

128 FERC ¶ 61,023
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 Participants Committee

Docket No. ER09-1144-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued July 14, 2009)

1. In this order, the Commission accepts a filing by ISO New England, Inc. (ISO-NE) and the New England Power Pool (NEPOOL) Participants Committee (collectively, the Filing Parties) that provides additional detail and clarification to a number of areas in the Forward Capacity Market (FCM) rules.

I. Background

A. Forward Capacity Market

2. ISO-NE has recently implemented a forward market for capacity, in which capacity resources (both generators and demand resources) compete to provide capacity to New England on a three-year-forward basis by participating in an annual Forward Capacity Auction. Providers whose capacity clears the Forward Capacity Auction acquire capacity supply obligations, which they must fulfill three years later. Prior to the delivery year, parties can adjust their capacity supply obligations, and ISO-NE can increase or decrease the amount of capacity it anticipates needing in periodic reconfiguration auctions. ISO-NE held the first two Forward Capacity Auctions in 2008, the third Forward Capacity Auction will be held in October 2009, and the fourth Forward Capacity Auction will be held in August 2010.

B. The Instant Filing

3. On May 15, 2009, the Filing Parties filed proposed tariff changes with the Commission seeking to revise various parts of the FCM rules. The instant revisions provide additional detail and clarification to various aspects of the FCM rules, including those dealing with the rights and obligations of Market Participants, payments and charges, and performance topics.

4. Section III.13.6 of Market Rule 1 sets forth the rights and obligations of resources with and without FCM Capacity Supply Obligations (CSO). The Filing Parties propose revisions to the market rules regarding the rights and obligations of resources, including reorganization of the current rule, new terminology, and certain clarifications. In addition, the current market rules include provisions regarding the payment to resources and charges to load under the FCM, adjustments to payments based on resource availability or unavailability, and penalties for non-performance and rewards for resources that are available during periods of system stress. Among the Filing Parties' proposed revisions to these market rules are clarifications and corrections that address the ownership transfer of resources, performance measures, payments and charges, charges for Capacity Load Obligations, and Capacity Transfer Rights. Finally, the Filing Parties propose miscellaneous clarifications to the determination of final capacity zones and the treatment of export bids.

5. The Filing Parties state that NEPOOL's Markets Committee, by a vote of 78.55 percent, recommended that the NEPOOL Participants Committee support the market rule revisions. At its March 6, 2009 meeting, the Participants Committee voted to support the proposed revisions with 87.032 percent in favor.

6. The Filing Parties further state that certain stakeholders felt that the rule changes should also include revisions to relax or eliminate the mitigation provisions for generators not subject to a CSO. However, ISO-NE opposed such revisions because they presented possible market power and price formation issues and the revisions were not thoroughly vetted by ISO-NE or the stakeholders. The Filing Parties explain that a party's proposed amendment to modify the instant mitigation provisions to eliminate mitigation of resources not subject to a CSO failed at the Participants Committee. Although ISO-NE does not oppose future discussions on this issue, it contends that those discussions must be appropriately prioritized among the many important issues to be addressed, but NEPOOL has not yet reached a commitment as to the timing of those discussions.

7. The Filing Parties request an effective date for the tariff changes of July 15, 2009.

C. Notice of Filings

8. Notice of the filing was published in the *Federal Register*, with motions to intervene, notices of intervention, comments and protests due on or before June 5, 2009.¹ Dominion Resources Services, Inc., Dynegy Power Marketing Inc., Northeast Utilities Service Company, the United Illuminating Company, and Constellation Energy Commodities Group, Inc. filed timely motions to intervene.

¹ 74 Fed. Reg. 25,526 (2009).

9. Timely motions to intervene and comments were filed by Exelon Corporation (Exelon), Connecticut Office of Consumer Counsel (CT OCC), the Massachusetts Department of Public Utilities (Mass DPU), and the Connecticut Department of Public Utility Control (CT DPUC).

10. The PSEG Companies² (PSEG) filed a timely motion to intervene and protest. The NRG Companies,³ the Mirant Companies,⁴ and GDF Suez Energy North America (collectively, NRG) filed a joint motion to intervene and protest.

11. ISO-NE, NEPOOL, and CT DPUC filed motions to answer and answers on June 22, 2009. NRG filed an answer to those answers on July 7, 2007.

II. Discussion

A. Procedural issues

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2008)), the notice of intervention and the timely-filed unopposed motions to intervene serve to make the entities filing them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by ISO-NE, NEPOOL, and CT DPUC because they have provided information that has assisted us in our decision-making process. We are not persuaded to accept NRG's answer to those answers, and therefore reject it.⁵

² The PSEG Companies include the following: PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC.

³ The NRG Companies include the following: NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and Somerset Power LLC.

⁴ The Mirant Companies include the following: Mirant Energy Trading, LLC, Mirant Canal, LLC and Mirant Kendall, LLC.

⁵ We note that the bulk of NRG's answer contains re-argument and additional support for the position that NRG already asserted in its protest. We further note, however, that to the extent that NRG asks the Commission to "remand" the issues discussed therein to the NEPOOL stakeholder process for further consideration, and to require ISO New England to file a progress report on that process by November 1, 2009,

(continued...)

B. Analysis

14. We accept ISO-NE's proposed revisions to its FCM rules to become effective July 15, 2009, as requested. As discussed below, we find ISO-NE's proposed revisions just and reasonable.

1. Non-Capacity Supply Obligation Resources

a. Filing Parties' Proposal

15. The Filing Parties propose modifications to the sections of the tariff that deal with Non-CSO Resources.⁶ Section III.13.6.2 establishes the rights and obligations applicable to Generating Capacity Resources that have no CSO for any portion of their asset. Currently, Non-CSO Resources are not required to offer into either the Day-Ahead or Real-Time Energy Markets, but a generating capacity resource having no CSO may submit an offer into the Day-Ahead Energy Market. The Filing Parties' proposed rule changes clarify that if any portion of the energy offered by a Non-CSO Resource in the Day-Ahead Energy Market clears, then its entire Supply Offer, up to the resource's Economic Maximum Limit, will be subject to all of the requirements of the Real-Time Energy Market applicable to a generating capacity resource having a CSO.⁷

16. The market rules also govern situations in which a generating capacity resource without a CSO does not offer into the Day-Ahead Energy Market, or submits an offer that does not clear, and state that the resource must self-schedule in order to participate in the Real-Time Energy Market. The Filing Parties' proposed revisions include language stating that the resource, once committed through a self-schedule, will be eligible for dispatch in the Real-Time Energy Market. In addition, generating capacity resources with no CSO must nonetheless comply with auditing, rating, data collection, and outage

and to file any proposed Tariff changes by February 20, 2010, we deny that requested relief. As we note *infra* at P 36, ISO-NE and NEPOOL have already committed to a Commission filing addressing the issues related to Local Sourcing Requirements and the establishment of Capacity Zones no later than February 20, 2010, and in the order that established this filing requirement we rejected similar requests to expand the scope of this stakeholder process. *ISO New England, Inc.*, 126 FERC ¶ 61,115 at P 53 (2009).

⁶ Sections III.13.6.2, III.13.6.4, III.A.4, and III.A.5.

⁷ ISO-NE and NEPOOL May 15, 2009 filing, transmittal letter at 7 (citing revised Market Rule 1 § III.13.6.2.1.1.2).

requirements, but are not subject to forced re-scheduling of previously-scheduled outages.

17. Finally, under the present tariff language, ISO-NE is permitted to request energy for reliability purposes in the Real-Time Energy Market from generation resources that have capacity that is not subject to a CSO (section III.13.6.2.1.1.2). The rules do not require a resource to provide energy from such capacity in these circumstances, and a resource will not be subject to specific availability penalties for failure to provide energy from that capacity. Under the present tariff language, energy requested under this provision is block loaded, meaning its output is fixed and not eligible for economic dispatch or to set the energy clearing price. The proposed changes (besides moving this section to new section III.13.6.4 of the tariff) relax this block loading requirement, allowing these resources to be economically dispatched and eligible to set the clearing price.

b. Comments and Protests

18. In its protest, NRG contends that ISO-NE's proposed tariff changes are unjust and unreasonable because they apply the same conduct and market impact mitigation rules to energy offers from Non-CSO Resources that do not receive capacity payments and have no obligation to participate in the energy markets, as are applied to energy offers from CSO Resources that do receive capacity payments and are obligated to offer their full energy capability in both the Day-Ahead and the Real-Time Energy Markets. NRG argues that since Non-CSO Resources must rely exclusively on energy market revenues to recover fixed costs, Non-CSO Resources should not have their energy offers mitigated based on their marginal costs because such mitigation will deny them a reasonable opportunity to recover their fixed costs.

19. NRG argues that the proposed rule changes will compel Non-CSO Resources to risk having their offers mitigated down to their Reference Level Price or marginal costs. Additionally, NRG argues that Non-CSO Resources are not appropriately compensated for local reliability service under the proposed rule changes, as resources are only able to de-list from the Forward Capacity Auction if the clearing price falls below the resource's approved net risk-adjusted going-forward costs and the resource is not needed for reliability. NRG states that the Commission has previously stated that markets must produce prices that appropriately reflect and compensate the generator for the locational value of the reliability service it is providing.⁸ NRG argues that when the value of a resource's local reliability service is not reflected in the market price, generators may

⁸ *Devon Power LLC*, 110 FERC ¶ 61,315, at P 20, 50 (2005).

lack a reasonable opportunity to recover their costs.⁹ Thus, NRG states that the application of the proposed mitigation rules to Non-CSO Resources is both unreasonable and may harm reliability.¹⁰

20. NRG argues that fears of generators exercising market power are unreasonable because energy offers from CSO Resources and Locational Forward Reserve Market¹¹ resources, as well as mitigation at the \$1,000/MWh Energy Offer Cap, are sufficient to discipline energy prices and prevent Non-CSO Resources from exercising market power when reserves are sufficient. NRG states that if a Non-CSO Resource submits an energy offer at or near the \$1,000/MWh Energy Offer Cap and is dispatched, the system is in a state of shortage and it is likely that such an offer will have no effect on clearing prices because they are already being set by a Reserve Constraint Penalty Factor or other offers at the Energy Offer Cap. Thus, NRG argues, the \$1,000/MWh cap serves to mitigate any potential market power and encourages Non-CSO Resources to be available for local reliability emergencies. NRG states that ISO-NE will rarely need to dispatch a Non-CSO Resource out-of-merit to provide local reliability service, and, to avoid shedding load, in those rare circumstances ISO-NE should be willing to pay prices up to the \$1,000/MWh Energy Offer Cap. NRG contends that it is precisely during shortage conditions that energy prices should be allowed to rise to the Energy Offer Cap to reflect the true value of the reliability service Non-CSO Resources provide. Additionally, NRG argues that allowing Non-CSO Resources to be economically dispatched in real time increases the options available to ISO-NE and thereby enhances real-time reliability, and will either lower system costs or, in times of severe Operating Reserve Shortages, have no impact because prices are expected to be at or near the level of the Energy Offer Cap.

21. NRG requests that the Commission require the Filing Parties to submit a compliance filing which subjects energy offers from Non-CSO Resources to mitigation consisting only of the \$1,000/MWh Energy Offer Cap. Alternatively, NRG recommends that the Commission should set for hearing and settlement procedures the issue of what mitigation should be applied to energy supply offers from Non-CSO Resources. NRG

⁹ *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112, at P 19 (2004); *Devon Power LLC*, 103 FERC ¶ 61,082, at P 28 (2003).

¹⁰ *Devon Power Co.*, 104 FERC ¶ 61,123, at P 33 (2003).

¹¹ The Locational Forward Reserve Market is designed to procure sufficient reserves on a forward basis to meet applicable reliability requirements (Market Rule 1 § III.9.2).

argues that the amount of revenue a Non-CSO Resource can earn in the energy market has a critical impact on the business decisions of the Non-CSO Resource and thus should be resolved in advance of the beginning of the First Commitment Period on June 1, 2010.

22. Exelon is generally supportive of the rules being proposed by ISO-NE, but states that ISO-NE's filing fails to adequately address the extent to which de-listed generators are subject to mitigation of energy offers. Exelon argues that applying the same energy market mitigation rules to de-listed units as are applied to cleared capacity resources is not just and reasonable, as such mitigation "assures" that Non-CSO Resources will "fail to recover their full fixed costs."¹² Exelon recommends that the Commission either order a relaxed mitigation paradigm for de-listed units, such as subjecting units only to the \$1,000 energy market bid cap, or send the matter back to ISO-NE for further stakeholder discussion, with a date certain for filing changes.

23. To the contrary, CT DPUC states that mitigation rules should continue to apply to resources that do not have a CSO. CT DPUC argues that if adopted, a proposal to eliminate mitigation or to weaken market monitoring of resources without a CSO would deprive customers of the just and reasonable rates that the Federal Power Act guarantees and would create new opportunities to exercise market power. CT DPUC explains that NRG's proposal would permit a de-listed generation resource to offer into the Real-Time Energy Market without any mitigation scrutiny and, when dispatched as the marginal unit, to be eligible to set price at whatever level it chooses above the competitive price. CT DPUC contends that the Peak Energy Rent deduction in the FCM cannot immunize the effect of market power that this proposal invites. In addition, CT DPUC argues that NRG's proposal would give generation resources substantial incentives to withdraw their capacity from the FCM. Finally, CT DPUC maintains that the Commission should reject NRG's proposal because ISO-NE has already made concessions to generator and supplier interests, and exempting resources without a CSO from mitigation will distort that apparent quid pro quo deal. The CT OCC agrees with CT DPUC's comments, noting that attempts by some generators to "game" the markets should be rejected. The Mass DPU also shares ISO-NE's concerns and fully supports ISO-NE's opposition to the proposal to relax or eliminate the mitigation measures and so urges the Commission to reject any attempts to relax or eliminate mitigation measures.

c. Answers

24. In its answer, ISO-NE states that the proposals for relaxation of mitigation provisions have not been properly vetted, are improperly raised here, and have potentially dangerous implications for New England's markets. ISO-NE argues that NRG would

¹² Exelon comments at 3.

like the option of either participating in the FCM or receiving fixed cost recovery through inflated energy or uplift payments achieved by the exercise of market power. ISO-NE states that such a strategy would undermine the FCM. In contrast to NRG's position that the energy markets are the sole vehicle for Non-CSO Resources to recover their fixed costs, ISO-NE explains that the FCM, in conjunction with the energy market and the ancillary service markets, is designed to provide an opportunity for resources to recover their fixed and variable costs and a return on investment. In addition, ISO-NE asserts that the FCM is voluntary and permits de-list bids for existing resources, so resources without a CSO have chosen to forego FCM revenues. ISO-NE claims that if a resource owner chooses to exit the portion of the market that is expressly designed to recover a portion of its fixed cost, it should not be permitted to create a requirement to allow these costs to be recovered in some additional way, but NRG's proposal is meant to do just that. According to ISO-NE, under market-based rates, a resource seller is to be provided a reasonable opportunity to recover its costs plus a return, and that opportunity is meant to be provided through the FCM along with revenues from energy and ancillary service markets. ISO-NE maintains that providing an additional fixed cost recovery mechanism for resources that opt-out of the FCM (and then choose to voluntarily participate in the energy market), would undermine market efficiency and inappropriately increase costs to consumers. ISO-NE also states that its proposed relaxation of the block loading requirement eliminates a design feature that prevents the exercise of market power and this proposal was premised on the fact that energy market mitigation would remain in effect.

25. Further, ISO-NE states that picking and choosing among market participants to select those who are subject to mitigation as NRG suggests is inappropriate, and conflicts with the Commission's policy that all market participants must equally be subject to the market mitigation rules. ISO-NE argues that NRG's proposal ignores the fact that there are rules already in place to appropriately price energy in reserve shortage situations. ISO-NE contends that NRG seeks to bypass these scarcity pricing rules in favor of using the exercise of market power to set price. In addition, ISO-NE claims that NRG's arguments that the rules do not appropriately compensate resources that do not have a CSO for local reliability service should be rejected. ISO-NE argues that NRG's proposal to allow \$1,000/MWh offers when there is no competition is not an improvement to the markets, but would facilitate the exercise of market power at times of system emergency when the last resources, those without a CSO, voluntarily agree to provide energy.

26. Last, ISO-NE argues that NRG's proposal is procedurally flawed as this issue is not directly implicated in the Filing Parties' proposal. ISO-NE notes that the mitigation structure to which NRG objects, exists in the currently-effective rules and is not modified or affected by the changes in the instant proposal. As such, ISO-NE notes that NRG's proper recourse is to either file with the Commission pursuant to section 206 or to initiate a full discussion of this issue in the stakeholder process.

27. In its answer, NEPOOL explains that the alternative mitigation proposal was considered as an amendment to the instant proposal, but was not supported by either ISO-NE or NEPOOL. However, there was broader support for further discussion of market rule changes that would provide more flexibility to resources without a CSO, and NEPOOL agreed to include this issue in the upcoming comprehensive discussions of FCM performance in the FCM Steering Group. NEPOOL encourages the Commission to redirect NRG and Exelon to pursue resolution of their concerns first in that stakeholder process.

28. In its answer, CT DPUC argues that NRG and Exelon seek to impermissibly expand the scope of this section 205 proceeding and that the protests are a prohibited collateral attack on the Commission's prior orders approving the current mitigation rules. CT DPUC states that suppliers are entitled only to an opportunity to recover their going-forward fixed costs, not a guarantee of recovery. CT DPUC asserts that contrary to the claims by NRG and Exelon, the Commission has no obligation to provide a preferential alternative to resources that have voluntarily foregone or could not compete to obtain a significant source of revenue. According to CT DPUC, NRG and Exelon seek preferential treatment for resources that cannot compete in the markets that ISO-NE administers. However, CT DPUC claims that the existing market rules pertaining to mitigation provide sufficient headroom to permit even Non-CSO Resources to recover at least a portion of their fixed costs.

29. CT DPUC states that NRG's proposal disregards the fundamental principle that market monitoring and mitigation is necessary for just and reasonable rates, and asserts instead that no mitigation is necessary because resources that are not needed for reliability do not have market power and, therefore, other suppliers will successfully discipline Non-CSO Resources' attempts to exercise market power over price. In addition, CT DPUC asserts that energy prices in the real-time market set by the unmitigatable exercise of market power will not reflect the locational value of a reliability service, and conflict with Order No. 719's requirement that RTOs maintain their market power mitigation measures during times when operating reserves are scarce. Finally, CT DPUC explains that exemptions from energy market mitigation create perverse incentives to leave the capacity market because resources or portions of resources that de-list would no longer be subject to the attendant CSOs, and NRG's proposal conflicts with the intent of the FCM design to smooth price spikes in the energy market.

d. Commission Determination

30. As stated previously, the Commission will accept the Filing Parties' proposed tariff sheets effective July 15, 2009. We will reject the protests of NRG and Exelon in this matter and deny their requested relief.

31. NRG contends that the rule changes proposed by the Filing Parties fail to provide Non-CSO Resources with a reasonable opportunity to recover their fixed costs through participation in the Day-Ahead and Real-Time Energy Markets. Implicit in this argument is the contention that the mitigation provisions of Appendix A of Market Rule 1 are unjust and unreasonable, because they unfairly burden Non-CSO Resources by restricting their ability to receive energy payments at the \$1,000/MWh Energy Offer Cap. Importantly, and as noted by both ISO-NE and CT DPUC, the proposed tariff revisions do not in any way alter the provisions of Appendix A to Market Rule 1 of ISO-NE's tariff, which provides for mitigation to be applied to both CSO and Non-CSO resources, and there is no provision in the currently-effective Appendix A that contemplates different forms of mitigation depending on a resource's participation in specific ISO-NE markets. Thus, NRG's protest to the instant filing is in reality an attack on the currently-effective Appendix A mitigation provisions, which were previously found to be just and reasonable, and which ISO-NE is not proposing to change. In a similar situation, we recently noted that the Commission was not required to address the merits of a proposal by NRG that was offered as an alternative to a proposal offered by ISO-NE under section 205, when we found that ISO-NE's proposal was just and reasonable.¹³ We agree with ISO-NE and CT DPUC that NRG's request is, therefore, procedurally improper and that any revision to the mitigation provisions should come either through a section 206 proceeding or as a product of the NEPOOL stakeholder process.

32. In addition, we also reject NRG and Exelon's proposal on its merits. To begin with, we note that NRG is requesting the ability for Non-CSO Resources to avoid mitigation below the \$1,000/MWh offer cap based on its claim that these resources "do not have a reasonable opportunity to recover their fixed costs in the Energy Markets."¹⁴ However, because neither NRG nor Exelon attempt to make any such demonstration in their pleadings, there is no basis in the record for the Commission to agree with their conclusion.

33. Nor do we agree with NRG's contention that "non-CSO Resources must rely exclusively on energy market revenues to recover their fixed costs."¹⁵ As demonstrated by NRG, the decisions to de-list from the FCM and to subsequently provide energy as a

¹³ *ISO New England Inc.*, 125 FERC ¶ 61,102, at P 59 (2008) ("[B]ecause the Commission is finding that ISO-NE's and NEPOOL's proposal is just and reasonable, we need not address the merits of the NRG proposal, especially in the context of a section 205 proceeding initiated by ISO-NE.")

¹⁴ NRG protest at 12.

¹⁵ *Id.* at 4.

Non-CSO Resource are both voluntary. NRG argues that the Commission has recognized that in a competitive market, generators must receive the opportunity to recover their fixed costs, including the opportunity to earn a reasonable rate of return.¹⁶ However, we find that to be a different argument than that put forth here by NRG – a resource with market-based-rate authority that *chooses* to de-list from the FCM and then *chooses* to provide energy as a Non-CSO Resource if requested by ISO-NE should face relaxed mitigation and must be able to earn its fixed costs, including a rate of return in the energy market. This argument ignores the additional opportunity for cost recovery provided by the ancillary services markets. Further, a generator that chooses to be a Non-CSO Resource may make that business decision in the anticipation that, since it is not required to keep its capacity available for ISO-NE, it may be able to earn significant revenue by offering capacity into other markets, such as New York, or by entering into Supplemental Availability Bilateral Agreements with New England resources that do have CSOs but are unable to fulfill them.¹⁷

34. NRG's proposal also undermines the Commission's market-based rates policy. In support of that policy, we note that when the Commission determines that a seller lacks or has mitigated market power, "it is making a determination that the resulting rates will be established through competitive forces, not the exercise of market power, and thus will fall within a zone of reasonableness which protects customers against excessive rates."¹⁸ By contrast, here NRG seeks approval for Non-CSO Resources to exercise market power (in the form of a request by ISO-NE to provide reliability service) in order to receive payments at the \$1,000/MWh Energy Offer Cap, despite the fact that these resources have made a specific choice to forego FCM revenues. NRG's proposal is further weakened by the fact that under the Filing Parties' proposal to relax the current block loading requirement, a request by ISO-NE for energy by Non-CSO Resources would allow these resources to be economically dispatched and eligible to set the market clearing price. ISO-NE states that the relaxation of the block loading requirement was premised on the retention of mitigation, and NRG and Exelon have not provided us with a basis to overturn that requirement. This situation is analogous to our finding in *Bridgeport* that there is "no basis for a generator operating under market-based rates

¹⁶ *Id.* at 11.

¹⁷ *See ISO New England Inc.*, 126 FERC ¶ 61,115, at P 12 (2009) ("Supplemental Availability Bilaterals are a way for resources that have capacity obligations to hedge against the risks that they themselves will fail to meet those obligations.").

¹⁸ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 409, *order on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008).

authority to claim that for it to remain available in a competitive market, it must receive energy revenues equivalent to a full cost of service,” since “in a competitive market, the Commission is responsible only for assuring that [a resource] is provided the *opportunity* to recover its costs.”¹⁹ It is clear that ISO-NE’s markets provide this opportunity.

35. We also agree with ISO-NE and CT DPUC that the “relaxed” mitigation sought by Exelon and NRG for Non-CSO Resources would create improper incentives in the ISO-NE markets. Specifically, this proposal would allow these resources to choose their preferred method of cost recovery – either through participation in the FCM or through energy/uplift payments at the Energy Offer Cap. While NRG contends that the removal of mitigation of \$1,000/MWh energy offers provides an incentive for these Non-CSO Resources to be available for contingencies, we find that this choice would undermine the construct of the recently approved FCM. In support of its proposal, NRG argues that any resource allowed to de-list from the FCM has satisfied two separate market screens – an economic withholding screen for de-list bids above certain thresholds along with a reliability review. However, we note that under the terms of the FCM Settlement, de-list bids below 0.8 times the Cost of New Entry are not reviewed by the Market Mitigation Unit (MMU), allowing these resources to pursue a “higher of” strategy at this price level, a strategy that may include consideration of the other resources in a supplier’s portfolio (since these Non-CSO Resources would now be eligible to set the market clearing price). Further, as opposed to resources with a CSO, Non-CSO Resources that offer at the Energy Offer Cap would avoid the Peak Energy Rent adjustment established in the FCM, which reduces capacity payments above a certain strike price in order to eliminate the economic withholding incentive.²⁰ Again, NRG’s proposal undermines the fundamental principles supporting the FCM Settlement. While the Commission will not speculate on the clearing price of future Forward Capacity Auctions, as the first two Forward Capacity Auctions have cleared at the administrative price floor, we note that the current environment provides an incentive for participants to seek a different form of cost recovery outside of the FCM, as proposed here by NRG. However, since NRG’s proposal would establish a potential incentive for resources to leave the FCM in order to

¹⁹ *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005).

²⁰ ISO-NE also notes that NRG’s proposal would remove mitigation on start-up fees, no load costs, and minimum run time. Thus, ISO-NE presents an example that, without mitigation, a resource could offer at the \$1,000/MWh energy offer cap, establish a minimum five day run time, and require a \$1 million start-up fee. In support, ISO-NE cites to a Commission order which required PJM to cost-cap its must-run units precisely to address this possibility. *PJM Interconnection L.L.C.*, 96 FERC ¶ 61,233 (2001).

exercise market power, the Commission cannot find such a proposal to be just and reasonable.

36. Addressing NRG's claim that the proposed rule changes do not properly compensate Non-CSO Resources for the local reliability service that they may provide absent the ability to offer at the Energy Offer Cap, we reiterate that such a request is outside the scope of the Filing Parties' proposal. Further, we also note that on more than one occasion, the Commission has rejected arguments that generators providing "local security" should receive excess compensation in addition to FCM payments.²¹ Here, NRG seeks an analogous ability to receive excess compensation (in the form of relaxed mitigation) for voluntarily providing energy when requested by ISO-NE. Addressing NRG's contention that reliability will be affected absent the ability for Non-CSO Resources to offer at the Energy Offer Cap, we note that in making this argument, NRG has failed to demonstrate that ISO-NE's de-list reliability review process does not properly consider reliability needs. Importantly, as Non-CSO Resources are not required to provide energy upon request during the FCM commitment period, participation by these resources is inherently voluntary. In addition, as NRG is aware, and as specified in a prior Commission order,²² the NEPOOL stakeholder process is presently considering whether the current probabilistic resource adequacy analysis may result in a failure to model separate Capacity Zones in the Forward Capacity Auction when local security concerns could support zonal separation. This potentially affects how much capacity will be procured within a zone and the price of that capacity. The Filing Parties have committed to a Commission filing addressing this issue no later than February 20, 2010, which would enable new rules to be in place before the Installed Capacity Requirement (ICR) must be established and informational filings must be made for the 2013-2014 Power Year and the fourth Forward Capacity Auction. NRG's request here would essentially prejudge the outcome of that process.

37. Finally, we do not find sufficient reason to set this filing for hearing, as requested by NRG. There are no material issues of fact in dispute since neither protesting party even contests the rationale for the filing.

²¹ See *ISO New England Inc.*, 125 FERC ¶ 61,102, at P 54 (2008).

²² *ISO New England Inc.*, 126 FERC ¶ 61,115, at P 6, 44 (2009).

2. Energy Market Offer Requirements

a. Filing Parties' Proposal

38. The Filing Parties explain that one of the primary obligations of resources with a CSO is to submit offers into the Day-Ahead and Real-Time Energy Markets when, and to the extent, the resource is available. According to the Filing Parties, the current market rules state that a generating capacity resource must be offered into the Day-Ahead and Real-Time Energy Markets, while the proposed revisions clarify that such offers must be in an amount equal to or greater than the resource's CSO. In addition, the Filing Parties propose a requirement that a resource that is not physically available at the level of its CSO must offer in the Day-Ahead and Real-Time Energy Markets to the extent that it is physically available.

b. Comments and Protest

39. CT DPUC states that ISO-NE should provide additional information about CSO Resources' energy offers during the FCM transition period. While CT DPUC contends that the Filing Parties' proposal to clarify the must-offer requirement is gratuitous, CT DPUC does support the proposed rule change. CT DPUC argues that the Filing Parties decided to improve the language in the market rules by changing "listed" to "CSO," and then provided even further clarifications to ensure that the must-offer obligation applied to the entire amount of the CSO. However, CT DPUC contends that the Filing Parties chose a "belt-and-suspenders" approach and repeated the requirement that the amount of the offer in the energy markets must be at least as many megawatts (MWs) as the CSO. Thus, according to CT DPUC, the Filing Parties' proposal to reiterate the tariff's already clear must-offer requirement in such detail raises serious questions, particularly when considered in the context of recent revelations that New York importers had engaged in longstanding conduct designed to evade their must-offer obligations.²³ CT DPUC states that ISO-NE should describe for the Commission and stakeholders (a) the extent to which it has examined capacity suppliers' offers during the transition period to identify any offers at less than their listed capacity in the energy markets whenever a resource was available, and (b) any instances when capacity suppliers did not offer all of their listed capacity in the energy markets. CT DPUC states that ISO-NE must assure its stakeholders that capacity suppliers have not thwarted this element of the must-offer rule. CT DPUC states that, because ISO-NE's market monitor did not reveal the market manipulation in which New York capacity suppliers were engaged for more than two years, CT DPUC is concerned that similar events may have occurred regarding CSO

²³ Citing *Blumenthal v. ISO New England, Inc. (Blumenthal)*, Docket Nos. EL09-47-000 and EL09-48-000.

suppliers, particularly since ISO-NE and NEPOOL without explanation have now proposed to clarify a rule that CT DPUC already considers clear. CT DPUC states that ISO-NE and its market monitor should reveal what, if anything, they have already done to identify instances when capacity resources might have circumvented the existing rules and report any capacity suppliers' attempts to be paid for capacity without making the requisite energy offers that were expected in the FCM Settlement and required by the transition period rules.

40. CT OCC incorporates the comments made by CT DPUC and agrees that additional information about supply offers during the transition period is needed.

c. Answers

41. ISO-NE states in its answer that CT DPUC's request for transition period information is inappropriate and outside the scope of this proceeding and should be rejected by the Commission. ISO-NE states that the rule changes in the instant filing have nothing to do with the transition period, and will only have an effect upon the start of the first Capacity Commitment Period in mid-2010. ISO-NE asserts that the proposed changes do not represent "belt-and-suspenders" and are far from being superfluous because the change was necessary to remove a reference to the "listed" portion of a resource (a term that pre-dates FCM), and did not go any further than necessary. ISO-NE argues that CT DPUC does not explain how the proposed revisions introduce ambiguity or risk of gaming. In addition, ISO-NE asserts that CT DPUC goes to great lengths to use these rule changes to raise unrelated concerns about the behavior of certain market participants during the transition period, but makes no specific allegations, presents no evidence, and cites no facts. Therefore, ISO-NE asserts that CT DPUC's request for an investigation into behavior during the transition period should be rejected. NEPOOL also states that the Commission should reject CT DPUC's request for information that is unrelated to the instant filing. NEPOOL maintains that this proceeding can not and should not be used as a vehicle for further investigatory or enforcement actions.

d. Commission Determination

42. We will not grant the relief sought by CT DPUC. CT DPUC presents no evidence that this proposed tariff revision is not just and reasonable, and in fact specifically supports the proposed rule change. While CT DPUC seeks further elaboration on whether capacity resources have failed to meet their obligations during the FCM transition period, we find accusations related to the role of the MMU in the capacity imports case²⁴ to be outside the scope of this proceeding, which is focused on proposed

²⁴ *ISO New England Inc.*, 127 FERC ¶ 61,235 (2009).

tariff revisions intended to prospectively address deficiencies in the current market rules. ISO-NE and NEPOOL are seeking to revise their tariff, and, in our view, they have met their section 205 obligation to demonstrate that the proposed tariff provisions are just and reasonable. ISO-NE and/or NEPOOL are not required to make an affirmative showing that specific failures by capacity resources have already occurred before accepting ISO-NE's proposed revisions. Requests for information regarding allegations of similar conduct in the pending complaint proceedings in *Blumenthal* will be addressed by the Commission in those proceedings, as appropriate.

3. Treatment of Pro-Rated Capacity Resources

a. Filing Parties' Proposal

43. The Filing Parties propose to clarify the meaning of Capacity Clearing Price in the context of the calculation of the monthly capacity payment for generating capacity resources. The Filing Parties state that this change recognizes the need to reflect the adjustments to the Capacity Clearing Price in circumstances such as indexing for inflation, and to apply the Capacity Clearing Price Collar when payments to resources are pro-rated. In addition, the Filing Parties propose modifications to the market rules regarding availability penalties. The Filing Parties state that references to the Capacity Clearing Price are clarified to include any adjustments to that price pursuant to the rules that contain provisions regarding the Capacity Clearing Price Collar.

b. Protest

44. In its protest, PSEG states that certain modifications to sections III.13.7.2.1.1(a) and III.13.7.2.7.1.2 of Market Rule 1 proposed by the Filing Parties would not be needed if the Commission grants the pending rehearing request of the PSEG Companies regarding the interpretation of tariff provisions concerning pro-ration of capacity resources from the first Forward Capacity Auction.²⁵ PSEG contends that if the Commission accepts the Filing Parties' proposed tariff changes, their introduction into the tariff should be subject to the outcome of PSEG's pending rehearing request in Docket No. ER08-633-001.

45. PSEG explains that the proposed revisions concern Capacity Clearing Price floor levels and the administration of requests by suppliers to pro-rate capacity obligations

²⁵ See pending request for rehearing of the PSEG Power Companies, *ISO New England Inc.*, Docket No. ER08-633-000 (July 21, 2008), and Order Granting Rehearing for Further Consideration, *ISO New England Inc.*, Docket No. ER08-633-001 (August 20, 2008).

when the MW level of capacity clearing the market in a given auction exceeds the ICR. According to PSEG, in that situation, the Filing Parties interpret the market rules as allowing for pro-rating the clearing price (for example, when resources are not allowed to de-list the “surplus capacity” above the ICR due to reliability concerns as happened in the first Forward Capacity Auction in Connecticut). As such, references to the Capacity Clearing Price need to be qualified by a specific reference to price adjustments so that the price paid to units that are unable to pro-rate MWs due to reliability issues is adjusted downward.

46. PSEG explains that because the Capacity Clearing Price serves as the benchmark for calculating performance penalties, if this value is not adjusted, suppliers could be charged performance penalties based on a price higher than they were actually paid. PSEG contends that if the Filing Parties’ interpretation of the tariff is accepted, the proposed changes to the market rules are clearly needed because, without the changes, resources in Connecticut would be subject to higher levels of penalties relative to resources elsewhere in the pool during the first FCM delivery year. PSEG argued in its rehearing request in Docket No. ER08-633-001 that units prevented from pro-rating MWs should receive the unadjusted Capacity Clearing Price, making the instant revisions unnecessary if rehearing were granted.

c. Commission Determination

47. PSEG agrees that the proposed modifications are necessary absent the Commission granting its pending rehearing request in ER08-633-001. However, as PSEG is aware, the Commission recently reiterated its position that PSEG’s claim that resources not allowed to pro-rate MWs should be paid the otherwise applicable clearing price “would violate section III.13.2.7.3(b) of the ISO-NE Tariff and the FCM Settlement, which prohibit ISO-NE from purchasing more capacity than what is equal to the ICR times the clearing price.”²⁶ We rejected PSEG’s interpretation based on the fact that the FCM Settlement and FCM rules subject pro-rating decisions to a reliability review.²⁷ On a procedural basis, the Commission agrees with PSEG that the proposed modifications to sections III.13.7.2.1.1(a) and III.13.7.2.7.1.2, which address the treatment of pro-rated capacity resources, would not apply in PSEG’s case should the Commission grant PSEG’s pending rehearing request in Docket No. ER08-633-001. However, we will not make ISO-NE’s proposed revisions to these sections subject to PSEG’s pending rehearing request. Under section III.13.2.7.3(b) of the ISO-NE Tariff, if excess capacity clears in a Forward Capacity Auction, resources may choose between a

²⁶ *ISO New England Inc.*, 127 FERC ¶ 61,238, at P 12 (2009).

²⁷ *Id.*

CSO of their full cleared capacity at a pro-rated price, or receiving the capacity clearing price and pro-rating their CSO. Regardless of the outcome of PSEG's rehearing request in Docket No. ER08-633-001, ISO-NE's proposed revisions are necessary for cases in which a resource voluntarily elects price pro-ration.

4. Availability Scores and Shortage Events

a. Filing Parties' Proposal

48. The Filing Parties propose modifications to the market rules to clarify ISO-NE's practice of calculating Shortage Event Availability Scores on an hourly basis. The Filing Parties state that the revised market rules provide that ISO-NE will calculate a resource's availability score for each hour that contains any portion of a Shortage Event, based on the performance of that resource during the hour. The Filing Parties explain that the resource's availability score for an hour, expressed as a percentage which may not exceed 100 percent, will be the sum of the resource's available MWs in that hour plus any adjustments, divided by the resource's CSO. In response to concerns during the stakeholder process regarding the lack of a sub-hourly measurement, the Filing Parties state that the use of sub-hourly measurement is "impractical because current market settlements are based upon hourly data, and therefore systems, databases and reports are structured for hourly data. Additionally, both Supplemental Availability Bilaterals and outage exemptions are hourly adjustments to availability."²⁸ The Filing Parties assert that any imprecision in the availability score because of the use of hourly data is equally as likely to favor the resource's availability score as to harm it. Therefore, the Filing Parties believe that use of hourly measurements as opposed to sub-hourly measurements is a more efficient business practice with only negligible (both positive and negative) effects on a resource's availability score.

49. Additionally, the Filing Parties propose modifying the market rules regarding hourly available MWs. The Filing Parties state that the revisions provide that a resource's available MWs in each hour that contains any portion of a Shortage Event will be determined pursuant to the provisions of the sub-sections of section III.13.7.1.1.3, but in no case will a resource's available MWs in an hour exceed that resource's Capacity Network Resource (CNR) Capability. The Filing Parties assert that this change reflects the integration of relevant interconnection queue rules with FCM rules. According to the Filing Parties, the capping of available MWs at the CNR Capability is consistent with the process of qualifying a resource's MWs for the Forward Capacity Auction, and ensures that a resource cannot either supplement another resource or receive a share of the availability credits for MWs that have not completed the steps required to be counted as

²⁸ Ethier/Dombrowski Testimony, Attachment 3 to Transmittal, p. 7-8.

capacity. The Filing Parties contend that if the hourly MWs were not capped by the CNR Capability, any MWs from a resource offered into the energy market that exceed the assigned CNR Capability would be allowed to count as available capacity, which is inappropriate under the Capacity Capability Interconnection Standard.

b. Protest

50. PSEG argues that the Commission should reject the Filing Parties' proposal to impose a minimum one hour penalty for Shortage Events that are less than one hour. PSEG notes that the current tariff language recognizes availability scoring for each hour or partial hour in the Shortage Event, and contends that the Filing Parties' proposal to eliminate sub-hourly measurement is unfair. PSEG does not agree with the Filing Parties' assertion that the imprecision in availability score would be minor and outweighed by other factors, arguing that the Filing Parties' claims are unsubstantiated and purely speculative. Further, PSEG states that ISO-NE's claims of impracticability and high implementation costs cannot be reconciled with the fact that performance in the Locational Forward Reserves Market is measured on a minute-to-minute basis. Therefore, PSEG argues that the Filing Parties have not adequately justified changing the currently effective tariff provision recognizing performance levels of periods less than one hour.

51. Addressing the measurement of hourly available MWs, PSEG states that resources with qualified MWs in the FCM that exceed their CNR Capability during a Scarcity Event should be allowed to consider such output in calculating performance. PSEG argues that the proposed rule change that would prevent a capacity resource that supplies output in excess of its CNR Capability during a Scarcity Event from counting that output in determining its Shortage Event Availability Score is both unfair and irrational and should be rejected for three reasons. First, PSEG argues that the fact that the unit operated during a Shortage Event at a particular level of output provides definitive proof that it contributed to reliability during extreme system conditions at a specified level of output. Second, PSEG contends that the proposed rule puts procedure over substance in treating the CNR rating as the potential maximum of the unit's reliability under all circumstances. Finally, PSEG argues that considering the unit's actual output for determining performance does not undermine deliverability rules in any respect. Therefore, PSEG contends that if a unit can operate above its CNR rating in real time under ISO-NE dispatch control, that performance should be incorporated into the owner's Shortage Event Availability Score.

c. Answers

52. In its answer, ISO-NE asserts that PSEG misunderstands the changes to the calculation of hourly availability scores when it states that a unit's Shortage Event Availability Score would be charged with a full 60 minutes of unavailability for an hour that included a 30 minute Scarcity Event. ISO-NE explains that it is true that it will

calculate an availability score for each whole hour that contains any portion of a Shortage Event, even if that Shortage Event is less than an hour in duration. However, that hourly availability score, which may not exceed 100 percent, will be calculated as a percentage by dividing the resource's available MWs in the hour by its CSO. The availability score for each hour will be weighted by the amount of the Shortage Event that falls within that hour so each hourly availability score is weighted based on the number of minutes of the Shortage Event that falls within that hour. Therefore, ISO-NE states that the revised rules do not establish a minimum one-hour period of non-availability, and performance during hours containing less than 60 minutes of a Shortage Event is expressly and carefully weighted to account for that fact.

53. In addition, ISO-NE argues that application of the CNR Capability Cap to the hourly available MW calculation is appropriate. ISO-NE explains that it is the hourly available MW calculation that is being capped at the resource's CNR Capability, not the resource's Shortage Event Availability Score, which itself is capped at 100 percent. According to ISO-NE, capping a resource's hourly available MW is necessary to ensure that the requirements associated with receiving CNR Interconnection Service, including satisfying the overlapping impacts analysis in the Forward Capacity Auction qualification process, are not bypassed. ISO-NE states that a resource, or portion thereof, that does not have CNR Interconnection Service may be eligible to operate in the energy markets with MW above its CNR Capability, but notes that such MW have not met the overlapping impact standard and other requirements associated with capacity resources. Therefore, output above CNR Capability does not count toward meeting a CSO.

54. In its answer, NEPOOL states that the instant proposal is reasonable without PSEG's requested changes pertaining to availability-related calculations. According to NEPOOL, both of PSEG's issues were raised in the stakeholder process, yet neither issue rose to the level of a proposed amendment to the market rule changes presented to NEPOOL for vote. NEPOOL argues that contrary to PSEG's assumptions, the revised rules do not establish a minimum one-hour period of non-availability. Further, NEPOOL asserts that performance during hours containing less than 60 minutes of a Shortage Event is expressly and carefully weighted and accounted for.

d. Commission Determination

55. We find ISO-NE's proposed revisions to the calculation of Shortage Event Availability Scores to be just and reasonable. Specifically, we reject PSEG's protest that ISO-NE's failure to use sub-hourly measurement in the calculation of Shortage Event Availability Scores is unfair. ISO-NE proposes to calculate an availability score for each resource for each hour that contains any portion of a Shortage Event, based on the

performance of that resource during the hour.²⁹ While it is plausible that ISO-NE could calculate an availability score for just the portion of the hour that included the Shortage Event, ISO-NE points out that current market settlements are based upon hourly data, and systems, databases and reports are structured for hourly data. Therefore, it would likely require significant new infrastructure, resources, time, and expense for ISO-NE to perform such sub-hourly measurement.

56. Instead, ISO-NE proposes to calculate a time-weighted Shortage Event Availability Score for each resource by multiplying the resource's hourly availability score by the number of minutes of the Shortage Event in that hour, and then dividing the product by the total number of minutes in the Shortage Event.³⁰ By performing this time-weighted calculation, ISO-NE accounts for the fact that a Shortage Event may not last for an entire hour. Therefore, contrary to PSEG's assertions, ISO-NE's proposed revisions will not result in a unit's Shortage Event Availability Score being charged with a full 60 minutes of unavailability for an hour that included a Scarcity Event less than 60 minutes in duration. PSEG has not demonstrated that ISO-NE's approach to the determination of availability scores is unjust and unreasonable, and we will therefore reject PSEG's protest in this matter.

57. We also reject PSEG's protest that the CNR Capability Cap should not be applied in the calculation of hourly available MWs. ISO-NE explains that its proposal reflects the integration of relevant interconnection queue rules with FCM rules.³¹ Specifically, ISO-NE's proposal to include the CNR Capability Cap ensures that the requirements associated with receiving CNR Interconnection Service, including satisfying the overlapping impacts analysis in the Forward Capacity Auction qualification process, are not bypassed. We agree that this is appropriate. The overlapping impacts analysis verifies that resources selected to perform in the Forward Capacity Auction provide incremental capacity to the system. As stated by the Filing Parties, a capacity resource receives CNR Interconnection Service for the amount of capacity that (1) can be delivered in accordance with the Capacity Capability Interconnection Standard (which includes the overlapping impact review) and (2) has received a CSO in the FCM.

²⁹ Market Rule 1, proposed § III.13.7.1.1.2.

³⁰ *Id.* proposed § III.13.7.1.1.1.A.

³¹ See *ISO New England Inc.*, 126 FERC ¶ 61,080 (2009). This order accepted revisions to the ISO-NE Tariff to resolve issues related to the relationship between the Forward Capacity Market and the generator interconnection procedures. Among other things, the revisions established a new level of interconnection service – CNR Interconnection Service.

Accordingly, ISO-NE's proposal to cap hourly available MWs at CNR Capability is necessary to prevent MWs that have not achieved CNR Interconnection Service from circumventing the deliverability requirement and being counted as capacity.

The Commission orders:

The Filing Parties' proposed tariff sheets are hereby accepted and made effective July 15, 2009, as requested.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.