Boralex states that a market participant could thus receive capacity payments even if it lacks the ability to provide firm energy when called upon because another market participant with grandfathered transmission rights would be entitled to transmission priority for energy imports. In addition, it states that a market participant with grandfathered transmission rights might not receive payment for the capacity it is capable of providing if ISO-NE has allocated ICAP import rights to other market participants without grandfathered transmission rights that do not have the ability to fulfill their capacity obligations by providing firm energy when called upon.

21. NECPUC supports the comments filed by CT DPUC. NECPUC likewise requests that the Commission order ISO-NE to make full disclosure about the transactions that lead to the proposed rule changes.

22. In its comments following the May 6 corrected filing, NSTAR mainly supports the proposed tariff amendments. NSTAR states that the proposed changes are a good initial step but identifies “a broad and unwarranted loophole.”<sup>19</sup> According to NSTAR, capacity payments entitle load to a dedicated resource and provide a call option on the energy produced from that facility. It contends that the value of the call option is diminished, if not vitiated, if the seller of the capacity is free to sell energy to the highest bidder. NSTAR states that “load pays capacity payments to ensure that, in times of need, it has the first call on the production from the facility.”<sup>20</sup> NSTAR concludes that, as an options holder, “load has placed down payment on energy”—not for the privilege of engaging in a bidding war for energy with other control areas in times of need.<sup>21</sup>

---

<sup>19</sup> NSTAR Comments at 4.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.* at 5.

23. CT DPUC states that the “broadly-supported rule changes ... should assist to mitigate uncompetitive offers into New England markets,” that the proposal is just and reasonable, and that the Commission should accept it.<sup>22</sup> However, it calls for a careful, independent examination of ISO-NE’s dispatching of generation. CT DPUC contends that the corrected May 6 filing “casts troubling doubts on the thoroughness and care of the market monitoring process and raises questions about the internal market monitor’s ability to perform effectively as the watchdog for New England’s markets.”<sup>23</sup>

24. United Illuminating and Northeast Utilities state that they support the proposed stricter controls on pricing for external capacity resources but disagree with one provision, namely, section III.8.3.7.3.1.2(b), the proposed penalty exemption for failure to deliver.<sup>24</sup> United Illuminating maintains that this exception is not consistent with the underlying purpose of an ICAP import contract, i.e., to ensure resource adequacy.<sup>25</sup> United Illuminating maintains that the most critical element of an ICAP import contract is the market participant’s commitment embodied therein to supply energy when called upon.<sup>26</sup> United Illuminating supports the proposal to make clear that market participants must offer energy from import capacity at competitive prices; however, it contends that the performance penalty exemption effectively makes meaningless this requirement.<sup>27</sup>

---

<sup>22</sup> CT DPUC May 6 Comments at 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> United Illuminating Comments at 4-5; Northeast Utilities Comments at 2-3. The penalty exemption provision would apply

[I]f a priced energy transaction supporting an ICAP Import Contract is associated with the New York Control Area and the Market Participant does not deliver energy to the New England Control Area when requested during hours that the Real-Time Energy Market price at the source location is higher than the Real-Time LMP at the associated New England Control are external node....

United Illuminating Comments at 4-5 (quoting section III.8.3.7.3.1.2(b)).

<sup>25</sup> United Illuminating Comments at 5.

<sup>26</sup> *Id.* at 5; *see also* Northeast Utilities Comments at 3 (“[The exemption] undermines the fundamental consumer benefit of the ICAP Import Contract”).

<sup>27</sup> United Illuminating Comments at 6.

Northeast Utilities points out that this provision does not ensure the lowest cost energy solution for New England.<sup>28</sup> United Illuminating states that ISO-NE witnesses fail to explain why they believe this exception “will not swallow the rule.”<sup>29</sup>

25. The Connecticut Parties similarly ask the Commission to reject the proposed failure-to-deliver penalty exemption because it would, they argue, create a preferential, inefficient, and unnecessary exemption for certain capacity resources that is incompatible with competitive energy markets.<sup>30</sup> They state that a capacity contract is a promise by the supplier to load that the supplier can be relied upon to deliver energy when needed—and New England customers have a right to expect this promise to be kept when they pay for such capacity imports. The Connecticut Parties contend that approving this exemption would undermine the value of capacity contracts.<sup>31</sup> They also contend that the proposed exemption would accord preferential treatment to holders of import capacity contracts. Finally, the Connecticut Parties state that they do not wish to disrupt the implementation of the proposed tariff changes; ISO-NE should implement the proposed changes as filed but it should make further modifications to eliminate the proposed penalty exemption no later than September 1, 2009.<sup>32</sup>

26. NEPOOL urges the Commission to approve the proposed changes without change or condition, to be effective July 1, 2009. It notes that the proposed changes are transitional only and are most important to be in place during hours of high demand, which makes their effectiveness during this summer particularly desirable.<sup>33</sup> With respect to the penalty exemption provision, NEPOOL states that the Commission has been deprived of the opportunity to consider comments from parties supporting the exemption due to the late date on which NSTAR filed its comments. It also states that there will be a full opportunity to explore this issue during the stakeholder process to identify Market Rule changes following the transition period.<sup>34</sup>

---

<sup>28</sup> Northeast Utilities Comments at 3.

<sup>29</sup> United Illuminating Comments at 7.

<sup>30</sup> Connecticut Parties Supplemental Comments at 3.

<sup>31</sup> *Id.* at 4.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> NEPOOL Comments at 6.

<sup>34</sup> *Id.* at 7.

27. NEPOOL states that Connecticut Parties' suggestion to accept the changes as filed, but require modifications to eliminate the exemption by September 1, 2009 was never discussed in the stakeholder process and would not allow an opportunity to understand how such a sequencing might impact the timing of efforts on other ISO-NE priorities (including the priority to identify and file a long-term Market Rule change to be effective post-transition period).<sup>35</sup> Therefore, NEPOOL asks the Commission to accept the changes as filed and to "refer to the committed stakeholder process any continued disagreement with whether those just and reasonable changes can or should be farther [sic] refined with the benefit of more time, facts, experience and process."<sup>36</sup>

## V. Commission Determination

### A. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Further, we will grant the unopposed motions to intervene out-of-time, given the entities' interests, the early stage of this proceeding, and the absence of undue prejudice or delay.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Brookfield's, and United Illuminating's and NSTAR's answers and will, therefore, reject them.

### B. Discussion

30. As an initial matter, we note that the parties to this proceeding generally support the proposed tariff revisions, but at the same time some of the parties make further requests. CT DPUC, for example, asks the Commission to require ISO-NE to submit a compliance filing that discloses more information related to any payment actually made to market participants who failed to deliver energy when called upon. We find that this request and the request for refunds are beyond the scope of this proceeding; this proceeding is focused on proposed tariff revisions intended to prospectively address deficiencies in the current market rules. The Commission will address these requests, among others, in the pending complaint proceedings in Docket Nos. EL09-47-000 and

---

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.* at 8.

EL09-48-000. Similarly, we will address Boralex's concern over the possibility of inappropriate gaming in Boralex's pending complaint proceeding in Docket No. EL09-51-000.

31. The Commission finds that the proposed tariff revisions establishing competitive bidding rules would result in more competitive bidding practices yet will continue to allow resources to reflect opportunity costs in their bids. Moreover, no party has voiced opposition to these proposed rules. The Commission also finds that the reformed penalty structure on the whole will provide a more meaningful incentive for suppliers to deliver energy when they are requested to do so. However, we have concerns with the reliability ramifications of the proposed penalty exemption contained in section III.8.3.7.3.1.2(b) and find that it has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Given that this package of proposed tariff revisions will provide important safeguards to the ISO-NE capacity market during the upcoming summer peak season and during the remainder of the transition period, we will accept the proposed tariff revisions for filing but, in light of our concerns about the proposed penalty exemption, will suspend them for a nominal period and make them effective July 1, 2009, subject to refund.

32. Regarding the proposed penalty exemption, we will direct the Filing Parties to provide, within 30 days of the issuance of this order, more information regarding the effect this penalty exemption would have on reliability<sup>37</sup> and the extent to which the exemption would not result in internal capacity resources being treated comparably to market participants with ICAP import contracts.<sup>38</sup>

33. CT DPUC also asks the Commission to require the Filing Parties to submit similar rule changes to become effective at the end of the transition period in order to eliminate any similar flaws to ICAP import contract rules that may exist in the rules that apply after the transition period. The Commission expects that ISO-NE will submit any necessary

---

<sup>37</sup> While we note that Operating Procedure No. 4 (Action During a Capacity Deficiency) would impose a restriction on the use of this penalty exemption during a severe reliability crisis, the Filing Parties have not sufficiently demonstrated the overall effect of this penalty exemption on reliability.

<sup>38</sup> We note that the Connecticut Parties, for example, allege that "An Import Capacity Contract with an op-out as proposed in Section III.8.3.7.3.1.2(b) creates special rules for capacity imports that are substantially different from the New England capacity suppliers' obligations." Connecticut Parties Supplemental Comments at 4. In addition, section III.8.7.2 (Rights and Obligations of De-Listed Resources) of the ISO-NE OATT appears to restrict internal resources in a way that external resources would not be restricted if the proposed exemption were in place.

rule changes to be effective at the end of the transition period when and if it discovers flaws in its ICAP import contract rules for that later time period.

The Commission orders:

(A) The Filing Parties' proposed tariff revisions are hereby accepted, suspended for a nominal period, as discussed in the body of this order, to become effective July 1, 2009, subject to refund.

(B) The Filing Parties are hereby directed to explain the effect the penalty exemption would have on reliability and the extent to which the exemption would not result in internal capacity resources being treated comparably to market participants with ICAP import contracts, within 30 days of the date of the issuance of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.