

132 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

ISO New England Inc. and New England Power Pool Participants Committee	Docket Nos. ER10-787-003 EL10-50-001 EL10-57-001
New England Power Generators Association v. ISO New England Inc.	ER10-787-000 EL10-50-000 EL10-57-000
PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC v. ISO New England Inc.	

ORDER GRANTING IN PART AND DENYING IN PART
REQUESTS FOR CLARIFICATION AND REHEARING
AND
DENYING MOTION FOR DISCLOSURE

(Issued August 12, 2010)

1. In this order, the Commission denies in part and grants in part rehearing and clarification of an order on revisions to the ISO New England (ISO-NE) Forward Capacity Market.¹ We also deny a motion to require disclosure of information related to past review of certain bids by ISO-NE's Internal Market Monitor (IMM).

¹ *ISO New England Inc.*, 131 FERC ¶ 61,065 (2010) (April 23 Order).

I. Background

A. FCM

2. ISO-NE administers a forward market for capacity, in which resources compete in an annual Forward Capacity Auction (FCA) to provide capacity on a three-year-forward basis. Providers whose capacity clears the FCA acquire capacity supply obligations (CSOs), which they must fulfill three years later. The Commission has accepted market rules that outline the rights and obligations of capacity resources.² ISO-NE held the first two FCAs in 2008 (FCA # 1 and FCA # 2), and held the third FCA in October 2009 (FCA # 3). ISO-NE is currently preparing to hold FCA # 4 in August 2010.

B. April 23 Order

3. On February 22, 2010, under section 205 of the Federal Power Act (FPA), ISO-NE and the New England Power Pool Participants Committee (NEPOOL) submitted significant revisions to the FCM market rules (Docket No. ER10-787-000). The proposed design changes to a number of the FCM market rules were the product of a lengthy stakeholder process, and had a requested effective date of April 23, 2010 (in time for the changed rules to govern FCA # 4 in August 2010). While the Commission was considering the February 22 filing, New England Power Generators Association (NEPGA) (Docket No. EL10-50-000) and PSEG Energy Resources & Trade LLC, *et al.* (PSEG) (Docket No. EL10-57-000) filed complaints against ISO-NE under section 206 of the FPA, both of which also addressed the substance of the proposed FCM market rules revisions.

4. On April 23, 2010, the Commission ruled on the joint filing made by ISO-NE and NEPOOL. The Commission found certain aspects of the February 22 filing to be just and reasonable, and accepted those provisions without suspension.³ The Commission then stated that its preliminary analysis indicated that the remainder of the filing had not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful; the Commission therefore set those issues for paper hearing. The Commission also consolidated, for purposes of the paper hearing, the February 22 filing with the complaints filed by NEPGA and PSEG, "so as to ensure that

² On February 15, 2007, ISO-NE filed revisions to its market rules to implement the FCM. The Commission accepted a portion of the market rules on April 16, 2007 (*ISO New England Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007)), and the remainder on June 5, 2007 (*ISO New England Inc.*, 119 FERC ¶ 61,239 (2007), *reh'g denied*, 122 FERC ¶ 61,171 (2008)).

³ April 23 Order, 131 FERC ¶ 61,065 at P 16.

NEPGA and PSEG are able to obtain full consideration of the arguments and alternative proposals they have raised in their complaints."⁴

1. Issues Set for Paper Hearing

5. The Commission set for paper hearing issues related to the Alternative Capacity Price Rule (APR), capacity zones, and the proper value of the cost of new entry (CONE).

6. Generally speaking, the APR adjusts the auction clearing price above the level that it would otherwise be under certain circumstances in which the IMM determines that offers from new capacity are not consistent with a resource's long run average costs or opportunity costs.⁵ While noting that the Filing Parties' proposal was an improvement over the existing APR, the Commission stated that the briefs on the APR should address: (1) the triggering conditions, if any, for the APR; (2) the treatment of out-of-market (OOM) resources that create capacity surpluses for multiple years (both "historical" and prospective OOM); and (3) the appropriate price adjustment under the APR.

7. Regarding capacity zones, while the Commission acknowledged that the Filing Parties' proposal to allow certain additional de-list bids to be considered in the modeling of an Import-Constrained Capacity Zone was an improvement, we sought briefs on: (1) whether zones should always be modeled; (2) whether all de-list bids should be considered in the modeling of zones; (3) whether a pivotal supplier test is necessary; and (4) whether revisions to the current mitigation rules would be necessary to model all zones.

8. CONE is intended to reflect the cost of new entry into the market and has numerous functions in the FCM construct. The Filing Parties proposed a new method of updating CONE under certain circumstances, which the Commission accepted in the April 23 Order. However, recognizing that the CONE value triggers the review of bids that may be considered OOM, the Commission set the proper value of CONE for paper hearing.

2. Timing of Order on Paper Hearing

9. Recognizing that ISO-NE would conduct the fourth FCA in August 2010, and to eliminate the uncertainty that would result from not having tariff provisions in place to govern that auction, the Commission accepted the tariff provisions that related to the

⁴ *Id.* P 17.

⁵ The April 23 Order also approved revisions to the APR that would account for the price impact of rejected de-list bids.

issues set for paper hearing. The Commission noted that it anticipated that, if practicable, it would issue an order accepting revised market rules before March 1, 2011 in time to govern FCA # 5 (June 2011) and subsequent auctions.

3. Price Floor

10. The FCM initially provided for a price floor for the first three FCAs with the price floor expiring after three successful FCAs. In the February 22 filing, the Filing Parties proposed to extend the price floor for three additional commitment periods (those governed by FCA # 4, 5, and 6) in order to address the effect of OOM resources that cleared in the first three FCAs and thereby contributed to the excess capacity in New England and lowered future FCM prices. In the April 23 Order, the Commission stated that "the extension of the price floor for three further commitment periods...has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful."⁶ The Commission further noted that "[g]enerally speaking, the Commission would prefer that the market be allowed to clear naturally, which has not happened to date" due to the existence of the price floor.⁷ However, the Commission stated, even though "according to the [IMM], the first three FCAs would have reached the price floor even without the OOM capacity,"⁸ we recognized that as a transitional measure pending revision of the APR, "an extension of the price floor in this case may be appropriate."⁹ The Commission therefore accepted, suspended and placed into effect the extension of the price floor, but stated that "[w]e expect . . . that in the Commission's final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with implementation of the new APR."¹⁰

⁶ *Id.* P 19.

⁷ *Id.* P 97.

⁸ *Id.*, footnote omitted.

⁹ *Id.* P 19.

¹⁰ *Id.*

II. Discussion

A. Motions for Clarification and/or Rehearing

11. ISO-NE, NEPOOL, the New England Power Generators Association (NEPGA), NextEra Energy (NextEra) and the Joint Filing Supporters¹¹ sought rehearing and/or clarification of the April 23 Order. The Boston Gen Companies¹² (Boston Gen) and ISO-NE filed answers to the requests for rehearing and/or clarification.

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2010), prohibits answers to requests for rehearing. We therefore reject ISO-NE's and Boston Gen's answers.

1. Legal Challenges

a. Positions of the Parties

13. Joint Filing Supporters request rehearing, asserting that the Commission erred in the following ways.

14. First, Joint Filing Supporters argue that the Commission departed from prior precedent by failing to give any weight to the broad-based stakeholder process that approved and supported the February 22 filing. Joint Filing Supporters state that the Commission had previously agreed that a stakeholder process was the best method for resolving the technical issues relating to reform of the FCM, and that, during this process, because of the negotiation that is necessary to attract majorities within NEPOOL and NECPUC while at the same time maintaining the support of ISO-NE, the parties adopted market rules that addressed all affected interests. Joint Filing Supporters state that the February 22 filing was the product of an extensive stakeholder process among all sectors, and that many concessions were made in the interest of producing a single unified package. Joint Filing Supporters point to several provisions in the filing that were advocated by, and benefitted, the generation sector. Joint Filing Supporters state that, while NEPOOL ultimately approved the filing with a 70 percent majority, generators have protested it due to narrow financial interests, namely, the desire to inflate the FCM

¹¹ The Joint Filing Supporters are the Connecticut Department of Public Utility Control, the New England Conference of Public Utility Commissioners, NSTAR Electric Co., the Northeast Utilities Cos., National Grid USA, the Energy Consortium and the Connecticut Office of Consumer Counsel.

¹² The Boston Gen Companies include Boston Generating, LLC; Mystic I, LLC; Mystic Development, LLC; and Fore River Development, LLC.

clearing price above the market-driven price even when there is a surplus of capacity. According to Joint Filing Supporters, the Commission's conclusions "that the proposed Rule Changes do not represent a broad consensus among all sectors and protestors have raised important issues that require further consideration"¹³ sets an impossible – and, therefore, arbitrary and capricious – standard for assessing this unusual cooperative effort.

15. Second, Joint Filing Supporters argue that the Commission should grant rehearing to evaluate the February 22 filing as a single package, to determine whether that package of rule changes would produce a just and reasonable result. Joint Filing Supporters point to the fact that the Commission's approval of the earlier settlement leading to the creation of the FCM has brought about a capacity market that has worked as planned to attract new resources while retaining existing resources. Joint Filing Supporters state that, during the stakeholder process, parties sought to tailor proposed market rule changes to work together, so the Commission should evaluate the entire filing together; Joint Filing Supporters argue that by accepting only parts of the filing while setting other parts for hearing, the Commission risks damaging the coherence of the original FCM market design.

16. Joint Filing Supporters further argue that by dismissing the position of a super-majority of stakeholders that the February 22 filing should be accepted or rejected as a single package, the Commission departed from settled precedent requiring it to give weight to the majority position developed in a bona fide stakeholder process.¹⁴ Joint Filing Supporters assert that, in the April 23 Order, the Commission accepted several provisions that load representatives had agreed to in the stakeholder process solely to achieve consensus, but set several of the provisions in the package for hearing, thus making those concessions a new bottom line for further negotiations. After the April 23 Order, Joint Filing Supporters argue, future multi-party efforts may be unsuccessful, and that state regulators will have little incentive to make the necessary compromises to achieve consensus, if the Commission "accede[s] to the protests of one isolated sector."¹⁵ Joint Filing Supporters ask the Commission to either grant rehearing to give appropriate weight to the product of the stakeholder process, or to explain why it gave no weight to that effort.

¹³ April 23 Order, 131 FERC ¶ 61,065 at P 37.

¹⁴ Joint Filing Supporters Request for Rehearing at 15 n.56, (citing *Greater Boston Television Corp. v FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

¹⁵ Joint Filing Supporters Request for Rehearing at 15.

17. Third, Joint Filing Supporters state that the Commission has not previously ordered hearings when protestors fail to provide specific evidence that the proposed rules may be unjust and unreasonable. Joint Filing Supporters argue that the Commission did not give a rational explanation for rejecting the "comprehensive" February 22 filing.¹⁶ Joint Filing Supporters state that the Commission erred by failing to find, when it evaluated the February 22 filing under section 205, that on the basis of the record evidence, the entire filing was just and reasonable. Joint Filing Supporters state that the Commission may not treat proposals by generators on a co-equal basis with ISO-NE's and NEPOOL's filing, and must limit its inquiry to whether the rates proposed by the filing utility are just and reasonable,¹⁷ but by consolidating the two complaints filed by generators under section 206 with the February 22 section 205 filing, the Commission may have improperly conflated its statutory review standards. Joint Filing Supporters state that the Commission's ability to consider alternatives is limited:

[T]he Commission must first determine whether the [February 22 filing] will produce just and reasonable results. At this stage, the previously effective FCM rules have been supplanted by the Joint Filing, which is now the only pertinent regime. Similarly, any other proposed alternatives to the Joint Filing are irrelevant because they may not even be considered in assessing whether the proposed rate satisfies the just and reasonable standard. If the Joint Filing is just and reasonable, the Commission must end its inquiry.¹⁸

18. Therefore, Joint Filing Supporters argue, the Commission must first determine whether the protestors have sufficiently demonstrated that provisions in the February 22 filing – not the existing FCM rules – may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful, and must articulate a rational basis for this

¹⁶ *Id.* at 15 n. 55 (citing, for example, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 131 FERC ¶ 61,144 at P 23 n.74 (2010)) ("When a protesting/complaining party wants a trial-type evidentiary proceeding, that party must provide more than mere unsubstantiated allegations; it must provide an adequate proffer of evidence that such a hearing is warranted").

¹⁷ Joint Filing Supporters also state that the "jump ball" tariff provision (NEPOOL Participants Agreement, section 11.1.5 at 40), under which the Commission may choose between a rules change option preferred by ISO-NE and the rules change option voted by the participants, is not applicable here.

¹⁸ Joint Filing Supporters Request for Rehearing at 23.

conclusion.¹⁹ Joint Filing Supporters allege that the Commission did not satisfy these requirements in requiring a paper hearing as to the following issues: (1) the conditions that trigger the application of the APR; (2) the treatment of historical OOM; or (3) whether zones should always be modeled. Joint Filing Supporters state that on rehearing, the Commission should accept the Joint Filing's proposed rules on these issues or, at a minimum, identify the evidence on which it relies for its conclusion that the Joint Filing's rules may be unjust or unreasonable.

19. Specifically, Joint Filing Supporters argue that the Commission has not sufficiently explained how the changes to the APR triggers in the February 22 filing are insufficient, stating only that the proposed rules do not address situations in which an OOM resource can be a source of buyer market power; Joint Filing Supporters argue that the proposed new APR-3 rule does address such situations. Similarly, Joint Filing Supporters argue that the Commission has not sufficiently explained how the February 22 filing's treatment of historical OOM may be unjust and unreasonable, in particular given that in an earlier case, the Commission found that mitigation should be directed toward the future, rather than toward past resources whose entry could no longer be avoided.²⁰ Finally, Joint Filing Supporters state, the Commission makes a conclusory statement that it is important to model zones, if possible, to set appropriate locational prices, but fails to discuss the impact of other changes contained in the February 22 filing on zone modeling, or to discuss why these other changes do not fully resolve the Commission's concerns.²¹

b. Commission Ruling

20. We deny Joint Filing Supporters' request for rehearing.

21. We note that Joint Filing Supporters present the February 22 filing as the result of a stakeholder process representing participants with "widely diverse interests."²² ISO-NE and NEPOOL state that the majorities supporting this filing in the Participants Committee

¹⁹ *Id.* (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1932)).

²⁰ Joint Filing Supporters Request for Rehearing at 24 (citing *New York Independent System Operator, Inc.*, 122 FERC ¶ 61,211, at P 100-101 (2008)).

²¹ Joint Filing Supporters Request for Rehearing at 25-26.

²² *Id.* at 7.

are 70.1 percent for changes to section 13 of the ISO-NE tariff,²³ and 71.69 percent for changes to section 12,²⁴ respectively.²⁵ This suggests that while many parties supported the filing, a significant number did not, including the entire generation sector and much of the supplier sector.²⁶ Further, the Commission did not ignore the fact that the February 22 filing was the result of a stakeholder process, as Joint Filing Supporters imply. Rather, we acknowledged it, specifically finding that although the "filing is the outcome of a stakeholder process that was properly conducted under NEPOOL's governance procedures" it is "clear that the proposed Rule Changes do not represent a broad consensus among all sectors."²⁷ Joint Filing Supporters argue that this language implies that the Commission would only approve a unanimous stakeholder filing, but in fact, the Commission set a part of the February 22 filing for paper hearing because the Filing Parties had failed to demonstrate that those proposals were just and reasonable.²⁸

22. By contrast, Joint Filing Supporters' argument here – that, if a filing is the result of a stakeholder process, the Commission must approve it "as a whole without modifications"²⁹ – would defenestrate the Commission's independent obligation under section 205 to examine each filing presented to it and determine whether the provisions of that filing are just and reasonable.³⁰ While "stakeholder consensus is an important

²³ See ISO-NE Transmission, Markets, & Services Tariff (ISO-NE Tariff), § III.12, Calculation of Capacity Requirements.

²⁴ See ISO-NE Tariff, § III.13, Forward Capacity Market.

²⁵ Transmittal to February 22 Filing at 3.

²⁶ *Id.* at 35 ("[T]he Rule Changes were approved with support generally from those representing transmission, load serving entities, publicly-owned entities, alternative resources and end users, with opposition from the entire Generation Sector and further opposition or abstention in the Supplier Sector.").

²⁷ April 23 Order, 131 FERC ¶ 61,065 at P 36, 37.

²⁸ For example, addressing the Filing Parties' proposed APR revision, we stated that "under the current rules, as well as under the proposed revisions, the APR does not mitigate market power unless certain other conditions are also met." *Id.* P 75.

²⁹ Joint Filing Supporters Request for Rehearing at 22.

³⁰ Joint Filing Supporters' citation to *ISO New England Inc.*, 126 FERC ¶ 61,180 (2009), does not support its argument. In that case, the Commission had already accepted a filing, and parties seeking rehearing specifically argued that "the Commission abandoned its FPA section 205 obligation by merely adopting the Filing Parties'

(continued...)

factor to be considered in reviewing the just[ness] and reasonableness of a rate design,"³¹ it is also the case that "stakeholder support alone cannot ultimately prove that a rate design is just and reasonable."³²

23. Similarly, Joint Filing Supporters are in error in asserting that the Commission was required to either accept or reject the February 22 filing in its entirety or set the entire package of proposed changes for paper hearing. Joint Filing Supporters provide no support for its assertion that, because the Commission approved the original FCM Settlement as a package, then the Commission is similarly required to engage in a "holistic" review of the February 22 filing, and only accept or reject the entire package. Under our prior ruling in *Trailblazer Pipeline Co.*,³³ the Commission can approve an entire contested settlement "[e]ven if some individual aspects of [the] settlement may be problematic, . . . on the ground that the overall result of the settlement is just and reasonable."³⁴ But the February 22 filing is a rate filing containing provisions that may not be just and reasonable, not a settlement proposal. The Commission must address the question of whether those provisions are just and reasonable, and it is doing so in this proceeding.

24. The ultimate disposition of the issues set for paper hearing have the capacity to render the FCM market design just and reasonable, or unjust and unreasonable. We

stakeholder process rather than offering its own independent determination." *Id.* P 17. It was in response to this argument that the Commission asserted that the rehearing petitioners had not shown that the stakeholder process was flawed, or that insufficient alternatives were presented to the Commission. *See* Joint Filing Supporters Petition for Rehearing at 14-15 n.54. This is not the same as an affirmative statement by the Commission that, whenever a stakeholder process results in a rate or rules filing, the Commission is required to accept it.

³¹ *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083, at P 172 (2008).

³² *Id.*; *see also* *Midwest Independent Transmission System Operator, Inc.*, 128 FERC ¶ 61,052, at P 18 n.20 (2009) (citing *Public Service Commission of Wisconsin v. FERC*, 545 F.3d 1058, 1062-65 (D.C. Cir. 2008) for the proposition that "while the Commission may give weight to negotiated stakeholder process, it must make its own independent assessment that the policy is just and reasonable").

³³ 85 FERC ¶ 61,345 (1998) (*Trailblazer*), *order on reh'g*, 87 FERC ¶ 61,110 (1999), *reh'g denied*, 88 FERC ¶ 61,168 (1999).

³⁴ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

recognize that, as Joint Filing Supporters stated, many parties may have compromised during the negotiations leading up to the February 22 filing, and the fact that at least a 70 percent majority was reached in Participant Committee voting suggests that those negotiations led to significant accomplishments. We would encourage parties to continue negotiations, now that the issues in contention have been narrowed by the April 23 Order, and would be glad to facilitate such further negotiations in any way possible, such as making non-decisional staff available, appointing a Commission settlement judge to oversee the proceedings, or referring the matter to the Commission's Dispute Resolution Service. Ultimately, however, the Commission is required by section 205 to determine whether a filing is just and reasonable, or is not; and the fact that a filing is supported by a large number of parties (or even all parties) does not alter that independent statutory obligation.

25. Further, contrary to Joint Filing Supporters' assertion that the Commission acted arbitrarily and capriciously in setting certain issues for a paper hearing "without citing some evidence that the Joint Filing's proposals may, in fact, be unjust or unreasonable,"³⁵ in the April 23 Order the Commission properly stated its grounds for finding that ISO-NE and NEPOOL had not yet demonstrated that certain provisions of the February 22 filing were just and reasonable. Joint Filing Supporters argue that the April 23 Order failed to provide a basis for setting three issues for hearing: (1) APR triggering conditions; (2) the treatment of historical OOM; and (3) whether zones should always be modeled. Regarding the APR trigger, we note that the entire APR was set for hearing, to include, *inter alia* what, if any, triggering conditions should exist and the treatment of historical OOM. Our basis for highlighting the APR triggering conditions was our concern that "the existing APR triggering conditions, as well as the proposed changed conditions, may overlook situations in which an OOM resource may be used as an instrument of buyer market power."³⁶ As Joint Filing Supporters note, our concern stems from the fact that "a new OOM resource can suppress the market clearing price even when no new capacity is needed, by displacing a marginal existing resource that would otherwise have set the market price."³⁷ While Joint Filing Supporters argue in response that "the proposed new APR-3 expressly addresses just such situations when no new capacity is needed,"³⁸ Joint Filing Supporters fail to acknowledge the fact that APR-3 is triggered only when de-list bids are rejected for reliability, a condition unrelated to our stated concern. Further, Joint Filing Supporters' argument also ignores the fact that APR-3 can be triggered only for

³⁵ Joint Filing Supporters Request for Rehearing at 21.

³⁶ April 23 Order, 131 FERC ¶ 61,065 at P 76.

³⁷ *Id.*

³⁸ Joint Filing Supporters Request for Rehearing at 24.

auctions without a price floor (starting with FCA # 7) since the floor price level is equal to the highest price at which APR-3 can be triggered.

26. With regard to historical OOM, as noted in the April 23 Order, our basis for setting the treatment of historical OOM for paper hearing was our concern that "because the proposed Rule Changes do not address historical OOM capacity, it is unlikely that their adoption here would allow triggering of the proposed APR."³⁹ As noted by Joint Filing Supporters, we also presented the arguments raised by the parties on this issue, including our prior decision not to explicitly address historical OOM entry in a related NYISO proceeding since "whether or not the entry of past resources was efficient or needed, their entry and their associated costs could not now be avoided, so mitigation would no longer be effective."⁴⁰ Our purpose in noting this point was not simply to "recite" arguments as alleged by Joint Filing Supporters, but to state the generators' argument that (unlike in NYISO) an APR was already in place in ISO-NE to deter uneconomic entry when the New England OOM investment were made. Identifying our concern with the Filing Parties' proposal to address historical OOM by extending the price floor for three additional commitment periods, we explained that "we anticipate that in the Commission's final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with the implementation of that new mechanism."⁴¹

27. On the issue of zonal modeling, we stated in the April 23 Order that the basis for setting the modeling of zones for hearing was our view "that it is important to model zones wherever possible to set appropriate locational prices" since "we have cited the need for locational pricing in New England for many years."⁴² Joint Filing Supporters allege that the Commission fails to explain why the acceptance of a related proposal in the April 23 Order does not establish that the rules for zonal formation are just and reasonable.⁴³ However, the issue of whether a zone should be modeled stems primarily from the Filing Parties' related proposal to allow de-list bids to be considered in the determination of zones. Prior to the February 22 filing, ISO-NE modeled zones only when the total amount of existing capacity within a particular zone was less than its LSR.

³⁹ April 23 Order, 131 FERC ¶ 61,065 at P 71.

⁴⁰ *Id.* P 80.

⁴¹ *Id.* P 97.

⁴² *Id.* P 134.

⁴³ The related proposal establishes the Local Sourcing Requirement (LSR) for an import-constrained capacity zone as the higher of the deterministic Transmission Security Analysis (TSA) or the probabilistic Local Resource Adequacy (LRA) reliability criteria.

As the Filing Parties noted, those rules did not "provide a means to form a Capacity Zone and determine a zonal price if resources within the modeled Capacity Zone de-list *during* the auction."⁴⁴ As such, and mindful of market power concerns, the Filing Parties proposed (and the Commission accepted) allowing certain additional de-list bids to be considered in the zonal determination. Addressing this proposal we noted that "while we believe that always modeling zones should be the ultimate goal, we agree with ISO-NE that such a change would require further analysis."⁴⁵ Our basis for further analysis was our concern "whether the current mitigation rules are adequate to model zones at all times."⁴⁶ Further, Joint Filing Supporters's argument that the aforementioned "higher of" proposal removes the need for reliability agreements that occurred in FCA # 1 and FCA # 3, ignores our discussion which specifically noted that "even if the proposed Rule Changes on this issue were in place at the time of those two auctions, no zonal price separation would have occurred."⁴⁷ As such, we reject Joint Filing Supporters' argument that the Commission failed to provide a rational basis for setting this issue for hearing.

28. Finally, contrary to Joint Filing Supporters' assertion, the Commission did not conflate its statutory review standards when it consolidated the section 206 proceedings with the February 22 section 205 filing. We consolidated the February 22 filing made under section 205 by ISO-NE and NEPOOL, and the complaints filed by NEPGA and PSEG under section 206, for purposes of the paper hearing, so to enable all parties to make their substantive arguments on the same topics, and the Commission to evaluate those arguments, at the same time.⁴⁸ This is not, however, the same thing as placing the same burden of proof on all parties.

29. In the April 23 Order, the Commission accepted two groups of tariff provisions: those that are subject to the outcome of the paper hearing, and those that are not. Any party who wished to seek rehearing of the provisions that were unambiguously accepted by the Commission in the April 23 Order were obligated to timely seek rehearing of the

⁴⁴ February 22 Filing, Attachment 3, Ethier Testimony, at 26.

⁴⁵ April 23 Order, 131 FERC ¶ 61,065 at P 135.

⁴⁶ *Id.*

⁴⁷ *Id.* P 134.

⁴⁸ *See id.* P 9 ("Both [NEPGA and PSEG] expressly state that their complaints address the substance of the Filing Parties' proposed revisions to the FCM market rules and that they are filing these complaints primarily to ensure that their alternative proposals may be considered at the same time that the Commission considers the revisions proposed by the Filing Parties").

Commission's acceptance of those provisions, as several parties did here. The Commission has now ruled on that rehearing without requiring any changes to any of the tariff provisions filed on February 22 that were not set for paper hearing. As to the first group of tariff provisions filed on February 22 (i.e., those accepted subject to paper hearing), ISO-NE and NEPOOL continue to have the burden under section 205 of proving that their proposed Rule Changes are just and reasonable.

30. With regard to the complaints in Docket Nos. EL10-50-000 and EL10-57-000, the Commission stated that "[u]nder section 206, . . . the burden is on the complainants . . . to support any challenges to tariff provisions which have previously been found just and reasonable and any alternative that they propose to such provisions."⁴⁹ That is to say, if NEPGA and PSEG seek to challenge either tariff provisions filed on February 22 that were not set for paper hearing, or tariff provisions that were approved by the Commission prior to February 22, NEPGA and/or PSEG must first demonstrate that those tariff provisions are not just and reasonable; they then have the burden of showing that their alternative proposals are just and reasonable. We continue to believe that the most expeditious way to resolve these controversial issues, and to put just and reasonable market rules into place as quickly as possible, is for all parties to make their presentations at the same time.

2. Timing

a. Positions of the Parties

31. ISO-NE and NEPGA seek clarification regarding the timing of the Commission's future actions.

32. ISO-NE asks the Commission to clarify or modify its order to ensure that the rules the Commission approved in the April 23 Order would remain in effect until new rules are approved, and that any market rule changes will be implemented no earlier than FCA # 6, which will take place in April 2012. If the Commission does not grant this clarification, ISO-NE seeks rehearing. ISO-NE states that it will not be possible to implement design changes, or new market rules, in time for FCA # 5. ISO-NE points out that the NEPOOL Participants Agreement requires that market rules be written and taken through the stakeholder process, a process which can take several months, and changes to market rules may require internal software development, testing, and training prior to the start of the next FCA. Further, ISO-NE argues that important milestones occur before an FCA is conducted. For example, ISO-NE explains that by October 1, 2010, market participants must make decisions as to whether to submit offers and de-list bids for FCA # 5 that are keyed to the value of CONE, and CONE may be subsequently changed by the

⁴⁹ *Id.* P 22, footnote omitted.

Commission's ruling on the paper hearing issues. Similarly, ISO-NE states that if the results of the paper hearing change the current modeling of Capacity Zones for the fifth FCA, it will not be possible for participants to properly submit offers composed of separate resources.

33. Thus, ISO-NE seeks clarification that the rules approved in the April 23 Order will remain in effect until at least the sixth FCA in April 2012. Further, ISO-NE requests that the Commission order ISO-NE and its stakeholders to develop and file a schedule for filing rules within 30 days of the issuance of the Commission's order on the paper hearing, and an implementation schedule to be submitted within 30 days of the Commission's approval of those market rules.

34. NEPGA asks the Commission to clarify that the new FCM market rules emerging from the hearing will be in effect no later than FCA # 5, notwithstanding any request for further delay. If the Commission does not grant clarification, NEPGA seeks rehearing. NEPGA states that, because ISO-NE has asked the Commission to delay issuance of new market rules, NEPGA is now asking the Commission to reiterate that it will issue new market rules by March 1, 2011. NEPGA states that solutions exist to ISO-NE's concerns. First, NEPGA states that it intends to submit new tariff provisions together with its paper hearing briefs in order to meet the Commission's deadline. Further, NEPGA states that a stakeholder proceeding on new market rules could be conducted in parallel with the Commission's paper hearing on market design. NEPGA further asserts that the Commission could issue a preliminary order giving guidance on key points, and ISO-NE could delay the FCA #5 Existing Resource Qualification process. NEPGA argues that, given that the existing FCM market design is profoundly flawed, the Commission should make every attempt to ensure that no further auctions are conducted under that flawed regime.

b. Commission Ruling

35. We grant ISO-NE's request for clarification or modification of the April 23 Order with regard to whether the rules the Commission approved in the April 23 Order would remain in effect until new rules are approved. However, we deny ISO-NE's request for clarification that any market rule changes will be implemented no earlier than FCA # 6.

36. With regard to whether design changes or new market rules will be in place in time for FCA # 5, the Commission will not at this time rule as to the effective date of such changes or new rules. We are cognizant of the practical constraints on ISO-NE and its market participants, the milestones that precede each auction, and the requirements associated with developing market rules in the NEPOOL stakeholder process. In the April 23 Order, we stated that "[w]e anticipate issuing an order on the issues addressed in

the paper hearing which will be effective only going forward for auctions after August 2010,"⁵⁰ and that continues to be the case. The market rules accepted in the April 23 Order are effective as of that date, as we stated,⁵¹ and will continue to be the effective rules unless and until the Commission issues a further order accepting other rules.

37. It is inappropriate for parties to file market rules at this time, as this will require parties to focus on specific market rule language rather than general market design issues. Further, with regard to the timing of our order on the paper hearing, we reiterate that in the April 23 Order the Commission stated its intent if practicable to issue an order terminating the transitional market rules and accepting revised market rules before March 1, 2011.⁵²

3. Price Floor

a. Positions of the Parties

38. NEPOOL asks the Commission to clarify its statement that it "anticipates" that in its final order accepting an appropriate APR mechanism, it will terminate the price floor coincident with the implementation of that new mechanism.⁵³ NEPOOL asks that the Commission clarify that this is not a final decision, but simply a statement of future intent or expectations. In the alternative, NEPOOL seeks rehearing on the basis that it is premature at this time to conclude that the price floor should terminate coincident with the implementation of any new APR, and that such a conclusion should only be reached after other aspects of the APR mechanism have been determined. NEPOOL states that it is not taking any substantive position on future APR and price floor questions, but rather, simply seeks to ensure that any alteration in the price floor from that filed is considered in the context of the entire set of changes to the FCM rules accepted by the Commission, and not based solely with reference to expectations on APR. NEPOOL asks the Commission to state that any final determinations relating to the expiration of the price floor will be made only after a new APR, the timing of its implementation, and its interrelationship with the price floor have been considered and determined.

⁵⁰ April 23 Order, 131 FERC ¶ 61,065 at P 15.

⁵¹ *Id.*

⁵² *Id.* P 23.

⁵³ NEPOOL Request for Clarification or Rehearing at 2, (citing April 23 Order, 131 FERC ¶ 61,065 at P 97).

39. NEPGA asks the Commission to clarify that the Commission did not mandate the elimination of the price floor without first considering the reforms to be adopted in the paper hearing. NEPGA further asks the Commission not to pre-judge the question of whether a price floor is necessary, and seeks clarification that the Commission did not mandate in advance that the price floor must be eliminated, but instead that it will review the status of the price floor at the same time that it considers the reforms that arise out of the paper hearing process. NEPGA states that it would be premature to require elimination of the price floor without first determining such issues as the treatment of historic OOM capacity.⁵⁴

40. ISO-NE requests that the Commission extend the price floor until new market rules are in place so that the floor price is terminated coincident with the implementation of the new APR.

b. Commission Ruling

41. We will grant the requests of NEPOOL and NEPGA to clarify that our statement from the April 23 Order was a statement of expectation rather than a definitive ruling. We stated in the April 23 Order that "we expect...that in the Commission's final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with implementation of the new APR."⁵⁵ Thus, we intend that any final determinations relating to the expiration of the price floor should be made after a new APR, the timing of its implementation, and its interrelationship with the price floor have been considered and determined. As to ISO-NE's request to extend the price floor until revised APR rules are in place, the April 23 Order approved the extension of the price floor for three additional FCAs pending any revisions to the APR.

4. Rights of Non-CSOs

a. Positions of the Parties

42. NextEra contends that the Commission erred in the April 23 Order by approving a clarification to section III.13.6.4 of the ISO-NE tariff regarding generating resources without a CSO. NextEra states that the clarification to section III.13.6.4 noted that although ISO-NE may request that generators without a CSO supply energy, such generators are not obligated under section III.13 of the tariff to provide energy for reliability purposes. NextEra contends that the Commission's approval of this language

⁵⁴ NEPGA also states in its request for clarification that it is filing a separate motion for disclosure of certain material; that motion is discussed below.

⁵⁵ April 23 Order, 131 FERC ¶ 61,065 at P 19.

ignored its argument that this language was inconsistent with what had been approved at a November 2009 Participants Committee meeting which would have required resources without a CSO to provide energy to address/avoid an emergency after ISO-NE has called on all resources with a CSO. As relief, NextEra seeks clarification from the Commission that its concerns relating to generating resources without CSOs must be addressed in the ISO-NE stakeholder process. Alternatively, NextEra seeks rehearing, arguing that the April 23 Order failed to consider how the changes to section III.13.6.4 of the ISO-NE tariff "broadly" affect the obligations, risks, and benefits of capacity resources with CSOs.

b. Commission Ruling

43. We deny NextEra's requests for clarification and rehearing. In the April 23 Order, we found that the proposed clarifying language concerning the rights and obligations of those resources with CSOs was just and reasonable.⁵⁶ The Filing Parties noted that this language reflects the intent of this market design – to procure capacity equal to the Installed Capacity Requirement (ICR) without having to rely on unobligated resources. As such, we agreed with the Filing Parties that unobligated resources should not face availability penalties since (unlike resources with a CSO) they do not have a "must offer" requirement. We also noted that ISO-NE was revising its Operating Procedure 4 to clarify the obligations of generation resources without CSOs, and that it appeared based on ISO-NE's answer that NextEra's concerns would be addressed by those revisions. Finally, addressing NextEra's procedural argument -- that the revised language in this section was different from a prior version approved at an earlier Participants Committee meeting -- we noted that our assessment of whether a particular proposal is just and reasonable is not affected by whether a prior draft version of certain language was proposed in the stakeholder proceeding, since such language was not filed with the Commission.⁵⁷

44. NextEra has provided no additional information that would make us revisit our decision from the April 23 Order. NextEra argues that revised section III.13.6.4 changes the risk profile of the obligations by shifting the obligations, risks and benefits to resources. In support, NextEra argues that ISO-NE operators will have "total discretion" on when to call on generating resources without a CSO, providing these resources with an energy payment but no capacity payment. However, NextEra also admits that such requests from ISO-NE are voluntary in nature for generating resources without a CSO.⁵⁸

⁵⁶ *Id.* P 169.

⁵⁷ *Id.*

⁵⁸ NextEra Request for Clarification or Rehearing at 5.

As such requests are voluntary for these resources, NextEra fails to demonstrate why this clarification is unjust and unreasonable for a generating resource that chooses to not obtain a CSO and therefore has no performance requirement under section III.13. Regarding the stakeholder process that led to the February 22, 2010 filing, NextEra provides no evidence that it was prevented from raising its concerns in that process.

5. CONE

a. Positions of Parties

45. NEPGA asks the Commission to clarify that the value of CONE for *future* FCAs is at issue in the paper hearing. Additionally, NEPGA disputes the Commission's statement from the April 23 Order that arguments that OOM entry has triggered the current CONE value appear to be flawed. In support, NEPGA contends that only ISO-NE has the data to prove that OOM capacity has not been accurately mitigated in past auctions. As a result, NEPGA states that it will file a subsequent motion seeking disclosure of relevant evidence from ISO-NE and the IMM regarding offers that were not deemed OOM. NEPGA states that if its motion is denied, then it will seek rehearing or clarification.

b. Commission Ruling

46. We grant NEPGA's request for clarification and state that only the value of CONE for future FCAs is at issue in the paper hearing. NEPGA's motion for disclosure is addressed in Section B of this order.

B. Motion for Disclosure of Information Relating to OOM Determinations

1. Motion

47. NEPGA filed a motion under Rule 212 of the Commission's Rules of Practice and Procedure⁵⁹ asking the Commission to order ISO-NE and its IMM to disclose information considered by the IMM as it determined whether it considered resources to be OOM for prior FCAs.⁶⁰ NEPGA asserts that the OOM determinations made by the

⁵⁹ 18 C.F.R. § 385.212 (2010).

⁶⁰ Specifically, NEPGA asks the Commission to require the Market Monitor to respond to the following questions:

1. For each Resource that sought to offer at a price below $0.75 \times \text{CONE}$, please provide the information reviewed by the [Market Monitor] in reaching its determination whether it was in-market. For Demand Resources, include any

(continued...)

IMM during past capacity auctions, under a tariff that NEPGA states is now recognized to have been flawed, will affect the outcome of future auctions and could lead to unjust and unreasonable outcomes even after tariff changes. It states that "correcting for this contaminating effect requires examination of the information underlying these OOM determinations,"⁶¹ and only the IMM is in possession of this information. NEPGA states that it does not challenge, or seek to reverse, any of the outcomes of past FCAs. However, NEPGA states, certain determinations made by ISO-NE officials, including the IMM, during the previous FCAs will affect "the parameters and therefore the outcome" of future FCAs,⁶² and these determinations were made under an FCA tariff which was not just and reasonable. NEPGA asserts that OOM bids can be used by capacity buyers with sufficient market power as a means to suppress prices, and therefore, the analysis and treatment of OOM bids submitted by parties in previous FCAs "will be at the heart" of the paper hearing before the Commission.⁶³

determination of the lost value of production or other economic losses associated with proffered reductions of energy use.

2. If any cleared, in-market Demand Resources received, or are eligible to receive, System Benefit Charges or other modifications to the retail tariff rate that the resource owner would otherwise have paid or received, please describe how such modifications were considered by the [Market Monitor] and provide all relevant information considered by the [Market Monitor].

3. Did the [Market Monitor] at any time review any other offers from Resources to determine if they were uneconomically low? This includes review of offers that were at or above $0.75 \times \text{CONE}$ and offers from new Resources deemed to be existing for purposes of FCA #1. If so, please describe such review, including all materials considered, and provide such materials unless publicly available.

NEPGA Motion for Disclosure at 8-9.

⁶¹ *Id.* at 1.

⁶² *Id.* at 3.

⁶³ *Id.* at 4.

48. NEPGA asserts that the IMM previously determined whether a resource was OOM on the basis of criteria that were more narrow than the definition that the Commission accepted in the April 23 Order. NEPGA also asserts that the tariff provisions in place prior to the April 23 Order did not "carry forward" the OOM determination, allowing a resource that was determined to be OOM in one auction to be "in-market" for all future FCAs. NEPGA states that this continues to be a problem going forward, because the February 22 filing provides for all resources that were designated OOM in prior auctions to receive an amnesty, and be permanently exempt from OOM mitigation and treated as in-market for all future FCAs. NEPGA argues that any tariff emerging from the paper hearing that continues this perpetual exemption from market power mitigation will, by definition, fail to achieve just and reasonable results. NEPGA further argues that flaws in the existing and proposed tariff have resulted in unjust and unreasonable outcomes in the past which will, unless examined and corrected, result in an unjust and unreasonable value for CONE, and that the only way for the Commission to properly reset CONE for future auctions is to remove from the calculation of CONE the effects of prior OOM bids. According to NEPGA, removing this effect requires evidence regarding the magnitude and composition of prior OOM bids.

49. NEPGA argues that market participants are entitled to access to evidence sufficient to ascertain whether and to what extent past determinations of OOM will affect the parameters such as CONE and future OOM determinations that in turn will affect the outcomes of future FCAs. NEPGA states that, although the Commission stated in its April 23 Order that there was no support provided for the contention that the IMM's analysis failed to properly consider all of the OOM capacity,⁶⁴ the Commission overlooked the fact that only ISO-NE and its IMM have the information necessary to support this allegation. NEPGA states that, by finding that the generators did not support their argument that prior OOM determinations were incorrect, the Commission has placed a burden on the generators to re-support its argument that cannot be carried, without access to all data relevant to all OOM determinations. Thus, NEPGA seeks disclosure of all such data.

2. Answers

50. ISO-NE, NEPOOL, Joint Filing Supporters and Eastern Massachusetts Consumer-Owned Systems⁶⁵ (EMCOS) filed answers requesting that the Commission deny NEPGA's motion.

⁶⁴ *Id.* at 7, (citing April 23 Order, 131 FERC ¶ 61,065 at P 150).

⁶⁵ Eastern Massachusetts Consumer-Owned Systems includes Braintree Electric Light Department, Concord Municipal Light Plant, Hingham Municipal Lighting Plant,

51. ISO-NE states that the April 23 Order simply set certain issues for a paper hearing and did not provide for discovery, and the resolution of the market design issues under the Commission's schedule for the paper hearing will be extremely challenging even without discovery (which, ISO-NE warns, other parties will also seek if the Commission grants discovery to NEPGA). Joint Filing Supporters and EMCOS also argue that NEPGA's proposed discovery is inconsistent with the Commission's paper hearing procedures. Joint Filing Supporters argue that NEPGA has not justified the need for discovery relating to the IMM's past characterization of particular OOM resources since the Filing Parties clearly stated that the relevant tariff revisions do not change the designation of whether a resource is OOM but only provide increased detail regarding any such determination.

52. ISO-NE, Joint Filing Supporters and EMCOS also argue that NEPGA improperly seeks discovery that is beyond the scope of the issues set for paper hearing, and that NEPGA is seeking to make an improper collateral attack on past Commission orders. ISO-NE notes that, while the Commission did set for hearing the appropriate treatment for historical OOM going forward, none of the issues set for paper hearing require reopening past OOM determinations, and in any case, the OOM determinations for the first three FCAs were properly made under the rules then in effect. ISO-NE states that neither the filing of tariff changes pursuant to section 205 of the FPA, nor the setting of such changes for paper hearing by the Commission, renders the previous tariff provisions unjust and unreasonable as alleged by NEPGA. Joint Filing Supporters similarly assert that, for each of the first three FCAs, ISO-NE filed a certification stating that the IMM had reviewed each bid under 0.75 times CONE, and the Commission had issued orders approving those certifications, and that NEPGA should not be granted discovery for the purpose of making a collateral attack on prior Commission orders.

53. ISO-NE also states that while the Commission set for paper hearing the issue of whether CONE should be reset, re-opening past OOM determinations is irrelevant to this issue since the Commission has already found that "arguments that OOM entry has triggered the current CONE value appear to be flawed" and "to the extent that the generator parties contend that the [IMM] analysis fails to properly consider all of the OOM capacity in its analysis, we note that they have not supported such an allegation."⁶⁶ ISO-NE also argues that the Commission has already accepted all of ISO-NE's previous OOM determinations, and any challenges to those determinations at this point are improper collateral attacks.

Reading Municipal Light Department, Taunton Municipal Lighting Plant and Wellesley Municipal Light Plant.

⁶⁶ ISO-NE response to Motion at 8, (citing April 23 Order, 131 FERC ¶ 61,065 at P 150).

54. NEPOOL states that it neither supports nor opposes NEPGA's motion for disclosure. However, NEPOOL seeks to ensure that any disclosure ordered by the Commission, including but not limited to negotiation of any confidentiality agreements, complies with the relevant provisions of the ISO New England Information Policy. NEPOOL also disputes NEPGA's characterizations of the existing OOM reviews as "flawed" and "feeble," noting that the FCM revisions accepted in the April 23 Order represent improvements to the current just and reasonable design.

3. Commission Ruling

55. NEPGA seeks information regarding ISO-NE's determinations as to what resources qualified for OOM treatment in the first three FCAs. NEPGA states that it does not seek to challenge the outcomes, including clearing prices of past FCAs (as, indeed, it could not, since any such challenge would be a prohibited collateral attack).⁶⁷ NEPGA states, however, that it is seeking this information in order to address two issues in the paper hearing proceeding: the going-forward treatment of historical OOM and the resetting of CONE.

56. We will deny NEPGA's motion for disclosure as NEPGA has not provided any basis for the Commission to reexamine the IMM's OOM determinations from the first three FCAs. When NEPGA argues that only the IMM and ISO-NE have the relevant data concerning these historical determinations, NEPGA fails to acknowledge the Filing Parties' uncontradicted representation that the relevant rules "will not change the determination of whether a specific project is found to be in-market or out-of-market" as "they do not change the current Tariff's basic principle that differentiates out-of-market capacity from in-market capacity."⁶⁸ Rather, as the IMM noted in his testimony, the proposed tariff revisions "simply make the process used to determine in-market and out-of-market revenues more transparent by adding detail to the tariff language."⁶⁹ The Filing Parties' statements and the IMM's testimony suggest that if ISO-NE were to evaluate capacity from the prior three auctions under the proposed rules changes, the determinations concerning OOM capacity would remain unchanged. The question before the Commission in the paper hearing is the manner in which OOM capacity should

⁶⁷ Prior to each of the first three FCAs, ISO-NE made a filing with the Commission that identified the number of megawatts of supply resources that would be treated as OOM capacity for purposes of that auction, and the Commission accepted each such filing. *ISO New England Inc.*, 122 FERC ¶ 61,018 (2008); *ISO New England Inc.*, 125 FERC ¶ 61,155 (2008); *ISO New England Inc.*, 128 FERC ¶ 61,266 (2009).

⁶⁸ February 22 Transmittal Letter at 20.

⁶⁹ *Id.*, Attachment 5, LaPlante Testimony at 4.

interact with the capacity clearing price, not what capacity should be considered OOM,⁷⁰ and thus, there is no justification for revisiting these historical determinations.

57. NEPGA's motion for disclosure, however, suggests that it wishes to seek to argue that, unless ISO-NE's past OOM determinations are revisited, "past errors will continue to affect FCAs going forward,"⁷¹ and, for all practical purposes, the value of CONE going forward will be tainted, unless action is taken to reverse ISO-NE's determination of what constituted OOM capacity in the first three FCAs (which NEPGA characterizes as re-evaluating offers that "ISO-NE today concedes were unmitigated OOM bids"⁷²). NEPGA explicitly states that it seeks discovery in this motion precisely so that it may, itself, re-examine and re-evaluate those offers, on the basis that these previous OOM determinations were conducted under "flawed" tariff provisions.⁷³

58. We disagree with NEPGA's assertion that the prior market rules were "flawed," as no party has provided any evidence to support such a claim. We agree with ISO-NE that the filing of tariff changes pursuant to section 205 of the FPA does not establish that the previous tariff provisions are unjust and unreasonable. Further, while the issues set for paper hearing in the April 23 Order included "the treatment of OOM resources that create capacity surpluses for multiple years,"⁷⁴ our order did not seek to revisit the IMM's historical OOM determinations, and we will not permit NEPGA to expand the scope of the paper hearing in this case. Rather, we noted that to the extent that NEPGA is arguing that OOM entry has triggered the current CONE value, the IMM notes that OOM entry did not have an effect on the clearing price for the first three auctions. In support, we stated that "arguments that OOM entry has triggered the current CONE value appear to

⁷⁰ See April 23 Order, 131 FERC ¶ 61,065 at P 38 ("[C]urrent APR adjusts the Capacity Clearing Price upward . . . when OOM Capacity offers into the market, . . . [under certain] conditions . . .") and P 69-71 ("APR is . . . intended to discourage buyers who have the incentive and ability to suppress market clearing capacity prices below a competitive level from doing so. . . . We agree with [certain parties] that ISO-NE's existing APR does not fully meet this objective. . . . [T]he concerns raised by [these parties] warrant further investigation and, therefore, we will require further proceedings . . .").

⁷¹ NEPGA Motion at 6.

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ April 23 Order, 131 FERC ¶ 61,065 at P 18.

be flawed.”⁷⁵ In fact, NEPGA’s argument here that “the unmitigated or inadequately mitigated OOM bids—recognized by the INTMMU or not—in the first three FCAs have served to crash each FCA to its price floor of $0.6 \times \text{CONE}$ ”⁷⁶ conflicts with previous testimony from its expert witness acknowledging: (1) that he “did not disagree” with the IMM’s assertion;⁷⁷ and (2) that he “never claimed that prices in the first three auctions would have been different without OOM entry.”⁷⁸ It is clear that NEPGA is concerned about the effect of historical OOM on future FCAs, and that is why the April 23 Order properly set the proposed treatment of these resources (and not the specific OOM determinations themselves) for paper hearing.

59. The questions before the Commission are the resetting of CONE and the treatment of historical OOM in future FCAs. It is, therefore, not appropriate to permit NEPGA to revisit the OOM determinations made by ISO-NE in the past, and we deny NEPGA’s motion to do so. Granting NEPGA’s motion for disclosure would, in fact, permit NEPGA to enlarge this proceeding beyond the scope of the issues set for paper hearing by the Commission.

III. Briefing in the Paper Hearing Proceeding

60. In our April 23 Order, the Commission provided for two briefs – a first brief to be filed on or before July 1, 2010, and a second brief to be filed on or before September 1, 2010. In light of ISO-NE’s suggestions, in its July 1 First Brief, that the Commission may wish to consider a broader redesign of the FCM than was originally contemplated, we now recognize that some parties may wish to file a third brief to respond to arguments made in the second briefs.⁷⁹ For those parties wishing to file a third brief, we will require third briefs to be filed no later than September 22, 2010.

⁷⁵ *Id.* P 150.

⁷⁶ NEPGA Motion at 6.

⁷⁷ NEPGA April 13, 2010 Answer, Supplementary Exhibit 2, Page 1 of 7

⁷⁸ *Id.* at 5.

⁷⁹ We stress that the third brief is voluntary, and that if parties are of the view that they have fully expressed their positions in the first and second briefs, there will be no need to file a third brief.

The Commission orders:

(A) The requests for clarification and rehearing are denied in part and granted in part, as discussed in the body of this order.

(B) The motion for disclosure is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.