

149 FERC ¶ 61,211
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Footprint Power Salem Harbor Development LP

Docket No. ER15-60-000

ORDER GRANTING DEFERRAL REQUEST

(Issued December 5, 2014)

1. On October 7, 2014, pursuant to section 205 of the Federal Power Act (FPA)¹ and Section III.13.3.7 of ISO New England Inc.'s (ISO-NE) Transmission, Markets and Services Tariff (Tariff),² Footprint Power Salem Harbor Development LP (Footprint) filed a request for a one-year deferral of its Capacity Supply Obligation³ obtained in ISO-NE's seventh Forward Capacity Auction (FCA 7) for the Capacity Commitment Period⁴ beginning on June 1, 2016. As discussed below, we grant Footprint's request to defer its Capacity Supply Obligation until June 1, 2017.

¹ 16 U.S.C. § 824d (2012).

² ISO New England Inc., ISO New England Inc. Transmission, Markets and Services Tariff, [III.13.3, III.13.3 Critical Path Schedule Monitoring \(8.0.0\)](#), § III.13.3.7.

³ A Capacity Supply Obligation is an obligation to provide capacity from a resource, or a portion thereof, to satisfy a portion of the Installed Capacity Requirement. A Capacity Supply Obligation is acquired through a Forward Capacity Auction, a reconfiguration auction, or a Capacity Supply Obligation Bilateral. ISO-NE Tariff section I.2.

⁴ A Capacity Commitment Period is the one-year period from June 1 through May 31 for which obligations are assumed and payments are made in the Forward Capacity Market.

I. Background

A. Footprint's Facility

2. Footprint states that, in early 2010, it identified the Salem Harbor Power Station (Salem Harbor) as a potential facility for redevelopment and, on August 3, 2012, it acquired Salem Harbor from Dominion Energy Salem Harbor, LLC. Footprint states that, in place of Salem Harbor's existing facility, it will build two state-of-the-art, efficient, low-emission, quick-start natural gas turbine generators; two steam-turbine generators; and two heat-recovery steam generators, including pollution control equipment (collectively, the Facility). Footprint states that the Facility will have an aggregate capacity of 674 MW and be located on a roughly 20-acre portion of the 65-acre Salem Harbor site. Footprint explains that about half of the output of the Facility will be available within 10 minutes, and the entire output of the Facility will be available within another 30 minutes.⁵

3. Footprint explains that the Facility cleared in merit in FCA 7, representing the first time an unsubsidized and uninstalled resource cleared in ISO-NE's Forward Capacity Market (FCM). Footprint also states that it exercised its ability under the Tariff to lock-in its capacity revenues for a period of five years. Footprint contends that this provision is intended to make it possible for a merchant resource to obtain financing based on revenues to be received in the FCM. Footprint explains that, at that time, five years of capacity market revenue was viewed as the minimum time necessary for lenders to be willing to finance a new merchant project.⁶ After clearing in FCA 7, Footprint states that it had 39 months to obtain all necessary permits, secure financing arrangements and complete construction of the plant, a process that had never been tested for a new plant not subsidized or sponsored by a state.⁷

B. ISO-NE Tariff

4. Under the Commission-accepted deferral process,⁸ the resource must first request and receive from ISO-NE a written reliability determination indicating that the absence of

⁵ Footprint Transmittal at 7-9.

⁶ *Id.* at 11 (citing *ISO New England Inc.*, 147 FERC ¶ 61,173, at P 56 (2014)).

⁷ *Id.* at 12.

⁸ *ISO New England Inc.*, 148 FERC ¶ 61,185 (2014) (September 12, 2014 Order), *reh'g pending*.

the resource's capacity would result in a transmission system reliability issue in both the associated Capacity Commitment Period and the next Capacity Commitment Period. If ISO-NE makes such a determination, then the resource may file with the Commission for a one-year deferral of its Capacity Supply Obligation. The resource must include in its filing to the Commission (1) the reliability determination from ISO-NE; (2) a demonstration that the project's development delay is due to factors beyond the control of the resource; and (3) a demonstration that the deferral is critical to the resource's ability to achieve commercial operation.

5. If the Commission approves a resource's deferral request, then, under the deferral provisions, all of the rights, obligations, payments, and charges associated with the Capacity Supply Obligation will apply one year later than they otherwise would have applied without the deferral. This includes the multi-year new entry capacity price lock-in if the resource opted for such a lock-in at the time it first cleared the FCA.⁹ During the deferral period, the resource may not buy or trade out of its Capacity Supply Obligation¹⁰ and ISO-NE retains the right to seek termination of the Capacity Supply Obligation if the resource appears incapable of meeting its deferred commercial operation date. The approved revisions also state that within 30 days of the Commission's acceptance of a deferral request, the resource must submit any financial assurance that would apply to a resource that has not achieved commercial operation one year after the start of a Capacity Commitment Period in which it has a Capacity Supply Obligation.

II. Deferral Request

6. On October 7, 2014, Footprint filed a request for a one-year deferral of its Capacity Supply Obligation. Footprint states that it meets the three criteria for a deferral.

7. As to the first criterion, Footprint states that on August 18, 2014, ISO-NE issued the requisite determination that the Facility is needed for reliability in the 2016-2017

⁹ For FCAs 1-8, a new capacity resource could elect to lock in its first year price for five years. Beginning with FCA 9, the Commission accepted ISO-NE's proposal, as part of a new system-wide sloped demand curve construct, to extend the lock-in period to seven years. *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,173 (2014).

¹⁰ If the resource bought or traded out of any portion of its Capacity Supply Obligation prior to the Commission's approval of the deferral, the resource must forfeit any arbitrage profits gained through that transaction. Alternatively, if the resource covers the Capacity Supply Obligation at a loss and receives a deferral, it will still incur the loss.

Capacity Commitment Period as well as the subsequent 2017-2018 period.¹¹ Footprint states that, even with a one-year deferral, Footprint's Facility is the best option for satisfying the Northeastern Massachusetts (NEMA)/Boston capacity zone's reliability needs because it is farther along in the development process than a new replacement resource would be.¹²

8. As to the second criterion, Footprint contends that the delays preventing its Facility from achieving commercial operation are beyond its control. Footprint explains that roughly six months prior to FCA 7 (held in February 2013), it began applying for a combined total of eight local, state and federal permits for the Facility. Of particular relevance, more than a month before FCA 7 was conducted, it applied for a federal Prevention of Significant Deterioration (PSD) permit.¹³ However, the Facility was substantially delayed by the last-minute appeal of the PSD permit. Footprint states that the appeal was not rejected until September 2, 2014, and the Massachusetts Department of Environmental Protection subsequently issued the final PSD permit on September 11, 2014. Footprint contends that there was nothing else it could have done to expedite the permit process.¹⁴ Footprint states that obtaining a PSD permit, even if it is not appealed, necessarily takes time, as it involves a five-phase process: (1) pre-application; (2) application; (3) draft permit preparation; (4) public participation; and (5) final decision to issue or deny a PSD permit. Footprint notes that the Massachusetts Department of Environmental Protection took nearly nine months to complete the draft permit application.¹⁵ Footprint contends that waiting for the next auction (FCA 8) would

¹¹ Footprint submitted ISO-NE's determination as exhibit 5 of the current filing.

¹² Footprint Transmittal at 13-14.

¹³ Footprint explains that the PSD permitting program is a Clean Air Act permitting requirement for any new or modified source of air pollution including power plants. Footprint notes that while it is a federal permit, issuance of a PSD permit in the NEMA/Boston area is controlled by the Massachusetts Department of Environmental Protection. Footprint notes that the Massachusetts Department of Environmental Protection initially issued the permit on January 30, 2014, which was appealed, as discussed herein.

¹⁴ Footprint Transmittal at 15.

¹⁵ *Id.* at 32-33.

not have made the process any faster, and Footprint likely would still be a year from completing the permit process rather than just completing it now.¹⁶

9. Footprint further contends that it is the first merchant resource in New England to rely solely upon auction revenues to obtain financing to construct the Facility, and it cannot proceed with construction while some permits are pending or while financing is in limbo. Footprint explains that the appeal of the PSD permit prevented construction of the Facility from beginning during the pendency of that appeal because, by statute, that appeal stays the effectiveness of the PSD permit.¹⁷ Footprint states that it has now obtained all requisite permits.

10. As to the third criterion, Footprint states that the deferral is critical for the Facility to achieve commercial operation. Footprint contends that the delay caused by the final appeal of the PSD permit and the resulting uncertainty of revenues associated with the first year of Footprint's five-year capacity commitment impaired its ability to procure the financing necessary to construct the Facility. Footprint states that, without a deferral, financing parties will assume that Footprint will be entitled to only four years of capacity payments. Noting that the lock-in period recently was increased from five to seven years,¹⁸ Footprint states that the Commission explicitly recognized that the five-year lock-in "is intended to provide predictable revenues and facilitate financing for new capacity."¹⁹

III. Notice of Filing and Responsive Pleadings

11. Notice of the filing was published in the *Federal Register*, 79 Fed. Reg. 62,129 (2014), with interventions and protests due on or before October 28, 2014. ISO-NE, New England Power Pool Participants Committee, Calpine Corporation, NRG Companies,²⁰

¹⁶ *Id.* at 16-17.

¹⁷ *Id.* at 17-18.

¹⁸ *Id.* at 37 (citing *ISO New England Inc.*, 147 FERC ¶ 61,173 at P 56).

¹⁹ *Id.* at 38-39 (citing *Devon Power LLC*, 115 FERC ¶ 61,340, at P 16 (2006)).

²⁰ NRG Companies include NRG Power Marketing LLC and GenOn Energy Management, LLC.

Exelon Corporation (Exelon), Emera Energy Services Inc., PSEG Companies,²¹ and the Attorney General of Massachusetts and the City of Salem, Massachusetts (Mass AG) filed timely motions to intervene. The New England States Committee on Electricity (NESCOE) submitted a motion to intervene out-of-time on November 4, 2014. Massachusetts Department of Public Utilities (Massachusetts DPU) filed a notice of intervention and comments. Exelon, Mass AG, and Senator Joan Lovely filed comments. PSEG Companies and NRG Companies (Protestors) jointly submitted a protest. On November 12, 2014, ISO-NE and Footprint filed answers. On December 3, 2014, Jeffrey Brooks, William Dearstyne, Linda Haley, and Andrea Maubourquette (collectively, Ratepayer-Residents) filed an untimely motion to intervene and protest and Footprint filed an answer to that protest. On December 4, 2014, Exelon Corporation filed an answer to ISO-NE.

IV. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely-filed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant NESCOE's and Ratepayer-Residents' late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits answers to protests unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Comments, Protests, and Answers

15. Mass AG, Massachusetts DPU, and Senator Lovely of Massachusetts support Footprint's Capacity Supply Obligation deferral application (collectively, Supporting Parties). Supporting Parties contend that Footprint's Facility ensures reliability in the region, the permitting delays were beyond Footprint's control, and the deferral is necessary to achieve commercial viability. Massachusetts DPU and Mass AG state that

²¹ PSEG Companies include PSEG Power LLC, PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC.

Footprint's Facility is the best resource to address reliability needs in the NEMA/Boston capacity zone because Footprint is the furthest along the development and permitting process than any other resource. Mass AG states the review period for the PSD permit and resulting appeal are under the Massachusetts Department of Environmental Protection's statutory obligations and therefore beyond Footprint's control.²²

Massachusetts DPU contends that under the current rules there are cases, like Footprint's, in which the 39-month planning period is not sufficient for reasons beyond the control of a new capacity resource, such as permitting delays and appeals.²³ Massachusetts DPU also contends that the PSD permit appeal had the effect of delaying the completion of the project's financing because project financing typically depends on the resolution of significant regulatory and permit issues.²⁴

16. Exelon submitted comments, taking no position on the proposed deferral application. However, Exelon states there are other alternatives that can address the NEMA/Boston capacity zone reliability needs for the FCA 8 commitment period (2017/2018). Specifically, Exelon states it has a project that could, if cleared in the FCA 10 auction, help address reliability issues for the FCA 8 capacity commitment period through participation in the annual reconfiguration auction for FCA 8. Exelon also states that pending Commission approval of waivers of certain Tariff deadlines, the same project could participate in the FCA 9 auction in February 2015, and be potentially available through participation in the annual reconfiguration auction for part or all of the FCA 7 capacity commitment period.²⁵

17. Protestors request that the Commission reject the instant filing or set the matter for hearing and settlement judge procedures. Protestors argue that Footprint has not met the criteria necessary to obtain a deferral. In addition, Protestors argue that Footprint has failed to acknowledge the significant expense that a deferral will have for load.²⁶

²² Mass AG Comments at 5-6.

²³ Massachusetts DPU Comments at 5.

²⁴ *Id.* at 6.

²⁵ Exelon Comments at 2.

²⁶ Protestors contend that the costs to load include approximately \$30 million related to applying an inflator to the annual payment rate for the 2016-2017 Capacity Commitment Period through the 2021-2022 period, approximately \$43 million to cover the transactions believed to be already entered into for the deferral year (2016-2017), and

18. Protestors argue that ISO-NE's reliability determination does not suggest a need for Footprint's Facility on a sub-zonal basis. Protestors note that the available information only shows a need for generic MWs of capacity within the NEMA/Boston zone, and claim this is contrary to requirements in section III.13.3.7 of ISO-NE's Tariff. According to Protestors, in assessing the NEMA/Boston zone when the former owners of the Salem Harbor Station site announced their intention to proceed with retirement, ISO-NE stated that "five transmission line upgrades were advanced from the Greater Boston study work to manage the upcoming retirement," indicating, according to the Protestors, that the truly localized reliability contributions of the Salem Harbor station had been resolved.²⁷

19. Protestors also argue that ISO-NE's reliability study was not placed into the record thereby providing the Commission no opportunity to review how ISO-NE performed the study and the extent to which Footprint's Facility is actually needed for reliability. Protestors contend that, if the study were part of the record, it would show that it fails to indicate any particular locational reliability need, and would provide no indication of the extent of the reliability need, only that "the resource" is needed due to 176 MW of the unit being required to originally meet the Local Sourcing Requirement in Boston when it cleared the FCA 7 auction.²⁸ Protestors contend that there are a number of alternative ways for ISO-NE to achieve whatever reliability need may exist in the NEMA/Boston capacity zone in the absence of the Footprint Facility.

20. In addition, Protestors argue that the permitting delays described by Footprint are not beyond its control. Protestors argue that there are risks inherent in the development of any new project that can be predicted and managed. Protestors argue that Footprint should have anticipated these delays when planning its project, determining when to enter the auction and arranging financing.²⁹

21. Finally, Protestors argue that Footprint has failed to show that the deferral is critical to the Facility achieving commercial operation. Protestors contend that there is

approximately \$32 million for the extension year (2021-2022), should the capacity clearing price equal Net CONE. Protestors' Protest at 4.

²⁷ Protestors' Protest at 8 (citing ISO-NE presentation to NEPOOL Reliability Committee, "Status of North Shore Upgrades – Salem Harbor Station Non-Price Retirement," December 19, 2013).

²⁸ *Id.* at 9.

²⁹ *Id.* at 10.

nothing in the record that directly ties the delay in permitting to the inability to obtain financing. Protestors state that Footprint has provided no financial records, analyses or expert witnesses to demonstrate the cause of its inability to obtain financing. Therefore, Protestors contend that there is no record upon which to determine whether granting a deferral is absolutely necessary to allow the unit to move forward, or whether just a little more time is required for the project to move itself forward and obtain the financing it needs on its own merits.³⁰ In addition, Protestors argue that Footprint's claim that a four-year lock-in period is not enough to finance a new merchant project in New England is speculative in that, even with the deferral, there is no evidence that Footprint's Facility will actually be able to secure the necessary financing and thereafter achieve commercial operation.³¹

22. In its answer, ISO-NE contends that its reliability study was performed in precise accordance with its Tariff,³² and that Protestors' claims to the contrary are specious. ISO-NE notes that the reliability study's use of "second contingency" (or N-1-1) analysis is mandated by the North American Electric Reliability Corporation (NERC), the Northeast Power Coordinating Council, Inc. (NPCC), and ISO-NE's Planning Procedures.³³

23. ISO-NE states that its Tariff provides for a reliability review analogous to the reliability review it conducts to determine whether the capacity associated with a delist bid or a Non-Price Retirement Request is needed for reliability.³⁴ ISO-NE explains that the deferral reliability review provides that a project is needed for reliability if the absence of the project's capacity will result in a violation of any one of the following: a NERC standard, an NPCC criterion, or ISO-NE System Rules. ISO-NE states that, in the absence of the Footprint Facility's capacity, the reliability analysis found violations of all three.

³⁰ *Id.* at 11-12.

³¹ *Id.* at 12.

³² ISO-NE Answer at 4 (citing Tariff section III.13.3.7).

³³ *Id.* at 5-7.

³⁴ *Id.* at 4 (citing Tariff sections III.13.3.7 and III.13.2.5.2.5).

24. ISO-NE contends that its Reliability Report³⁵ provides no discussion whatsoever of the Local Sourcing Requirement; instead, it shows that the Facility's capacity is needed for reliability because the capacity solves local reliability issues within NEMA/Boston. ISO-NE states that while the Reliability Report demonstrates that Footprint's Facility is needed to solve local issues within NEMA/Boston, the FCA software determined that without the Facility's capacity, NEMA/Boston would not satisfy its Local Sourcing Requirement. Further, ISO-NE states that, in the absence of the Facility's capacity, the Reliability Report shows twenty transmission lines with thermal violations in the Capacity Commitment Period beginning in June 2016 and seventeen transmission lines with thermal violations in the period beginning in June 2017. ISO-NE notes that, while some of these violations can be addressed without generation from Footprint's Facility, many cannot.³⁶

25. ISO-NE further contends that Exelon's comments should be rejected because they are not on the merits of this proceeding, a proceeding in which the Commission is to determine whether Footprint's application for a deferral of its Capacity Supply Obligation has merit. ISO-NE further contends that if Exelon believes that the conclusion that Footprint's Facility is needed for reliability is unsound, Exelon should file a protest and present its evidence for such a position.³⁷

26. In its answer, Footprint contests Protestors' claim that "there is no record upon which to determine whether granting a deferral is absolutely necessary to allow the unit to move forward, or whether just a little more time is required for the project to move itself forward and obtain the commitments it needs on its own merits."³⁸ Footprint argues that this overstates the Commission-approved standard for granting a deferral, which is that the applicant must show "it is unlikely to achieve commercial operation without a one-year deferral of its Capacity Supply Obligation."³⁹

³⁵ ISO-NE explains that the report contains Critical Energy Infrastructure Information and therefore is being filed as CEII. ISO-NE also explains that the report was provided to the Reliability Committee for discussion at its August 15, 2014 meeting.

³⁶ ISO-NE Answer at 7-8.

³⁷ *Id.* at 8-9.

³⁸ Footprint November 12, 2014 Answer at 1 (citing Protestors' Protest at 12).

³⁹ *Id.* (citing September 12, 2014 Order, 148 FERC ¶ 61,185 at P 25).

27. Footprint contends that it has made this showing by providing supporting testimony indicating that “potential lenders and equity providers remain unwilling to provide financing due to concerns that Footprint may not be entitled to five full years of stable revenue as a result of the delays associated with the permit appeals.”⁴⁰ Footprint further explains that, subsequent to submitting its deferral request, on October 20, 2014, it entered into a Letter of Intent with Highstar Capital IV, LP (Highstar) pursuant to which Highstar has expressed a non-binding intent to invest up to 100 percent of the construction equity necessary to finance the project. In addition, Footprint explains that a subsidiary of Toyota Tsusho Corporation is also considering maintaining a minority participation in the project. Footprint explains that Highstar is working with Footprint to enter into definitive transaction documents as soon as possible, but that a key condition precedent of any such definitive documentation will be an order from the Commission granting the application in this docket. Footprint explains that, upon the Commission’s approval of a deferral, and the necessary Highstar Investment Committee and Toyota Board approvals and Credit Committee approvals from each of the lenders, the parties are anticipating a financial close on December 15, 2014.⁴¹

28. Ratepayer-Residents contend that Footprint’s deferral request is not justified because the delay was not caused by the permit appeal but by Footprint itself and that Ratepayer-Residents’ appeal had merit.⁴² Ratepayer-Residents claim that the delay might have been avoided if Footprint had been more cooperative and taken fewer risks. Ratepayer-Residents further state that the appeal was based on Footprint’s calculated decision to take shortcuts in analyzing the air pollution limits that the Facility will be subject to and that Footprint should have expected the appeal.⁴³ Ratepayer-Residents argue that it is not clear that the permit appeal is the only cause of Footprint’s failure to begin operation because there is no public evidence that Footprint has yet completed negotiation of certain required bilateral agreements.⁴⁴ Ratepayer-Residents also argue that any gap in capacity is likely to be filled without Footprint’s Facility and that granting the deferral might allow Footprint to receive rates that are above the market value that it

⁴⁰ *Id.* at 1-2 (citing Warner Testimony).

⁴¹ *Id.* at 2.

⁴² Ratepayer-Residents Protest at 3.

⁴³ *Id.* at 4-5.

⁴⁴ *Id.* at 5. Ratepayer-Residents state that these include a community benefits agreement required by the state Energy Facilities Siting Board and a payment-in-lieu-of-taxes (PILOT) agreement.

should receive for this capacity based on the demand conditions during the new deferred obligation period.⁴⁵

29. In its answer, Footprint asserts that the environmental and land use disputes raised by Ratepayer-Residents are beyond the scope of the deferral criteria set forth in the Tariff.⁴⁶ Footprint also asserts that the Commission should not grant Ratepayer-Residents' late-filed motion to intervene, arguing that Ratepayer-Residents were on notice of the proceeding and did not demonstrate reasonable diligence, and that any further delay will cause prejudice to Footprint and the other residents of the Boston load pocket.⁴⁷

30. In its answer, Exelon contends that upgrades to its existing Mystic units 8 and 9 can provide 100 to 140 MW of additional generation in the NEMA/Boston zone.⁴⁸ Exelon states that meetings were held in August 2014 with ISO-NE representatives, and during those meetings Exelon acknowledged certain waivers would be required for the project to participate in the 2016 – 2017 and 2017 – 2018 capacity commitment periods.⁴⁹ Exelon further states that ISO-NE advised Exelon that ISO-NE would not support the needed waiver requests, and accordingly, Exelon did not seek the necessary waivers from the Commission.⁵⁰

C. Commission Determination

31. We grant Footprint's request for a one-year deferral of its Capacity Supply Obligation until June 1, 2017, as requested. As discussed further below, we find that Footprint has met the requirements set out in section III.13.3.7 of ISO-NE's Tariff.

32. As to the first criteria, Footprint submitted ISO-NE's reliability determination that the Facility is needed for reliability in the 2016-2017 Capacity Commitment Period and the subsequent 2017-2018 period. Further, ISO-NE explains, in its answer, that it conducted a reliability review, consistent with the requirements of the Tariff, to

⁴⁵ *Id.* at 6-7.

⁴⁶ Footprint December 3, 2014 Answer at 2.

⁴⁷ *Id.* at 4-7.

⁴⁸ Exelon December 4, 2015 Answer at 3.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

determine if the absence of the Facility's capacity would result in a violation of a NERC standard, an NPCC criterion, or ISO-NE System Rules and the reliability analysis found that there would be violations of all three. Specifically, ISO-NE found that in the absence of the Facility's capacity, there would be multiple thermal violations in both the Capacity Commitment Period beginning in June 2016 and the period beginning in June 2017, and that many of these violations cannot be addressed without Footprint's Facility. Although Protestors and Ratepayer-Residents assert that the Facility is not actually needed for reliability, the Reliability Report demonstrates that the Facility is needed to solve local reliability issues within the NEMA/Boston capacity zone. Moreover, we note that the Facility is better situated to address reliability concerns in NEMA/Boston than other alternatives, such as Exelon's proposed project, because Footprint's Facility has already cleared an FCA and completed the lengthy permitting process.

33. As to the second criteria, we find that Footprint has demonstrated that it has failed to achieve commercial operation on time due to factors beyond its control. Specifically, as supported by the Mass AG and Massachusetts DPU, the delay caused by the appeal of the PSD permit was beyond Footprint's control. Although Footprint initially submitted an application for the permit before FCA 7 was conducted, the PSD permit appeal was not resolved until September 2, 2014, when the Environmental Appeals Board dismissed the appellants' petition for review. At the time Footprint cleared FCA 7, it could not have known that it would take over two years for the permit to be issued. This permit and appeal process delayed the financing of the Facility and therefore delayed Footprint's ability to begin construction. Ratepayer-Residents' claim that there is no evidence that Footprint has negotiated certain bilateral agreements, and that such failure might have contributed to the delay, is speculative and unpersuasive.

34. As to the third criteria, we find that Footprint has demonstrated that the deferral is critical to the Facility's ability to achieve commercial operation. Granting Footprint a one-year deferral of its Capacity Supply Obligation provides the best chance for the Facility to come online in time for the 2017-2018 Capacity Commitment Period, an outcome that would at least limit the duration of any capacity shortfall to one year. Without the deferral, Footprint has shown that it faces greater difficulties in obtaining financing on favorable terms because its five year lock-in commitment period would be shortened by one year. Specifically, Footprint provided testimony from its financial advisor stating that potential lenders and equity providers are unwilling to provide financing because of concerns that Footprint would not be entitled to five years of stable revenue due to the delays from the permit appeals. While Protestors assert that Footprint has not proven that the Facility will not be built in the absence of a deferral, we note that the Tariff only requires Footprint to show that the deferral is *critical* to its ability to

achieve commercial operation, not that the deferral is absolutely necessary.⁵¹ Even if Footprint's ability to obtain financing is not wholly contingent upon a deferral, the terms under which financing will be obtained likely are impacted by a deferral, particularly for the first new merchant resource relying on the FCM for funding. Indeed, Footprint states in its answer that several equity providers have made approval of the pending deferral a condition precedent to participation in the project. Thus, Footprint has shown that maintaining the five-year capacity revenue lock-in period is critical in order to increase the assurance to potential investors of a longer, stable revenue stream during the initial period of commercial operation.

35. Protestors express concerns that the Facility may not achieve commercial operation even if a deferral is granted. While there may be some risk involved in granting any deferral, in this case Footprint has demonstrated, as discussed above, that granting the deferral will help ensure that the Facility becomes operational. In addition, under the deferral rules, Footprint is subject to additional risk if the Facility ultimately does not become operational. A resource that receives a deferral must submit a portion of its required financial assurance on an accelerated timeline. Specifically, the Tariff requires that within 30 days of the date of this order, Footprint must post an amount equal to the amount that would apply to a resource that has not achieved commercial operation one year after the start of the Capacity Commitment Period in which it has a Capacity Supply Obligation. Moreover, ISO-NE retains the right to seek termination of the Capacity Supply Obligation if Footprint appears incapable of meeting its deferred commercial operation date of June 1, 2017.

36. As to remaining arguments regarding additional costs to load, and alternative projects that could potentially meet New England's reliability needs, those arguments are beyond the scope of this proceeding, which is limited to whether Footprint has met the three requirements under the Tariff for a deferral of its Capacity Supply Obligation. Further, Ratepayer-Residents' arguments regarding the merits of the PSD permit application and appeal are not properly before this Commission.

⁵¹ See also September 12, 2014 Order, 148 FERC ¶ 61,185 at P 25 ("The resource must then demonstrate to the Commission that it is unlikely to achieve commercial operation without a one-year deferral of its Capacity Supply Obligation...").

The Commission orders:

Footprint's request for a one year deferral of its Capacity Supply Obligation until June 1, 2017, is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.