

128 FERC ¶ 61,270  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Connecticut Municipal Electric Energy Cooperative,  
Massachusetts Municipal Wholesale Electric Company,  
Pascoag (RI) Utility District, and Vermont Department  
of Public Service,

Complainants,

Docket No. EL09-60-000

v.

ISO New England Inc.,  
Respondent

ORDER DENYING COMPLAINT

(Issued September 18, 2009)

1. On June 11, 2009, the Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Pascoag (RI) Utility District and Vermont Department of Public Service (collectively known as Public Entities) filed a complaint against ISO New England Inc. (ISO-NE) seeking to prevent the elimination of the reserve margin gross-up (Reserve Margin Gross-Up) for New York Power Authority (NYPA) imports in the forward capacity market (FCM). In this order, the Commission denies the complaint because the Public Entities have failed to establish sufficient grounds to grant a departure from the ISO-NE tariff and treat the NYPA imports differently than similarly situated resources.

**I. Background**

2. In 2008, the Commission reviewed an ISO-NE informational filing providing FCM resource qualification ratings for use in the forward capacity auction (Forward Capacity Auction) for the 2011-12 FCM commitment period (2008 Informational Filing).<sup>1</sup> In the 2008 Informational Filing, ISO-NE continued the practice of applying a Reserve Margin Gross-Up factor to certain resource qualification ratings. The resource

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<sup>1</sup> ISO-NE 2008 Informational Filing, Docket No. ER08-1513-000, Attachment C, (Sept. 9, 2008).

qualification ratings determine how much capacity a resource is obligated to provide, if the resource assumes a capacity supply obligation in a Forward Capacity Auction.<sup>2</sup> Resources affected by the Reserve Margin Gross-Up include the NYPA imports, the subject of this complaint, and demand response resources. The gross-up mechanism increased the resources' capacity values reflected in the resource qualification ratings by a reserve margin equal to the Installed Capacity Requirement (ICR)<sup>3</sup> divided by the expected system peak load for New England.<sup>4</sup> Historically, vertically-integrated utilities employed the Reserve Margin Gross-Up when making cost-benefit analyses to determine whether to build new generation or implement demand-side programs.<sup>5</sup> In the proceeding to review the 2008 Informational Filing, there were concerns that use of the gross-up for demand response resources in the FCM may result in a failure to procure sufficient capacity in the Forward Capacity Auction to satisfy the ICR.<sup>6</sup> Despite a protest over the retention of the gross-up, the Commission accepted the 2008 Informational Filing because: (1) the gross-up was required by the then-current tariff, (2) ISO-NE was able to cure any potential capacity deficiency through subsequent capacity acquisitions, and (3) continued use of the gross-up was under evaluation in the NEPOOL stakeholder process. The Commission deferred consideration of the Reserve Margin Gross-Up issue until ISO-NE filed tariff revisions to address the issue following completion of the stakeholder process.

3. In the December 2008 Order, the Commission accepted an ISO-NE and New England Power Pool (NEPOOL) filing of tariff changes to eliminate the Reserve Margin

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<sup>2</sup> See *ISO New England Inc.*, 125 FERC ¶ 61,155, at P 7 (2008) (accepting 2008 Informational Filing).

<sup>3</sup> The Installed Capacity Requirement (ICR) reflects the amount of resources necessary such that the probability of disconnecting firm load (a loss of load expectation) will satisfy the reliability requirement of 0.1 disconnects per year.

<sup>4</sup> See *ISO New England Inc.*, 125 FERC ¶ 61,155, at P 23 (2008). ISO-NE's ICR determination and capacity market process were discussed in the D.C. Circuit order, *Conn. Dept. of Public Utility Control v. FERC*, 567 F.3d 477, 480 (D.C.Cir. 2009) (affirming Commission jurisdiction over ICR determination).

<sup>5</sup> The prevailing assumption in these analyses was that each megawatt of reduced system peak load resulting from demand response resources not only avoids the construction of generation capacity equal to the reduction, but it also avoids having to procure the generation reserve margin to address the imperfect availability of generation resources.

<sup>6</sup> *ISO New England Inc.*, 125 FERC ¶ 61,355, at P 5 (2008) (December 2008 Order).

Gross-Up for demand response resources from ISO-NE's market rules for the FCM.<sup>7</sup> The Commission found that the use of the current Reserve Margin Gross-Up has the potential to harm New England because it can lead to under-procurement of resources in the Forward Capacity Auction.<sup>8</sup> As noted in the December 2008 Order, ISO-NE also intended to eliminate the NYPA imports' gross-up and was discussing the issue with its stakeholders.<sup>9</sup>

4. Subsequent to the December 2008 Order, ISO-NE delivered its informational filing providing FCM resource qualification ratings for the Forward Capacity Auction for the 2012-2013 FCM commitment period (2009 Informational Filing).<sup>10</sup> In the 2009 Informational Filing, ISO-NE reported the NYPA import resource qualification ratings as 84.1 MW, whereas the 2008 Informational Filing reported 97.640 MW, reflecting a gross-up.<sup>11</sup>

5. Although ISO-NE notes that the calculation for existing import capacity resources reflects the elimination of the NYPA import gross-up and seeks approval of the 2009 Informational Filing in that proceeding, ISO-NE acknowledges that a challenge to the removal of the NYPA imports gross-up has been filed in this proceeding and commits to resolving related issues in this proceeding.<sup>12</sup> Consequently, we address the NYPA imports in this proceeding, rather than through the order to be issued concurrently in Docket No. ER09-1424-000 which otherwise addresses issues relating to the 2009 Informational Filing.<sup>13</sup>

## **II. The Public Entities' Complaint**

6. Public Entities challenge ISO-NE's decision to discontinue use of the Reserve Margin Gross-Up to determine the NYPA imports' capacity resource ratings. The NYPA

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

<sup>8</sup> *Id.* P 33.

<sup>9</sup> *Id.* P 31.

<sup>10</sup> *See* the ISO-NE July 7, 2009 Informational Filing in Docket No. ER09-1424-000.

<sup>11</sup> 2009 Informational Filing, Attachment C, p. 180, and 2008 Informational Filing, Attachment C, p. 1.

<sup>12</sup> *See* ISO-NE, 2009 Informational Filing, filing letter at 5 n. 17.

<sup>13</sup> The 2009 Informational Filing will be addressed in the contemporaneously issued order, *ISO New England Inc.*, 128 FERC ¶ 61,266 (2009).

imports entitle Public Entities to firm power imported into New England from two hydroelectric power plants licensed to and operated by NYPA. Public Entities report that they discussed with ISO-NE its intention to eliminate the NYPA imports gross-up, reflected in the resource qualification ratings for the 2012-13 Forward Capacity Auction provided in the 2009 Informational Filing. Public Entities state also that they participated in the ISO-NE stakeholder process leading up to the elimination of the demand resource gross-up and attempted to preserve the application of the gross-up to the NYPA imports.

7. Public Entities allege that the elimination of the capacity gross-up for the NYPA imports is unjust and unreasonable due to: (1) the decades of established practice with respect to the NYPA imports, (2) the need to maintain the NYPA imports' historical treatment, and (3) recent Commission and ISO-NE statements regarding the need to preserve NYPA imports' capacity value in the development of the FCM. Public Entities assert that the NYPA imports are substantially different from demand response resources or any other resources participating in the FCM. Further, Public Entities state that they would lose approximately \$600,000 per year if ISO-NE eliminates the gross-up. Public Entities argue that there are no new or emerging facts that justify the elimination of the imports' gross-up. Thus, Public Entities request relief through a Commission order either (a) reversing ISO-NE's determination and requiring the reinstatement of the NYPA imports gross-up or (b) requiring ISO-NE to return to the prior treatment of load reduction accorded to these imports before the advent of Standard Market Design (SMD) in 2003.<sup>14</sup>

8. By way of historical background, Public Entities describe the NYPA imports as power deliveries to New England under two contracts from NYPA's Niagara and St. Lawrence hydroelectric projects. The two contracts entitle Public Entities to delivery of approximately 84.1 MW of firm hydropower from the NYPA projects. Public Entities report that NYPA was created in 1931 to develop the St. Lawrence project, with deliveries from the St. Lawrence project commencing in 1958, followed by Niagara project deliveries in 1962. The initial license for the St. Lawrence project required NYPA to make a reasonable portion of the capacity and output available to neighboring states.<sup>15</sup> Likewise, Public Entities report that the Niagara Redevelopment Act required the license to address capacity and output allocations, in order to increase competition in the marketplace and provide a preference for 50 percent of project power to public bodies

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<sup>14</sup> Public Entities explain that implementation of load reduction involves deducting the contract amount of the NYPA imports from each recipient's peak-hour metered loads for purposes of both ISO-NE's capacity market settlement and ICR determinations.

<sup>15</sup> Public Entities complaint at 14.

and nonprofit cooperatives.<sup>16</sup> The Commission renewed the St. Lawrence license for an additional 50-year term in 2003, when NYPA agreed to provide 4.25 percent of the project's firm power and associated energy to Connecticut, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont under contracts running through April 30, 2017.<sup>17</sup> The Niagara project was issued a new 50-year license effective September 1, 2007 through a settlement in which NYPA and the neighboring states agreed to preserve the status quo for preference power to public bodies and non-profit cooperatives in the neighboring states.<sup>18</sup> Contracts for Niagara project power between NYPA and Connecticut, Massachusetts, Rhode Island and Vermont continue through August 31, 2025.

9. Public Entities state that ISO-NE previously recognized NYPA imports' special status and characteristics in calculating the impact on the recipients' resource-adequacy obligations, which in turn, was reflected in the reduced level of reserves that New England needed to carry. In doing so, ISO-NE allocated the full amount of the load reduction to the NYPA import recipients. However, implementation of new SMD software forced load-reduction to cease, as the software could not easily accommodate the load reduction treatment. Public Entities state that they agreed not to oppose ISO-NE's changes since a Reserve Margin Gross-Up would replace the load reduction.

10. Furthermore, Public Entities note that in late 2007, ISO-NE recognized the importance of long-term contracts when it filed revisions to the FCM rules to address pre-existing long-term import contracts; the changes were necessary, since the FCM rules could have resulted in the partial abrogation of rights under pre-FCM capacity import contracts.

11. Public Entities cite the FCM settlement agreement, which stated that the NYPA imports' gross-up "shall be continued . . . during the transition, in as close as possible a manner to its treatment today."<sup>19</sup> Public Entities allege that there was no indication in the agreement language that the gross-up (or other form of special recognition) would be

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<sup>16</sup> *New York Power Authority*, 105 FERC ¶ 61,102, at 16-17 (2003), *order on reh'g*, 109 FERC ¶ 61,092 (2004).

<sup>17</sup> *Id.*, 105 FERC ¶ 61,102.

<sup>18</sup> *New York Power Authority*, 118 FERC ¶ 61,206, *clarified*, 120 FERC ¶ 61,266 (2007).

<sup>19</sup> Public Entities complaint at 19 (citing settlement agreement filed Mar. 6, 2006, at 23, section 11, part III(D)(4)(a) (FCM Settlement Agreement)). The FCM Settlement Agreement was filed in Docket Nos. ER03-563-030, *et al.*, and accepted by *Devon Power LLC*, 115 FERC ¶ 61,340 (2006).

eliminated. Public Entities note that this reference appears within the section dealing with post-transition period “Auction Mechanics” and not in the “Transition Period” section. Public Entities assert that even if the gross-up is not protected in the FCM Settlement Agreement, it would not preclude continuation or provide an independent basis for terminating the gross-up.

12. In addition, Public Entities argue that the NYPA firm capacity imports represent an almost perfectly-available resource due to the reliability of the underlying hydroelectric facilities, the firmness of power being imported, the delivery of the scheduled power at multiple interconnection points, and NYPA’s contractual replacement-energy obligations.<sup>20</sup> By contrast, Public Entities note that ISO-NE’s filing to eliminate the Reserve Margin Gross-Up for demand response resources stated that the average availability for active demand response during the prior five years was approximately 76 percent.<sup>21</sup> Thus, because demand response resources are no more available as a class than generating resources, Public Entities conclude that concerns of undue discrimination, which led ISO-NE to eliminate the Reserve Margin Gross-Up for demand response resources, do not apply to the highly available NYPA imports.

13. Public Entities assert that the imports have a decades-long track record of extremely reliable delivery to support either the continued application of a capacity gross-up or treatment as firm demand reductions. Further, Public Entities argue that the demand response resource gross-up could hypothetically cause a failure to meet the loss of load expectation standard, whereas application of the NYPA import gross-up causes no such similar failure since the gross-up quantities are much smaller. Public Entities assert that no harm occurred in the past under such treatment.

14. Public Entities note that in its filing addressed in the December 2008 Order, ISO-NE acknowledged that “[a] reserve margin gross-up is intended to reflect the amount of extra system capacity (or reserves) that would not be needed if the system peak load could be reduced with certainty by a perfectly available resource.”<sup>22</sup> Public Entities argue that the NYPA imports’ almost perfect availability to provide energy as scheduled breaks any connection between a technical “under-procurement” of capacity to meet the ICR and a resulting failure to satisfy the applicable loss of load expectation requirement.

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<sup>20</sup> Public Entities state that they have entered into a separate contract with NYPA for replacement energy and power when deliveries under the NYPA contract are curtailed during periods of low flows.

<sup>21</sup> Public Entities complaint at 27-28 & n.25 (citing ISO-NE filing to eliminate demand response resource gross-up in Docket No. ER09-209-000, transmittal letter at 6 n. 14 (Oct. 31, 2008)).

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

According to Public Entities, the results of the ICR calculation are not presented in terms of resource mixes; they are presented as a single amount, which is the amount of capacity of *average availability for the resource mix* used in calculating the ICR that would be needed to satisfy the loss of load expectation requirement. Public Entities go on to say that resources with better than average availability to deliver scheduled energy provide a proportionally greater contribution toward satisfying the loss of load expectation requirement than average capacity resources. Thus, Public Entities argue, while the NYPA import gross-up could displace up to 14 MW of average-availability capacity, the much-greater-than-average availability of the 84 MW firm capacity import makes up (or more than makes up) the difference. In sum, Public Entities assert that a firm load reduction reduces the needed system reserves by more than the face value of the load reduction.

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

#### **A. Federal Register Notice**

15. Notice of Public Entities' filing was published in the *Federal Register*, 74 Fed. Reg. 29,203 (2009), with interventions and comments due on or before July 1, 2009. Exelon Corporation, Mirant Parties,<sup>23</sup> and NEPOOL Participants Committee filed timely motions to intervene. On July 1, 2009, ISO-NE filed an answer to the complaint. On July 21, 2009, Public Entities filed an answer in reply to ISO-NE's answer. On August 5, 2009, ISO-NE submitted a subsequent answer responding to Public Entities' reply.

#### **B. ISO-NE Answer**

16. In its answer, ISO-NE states that Public Entities have not provided any evidence that the decision to discontinue the Reserve Margin Gross-Up for the NYPA imports violates any statute, regulation, or filed rate. ISO-NE asserts that, in fact, the discontinuation of the Reserve Margin Gross-Up is consistent with the filed rate, specifically, with the requirements set forth in section III.13 of Market Rule 1 (the FCM rules).

17. According to ISO-NE, the FCM rules, which implement the FCM settlement, mandate that ISO-NE procure the precise amount of capacity that is needed by the region to meet the ICR. ISO-NE asserts that the application of a Reserve Margin Gross-Up to the NYPA imports results in the under-procurement of ICR, contrary to the FCM rules. ISO-NE states that Public Entities concede this result but attempt to dismiss the under-procurement problem by noting that the NYPA imports have a high level of availability and that the gross-up is a small amount. ISO-NE contends that the relatively high level

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<sup>23</sup> Mirant Energy Trading, LLC (MET), Mirant Canal, LLC, and Mirant Kendall, LLC.

of availability of the NYPA imports is already taken into account in the ICR calculation,<sup>24</sup> that there are other types of high availability capacity suppliers who do not receive Reserve Margin Gross-Ups, and that the fact that the gross-up amount is “small” is completely irrelevant.

18. ISO-NE asserts that eliminating the Reserve Margin Gross-Up for the NYPA imports is consistent with the Commission’s December 2008 Order, which accepted the elimination of the Reserve Margin Gross-Up for demand resources. ISO-NE states that applying a gross-up to the NYPA imports poses the same problems as the gross-up posed for demand response resources, in particular, the under-procurement of capacity in the Forward Capacity Auction. Thus, the practice is not only contrary to FCM rules but also has the potential to lead to a failure to satisfy the loss of load expectation reliability

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<sup>24</sup> ISO-NE’s answer, testimony of Dr. Robert G. Ethier, ISO-NE Vice President of Market Development, at p. 5-7, explains:

The ICR is calculated each year using a statistical model of the New England power system. The primary inputs to the model are the capacity values . . . of each resource . . . expected to provide capacity in the year being modeled, the expected availability of each resource, and a forecasted weekly load distribution for the years being modeled. . . . All else being equal, the presence of resources with higher availability . . . will result in a lower ICR than will the presence of resources with lower availability. . . . The problem [of a gross-up leading to under-procurement of the ICR] is a function of the fact that the ICR calculation already reflects the availability of resources, and that any highly available resource, including the NYPA imports, already has reduced the ICR when it is included in the reliability model because less reserves are needed to protect for the loss of these resources as compared with the higher reserves need[ed] to protect for the loss of other less available resources.

The testimony continues, explaining that a gross-up is furthermore not necessary to reward high availability, as the FCM rules already include a reward mechanism. According to the testimony, under the FCM, capacity resources need to be available during “shortage events” in order to receive capacity payments; resources not available during these shortage events therefore experience a diminution of capacity revenues. *Id.* at 8.

requirement. In addition, the practice fails to provide for comparable treatment of resources with similar availability characteristics.

19. ISO-NE responds to Public Entities' argument that a resource with near-perfect availability should retain a Reserve Margin Gross-Up, noting that the Commission was not persuaded by a similar argument in the December 2008 Order. ISO-NE also asserts that the Commission noted in the December 2008 Order that the request to continue the gross-up did not address the issue of comparable treatment of resources with similar availability characteristics. Likewise, according to ISO-NE, in Public Entities' proposal, no other capacity resources with similar or greater availability will be eligible for equivalent compensation. Finally, ISO-NE states that, as it explained in its filing requesting the elimination of the demand response gross-up, solving the under-procurement problem caused by the gross-up by increasing the ICR would increase the costs charged to electricity customers.

20. According to ISO-NE, the fact that a NYPA power allocation is at issue in the instant case provides no basis for distinguishing it from the treatment provided for other resources in the December 2008 Order. ISO-NE states that while it is well established that Public Entities are to be allocated power from the St. Lawrence and Niagara projects, nowhere does Congress nor the governing case law or policy indicate that NYPA power is entitled to a gross-up adder or "load reduction" treatment. According to ISO-NE, Public Entities seek to preserve the economic value of the firm capacity for which they have contracted through "extra credit" that no other resource in the market enjoys.<sup>25</sup>

21. ISO-NE states that, contrary to Public Entities' argument, ISO-NE is not changing a decades-long practice without justification; it is simply implementing the Commission-approved filed rate that requires it to procure the ICR. According to ISO-NE, the preferential treatment of applying a Reserve Margin Gross-Up for the NYPA imports is not a long-standing or settled practice but is instead a product of a compromise reached during the establishment of SMD. ISO-NE states that the consequences of under-procurement in the FCM are more severe than under the previous installed capacity (ICAP) market, because in the FCM only those resources with a capacity supply obligation must offer capacity.<sup>26</sup> ISO-NE states that even if the NYPA imports' gross-up treatment was in fact a settled practice, discontinuation of the practice is justified and not unjust or unreasonable because it resolves the under-procurement problem, provides more comparable treatment for different resource types, and assures that New England's consumers pay for no more capacity than is required to meet the ICR.

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<sup>25</sup> ISO-NE answer at 16 (quoting Public Entities complaint at 28).

<sup>26</sup> Under the ICAP market, all available resources had a "must-offer" requirement.

22. ISO-NE next argues that Public Entities fail to meet their burden under section 206 of the FPA because they fail to demonstrate that discontinuation of the gross-up is unjust or unreasonable and similarly fail to demonstrate that their requested alternative is just and reasonable. According to ISO-NE, in the December 2008 Order, the Commission already rejected the argument now advanced by Public Entities that because a resource is different from other resources, a Reserve Margin Gross-Up should be applied. ISO-NE states that the high availability of the NYPA imports and the relatively small size of the NYPA import gross-up provide no basis for distinguishing the instant case from the demand response resources gross-up elimination case or for continuing the preferential treatment only for the NYPA imports. Because the ICR calculation reflects the availability of resources, highly available resources already reduce the ICR, and the problem of under-procurement would exist even if a resource were 100 percent available: any gross-up, even a small one applied to a highly available resource, will result in a shortfall equal to the amount of the gross-up and would be inconsistent with FCM requirements.

23. ISO-NE asserts that Public Entities have failed to demonstrate that its requested relief, continuing the gross-up or reinstating “load reduction” treatment, is just and reasonable. Reinstating the Reserve Margin Gross-Up would increase the total costs of capacity to New England, require a revision of the FCM rules establishing the methodology for determining the ICR, and, because the qualification process for the third Forward Capacity Auction is complete and already reflects the elimination of the gross-up, could disrupt the FCM process. Addressing Public Entities’ alternate proposal, ISO-NE contends that reinstating the “load reduction” treatment would shift costs from Public Entities to other New England load serving entities. According to ISO-NE, Public Entities have provided no basis for reinstating this favorable treatment at the expense of others in the region.

#### **IV. Discussion**

##### **A. Procedural issues**

24. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities filing them parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Public Entities’ July 21, 2009 and ISO-NE’s August 5, 2009 answers and will, therefore, reject them.

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

25. The Commission denies the Public Entities’ complaint. Under section 206 of the Federal Power Act, whenever the Commission finds on complaint that existing rates,

charges or classifications of a public utility are unjust, unreasonable, unduly discriminatory or preferential, it shall determine the just and reasonable rates, charges or classifications and establish the same by order.<sup>27</sup> Section 206(b) places the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential on the complainant.<sup>28</sup> Accordingly, Public Entities bear the burden to (1) establish that the ISO-NE tariff, including the FCM rules and FCM Settlement Agreement, as currently filed is unjust and unreasonable with regard to setting the NYPA imports' resource qualification ratings, and (2) show that their proposed alternative treatments are just and reasonable.

26. Public Entities have failed to demonstrate that removal of the Reserve Margin Gross-Up and application of the Commission-approved FCM rules to the NYPA imports is unjust and unreasonable. As explained by ISO-NE, the application of the Reserve Margin Gross-up to the NYPA imports results in the under-procurement of ICR, contrary to the FCM rules. Indeed, Public Entities concede that the application of the gross-up produces an "under-procurement" of ICR.<sup>29</sup> Similarly, the Commission based its approval of ISO-NE's tariff revisions in the December 2008 Order on the fact that the use of the current Reserve Margin Gross-Up has the potential to harm New England because it can lead to under-procurement of resources in the Forward Capacity Auction.<sup>30</sup>

27. In addition, we note as we did in the December 2008 Order that the existing rules adequately recognize resources that are highly available, providing incentives for high availability to all resources on a non-discriminatory basis.<sup>31</sup> The Commission further noted in the December 2008 Order that parties defending the gross-up neglected to address the fact that the assumed high availability of an energy efficiency resource (which reduces the ICR) in concert with a continued Reserve Margin Gross-Up for these resources simply prolongs the issue (albeit on a reduced scale) that was addressed in the filing approved therein – the double counting of demand response resource availability which can lead to a failure to satisfy the 0.1 disconnects per year reliability requirement.<sup>32</sup> The Commission also observed that under a proposal made to retain the Reserve Margin Gross-Up for one type of highly available capacity resource, other

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<sup>27</sup> 16 U.S.C. § 824e (2006).

<sup>28</sup> 16 U.S.C. § 824e(b).

<sup>29</sup> Public Entities complaint at 25.

<sup>30</sup> December 2008 Order, 125 FERC ¶ 61,355 at P 33.

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

<sup>32</sup> *Id.* P 36.

capacity resources with high availability would not be eligible for equivalent compensation.<sup>33</sup>

28. The Commission rejects Public Entities' contention that terminating gross-up treatment for the NYPA imports is unjust and unreasonable. Instead, the Commission finds that ISO-NE's planned removal of the gross-up from the NYPA imports and calculation of the NYPA imports resource qualification ratings pursuant to the Commission-approved FCM rules is just and reasonable.<sup>34</sup> The historical availability of the NYPA imports is already accounted for in the ICR calculation. Also, as in the December 2008 Order, we find that the FCM rules already provide highly available resources with greater compensation than less-available resources.<sup>35</sup>

29. Furthermore, the Commission rejects Public Entities' alternatives: continuing the gross-up or granting them load reduction in the capacity cost allocation equal to the amount of the gross-up. The gross-up treats a resource as contributing more capacity to meet the ICR than is actually available. Continuing the gross-up will likely result in a failure to procure sufficient capacity in the FCM as required under Market Rule 1, a point Public Entities concede in the complaint.<sup>36</sup>

30. Likewise, we reject Public Entities' alternative proposal for "load reduction" in the FCM cost allocation process. As ISO-NE notes, such an arrangement would provide unique treatment for the NYPA imports, which Public Entities have not justified here. Load serving entities in New England support the regional capacity requirements based on their proportionate share of the peak load (and not on the performance of their individual resources). Consequently, adopting the Public Entities' proposal would simply shift costs to other New England load serving entities.

31. The Commission rejects Public Entities' arguments (a) that the gross-up treatment should be continued because the NYPA imports gross-up is smaller than the demand response resources gross-up considered in the December 2008 Order and (b) that the high availability of the NYPA imports coupled with the relatively small amount of capacity "breaks any connection" between the failure to procure the ICR and a resulting failure to satisfy the 0.1 disconnects per year reliability requirement. Public Entities' assertion ignores the fact that the specific high availability of these resources is already accounted

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<sup>33</sup> *Id.*

<sup>34</sup> *See also id.* P 33-34 (accepting elimination of gross-up for demand response resources).

<sup>35</sup> *Id.* P 33.

<sup>36</sup> Public Entities complaint at 25-26.

for in the ICR methodology.<sup>37</sup> Public Entities' contention that the quantity of capacity at issue here is relatively small (and potentially within the uncertainty limits of the ICR calculation itself) is immaterial and does not provide an adequate basis for the Commission to treat these resources uniquely and contrary to our position in the December 2008 Order. Importantly, under the current and approved ICR methodology, *any* capacity gross-up has the potential to cause ISO-NE to procure less capacity than dictated by the ICR. Such a result would violate Market Rule 1.

32. Public Entities argue that the high availability of the NYPA imports benefits all parties by reducing the overall resource adequacy requirement for New England. But under the FCM rules, Public Entities' highly available resources receive the same treatment as other highly available capacity resources that reduce the ICR and remain available during shortage events.

33. Furthermore, Public Entities have failed to establish any historical preferential treatment that justifies continuing the gross-up practice in the current markets. The FCM Settlement Agreement requires that "the NYPA firm import allocation recipients will be able to continue to claim capacity credit for these firm imports during the transition, in as close as possible a manner to its treatment today."<sup>38</sup> Consistent with this requirement, during the FCM transition period, which terminates in June 2010, Public Entities have received a capacity gross-up for the NYPA imports. However, as noted by ISO-NE, while it is true that the NYPA imports continued to receive the gross-up for the first two Forward Capacity Auctions, the FCM Settlement Agreement is silent on the treatment of the NYPA imports following the transition to FCM.

34. As noted by ISO-NE, in the process that led to the December 2008 Order, stakeholders found (and we agree) that the NYPA imports gross-up causes the same problems as the demand response resource gross-up that was eliminated. In the 2009 Informational Filing, ISO-NE proposes to terminate the gross-up for the NYPA imports with the qualification process for the third Forward Capacity Auction. Thus, consistent with the approved timing for the removal of the gross-up for FCM demand response resources (which also received capacity gross-ups during the first two auctions), ISO-NE seeks to terminate the gross-up for the NYPA imports with the qualification process for the third Forward Capacity Auction. As this continued gross-up treatment would result in a failure of ISO-NE to procure the ICR, we find it appropriate for ISO-NE to revise its treatment of the NYPA imports to be consistent with the terms of the tariff and its treatment of other capacity resources. We recognize that the NYPA imports have

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<sup>37</sup> Highly available capacity resources reduce the overall ICR value, while less available capacity resources increase it.

<sup>38</sup> FCM Settlement Agreement, section 11, part III(D)(4)(a).

historically received additional capacity credit for these resources in excess of their rated capacity; however, we are not persuaded that such historical treatment that occurred under a market design in which all capacity resources had a must-offer requirement is valid under the FCM market design, in which only resources with a capacity supply obligation (equal in total to the ICR) have a must-offer requirement.

35. As for Public Entities' claim that the removal of the gross-up would be contrary to Congress's intent in providing for the preference contracts, we find that Public Entities fail to support this allegation. Public Entities note that their NYPA contracts entitle them to delivery of 84.1 MW firm hydropower to the New England interface and argue that they should receive the full benefit of this entitlement. There does not appear to be any inconsistency with this expectation and the FCM calculations, since the FCM resource eligibility determinations in the 2009 Informational Filing appear to reflect the full 84.1 MW for the NYPA imports.

36. In conclusion, Public Entities have failed to provide any factual basis that would meaningfully distinguish the NYPA imports from other capacity resources making the application of the FCM rules for calculating their resource qualification ratings not just and reasonable. We find that Public Entities have failed to establish an ongoing contractual, tariff, or other obligation based on historical practice for continuing to provide gross-up treatment to the NYPA imports. For these reasons, we affirm ISO-NE's treatment of the NYPA import capacity resource ratings as reflected in the 2009 Informational Filing subject to the resolution of any issues addressed in Docket No. ER09-1424-000, and we deny the Public Entities' complaint.

The Commission orders:

The Commission denies the Public Entities' complaint, as discussed herein.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.