

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc. and New England Power Pool Participants Committee	Docket Nos. ER10-787-000 EL10-50-000 EL10-57-000
New England Power Generators Association v. ISO New England Inc.	ER10-787-004 EL10-50-002 EL10-57-002
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.	

(Issued April 18, 2011)

Attached is the statement by Commissioner Spitzer dissenting in part to an order issued on April 13, 2011, in the above referenced proceeding. *ISO New England, Inc. and New England Power Pool Participants Committee, et al.*, 135 FERC ¶ 61,029 (2011).

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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SPITZER, Commissioner, *dissenting in part*:

I agree with the majority's conclusion that the Alternative Capacity Price Rule (APR) revisions from the February 22, 2010 filing by ISO New England Inc. (ISO-NE) and the New England Power Pool Participants Committee are not just and reasonable. I also agree with the majority that, pursuant to section 206 of the Federal Power Act, the Commission must determine and put in place a just and reasonable alternative. I disagree with the majority, however, that the Commission should require ISO-NE to institute a minimum offer price rule (MOPR) as the mechanism to mitigate buyer-side market power; I would have accepted the two-tiered pricing proposal offered by ISO-NE.

I disagree with the majority that the Commission should require ISO-NE to institute a MOPR. A MOPR is certainly one way to deter the exercise of buyer-side market power. However, based on the extensive record in this proceeding, I have no basis to conclude it is appropriate for the ISO-NE region. Despite the thousands of pages of arguments in this proceeding, no party advocated for a MOPR.<sup>1</sup> In fact, there is barely any mention of a MOPR in the record.<sup>2</sup>

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<sup>1</sup> The majority argues that the MOPR proposal is some sort of outgrowth of the benchmarking component of ISO-NE's two-tiered pricing proposal. Majority Decision at P 17 (“[W]hile we reject the APR proposal as formulated by ISO-NE in its July 1 Proposal, we find that the principles set forth by the ISO in that proposal form the basis for an effective buyer-side mitigation mechanism.”), P 165 (“While we reject ISO-NE's July 1 Proposal, we find that the fundamental component upon which it relies, benchmark pricing, forms the basis for a just and reasonable buyer-side mitigation measure.”).

In the absence of any record evidence in support of a MOPR, the majority's rationale for imposing a MOPR seems to amount to little more than that MOPRs have been adopted in the other eastern RTO/ISO markets.<sup>3</sup> I do not find that basis persuasive to satisfy our obligation under section 206.

Moreover, a MOPR directive will require significant additional stakeholder processes.<sup>4</sup> ISO-NE and its stakeholders have struggled with these issues since before December 2008, and have been waiting for a Commission decision for quite some time.<sup>5</sup> While I generally support the stakeholder process, the balance here seems to weigh in favor of greater certainty and a more timely remedy to the flaws in the capacity market, rather than further stakeholder discussions.

I would accept ISO-NE's two-tiered pricing proposal as a just and reasonable mechanism for mitigating buyer-side market power. I believe that the two-tiered pricing

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However, there is no basis in the record to support a review the benchmark pricing piece of the two-tiered pricing proposal in isolation. As discussed below, I believe that, on balance, the record demonstrates that the two-tiered pricing proposal is just and reasonable.

<sup>2</sup> The majority cites to comments made by New England Power Generators Association, Inc. (NEPGA). Majority Decision at P 17, P 165. Although NEPGA acknowledges the existence of the MOPR in PJM and NYISO, and contrasts ISO-NE's APR and two-tiered pricing proposals to those MOPRs, NEPGA does not advocate for a MOPR in the ISO-NE region. NEPGA Opening Brief, Exh. 2, Testimony of Robert B. Stoddard, at 95:3-8; *see also* NEPGA Second Brief, Exh. 8, Supplementary Testimony of Roy J. Shanker, at 8:10 to 9:7; NEPGA March 15, 2010 Protest at 45-48, 72-73.

<sup>3</sup> Majority Decision at P 19 (“[W]e will require ISO-NE to work with its stakeholders to develop an offer-floor mitigation construct akin to those in PJM and NYISO.”), P165 (“We will therefore require ISO-NE to work with its stakeholders to develop a mitigation regime that relies on these benchmarks but does not procure more capacity than ICR, that is, to develop an offer-floor mitigation construct akin to those in PJM and NYISO.”).

<sup>4</sup> Majority Decision at P 169.

<sup>5</sup> *See ISO New England, Inc. and New England Power Pool Participants Committee*, 131 FERC ¶ 61,065 at P 23 (2010), *order granting in part and denying in part requests for clarification and rehearing and denying motion for disclosure*, 132 FERC ¶ 61,122, at P 30, 37 (2010).

proposal is a just and reasonable approach to a problem that has existed in FCM since its inception – how to deter uneconomic investment. The two-tiered pricing proposal recognizes the potential for “excessive” capacity purchases, but limits compensation to new resources by paying the lower Capacity Clearing Price (rather than the higher Alternative Capacity Price).<sup>6</sup> Paying a potential *new* entrant the relatively lower Capacity Clearing Price provides it with a price signal that properly reflects the supply and demand balance in the market; paying such a resource a higher price than it had indicated by its offer that it was willing to accept would only result in additional market entry. However, paying an *existing* resource the relatively higher Alternative Capacity Price is proper because existing resources are uniquely harmed by the presence of out-of-market (OOM) resources – these existing resources established their entry prices without being able to foresee the price suppressing effect of OOM capacity.

I disagree with the majority that the fact that the two-tiered pricing proposal could permit the purchase of capacity above the ICR renders the proposal unjust and unreasonable, even when taking into consideration the “design, purpose, and history of New England’s FCM.”<sup>7</sup>

First, the majority emphasizes strict adherence to the ICR, but neglects to consider that the ICR for any given delivery year is not a static number.<sup>8</sup> Additionally, under the

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<sup>6</sup> See Majority Decision at 89-97.

<sup>7</sup> Majority Decision at P 163; *see also id.* P 19 (citing “the design and history of the FCM”). I am unsure why the “design, purpose, and history” is the criteria to determine what is just and reasonable under FPA. Moreover, while the majority insists this action is necessary in light of “the particular context of the design, purpose, and history of New England’s FCM,” I would note that a MOPR is not part of that design, purpose, or history. Yet somehow the majority is comfortable imposing *this* requirement on the ISO-NE region.

<sup>8</sup> ISO-NE Market Rule 1, Section III.12.3 (Consultation and Filing of Capacity Requirements) (requiring ISO-NE to review the modeling assumptions and resulting Installed Capacity Requirements and the Local Sourcing Requirements with the Governance Participants, the state utility regulatory agencies in New England and, as appropriate, other state agencies and file the results for each upcoming Capability Year through the relevant Capacity Commitment Period with the Commission); *see also ISO New England Inc. and New England Power Pool*, 130 FERC ¶ 61,105 (2010) (accepting proposed ICR for 2010/2011 Capability Year and related tariff amendments that affect calculation); *ISO New England Inc. and New England Power Pool Participants Committee*, 127 FERC ¶ 61,142 (2009) (accepting proposed ICR for 2009/2010 Capability Year); *ISO New England Inc.*, 125 FERC ¶ 61,154 (2008) (conditionally accepting proposed ICR for 2011/2012 Capability Year); *ISO New England Inc.*, 121

two-tiered pricing proposal, the total amount of capacity purchased would only exceed the ICR if OOM capacity clears.<sup>9</sup> If no OOM capacity is offered into the auction (a probable result in the absence of state-funded capacity), the FCM will clear at the Capacity Clearing Price and all capacity would receive that same price.

Finally, the majority rejects the two-tiered pricing proposal because it is inconsistent with the three “high-level design elements” identified by ISO-NE.<sup>10</sup> The majority criticizes two-tiered pricing because it fails to achieve the third element – not procuring more than the ICR.<sup>11</sup> The majority’s analysis is flawed. First, the three design elements discussed by ISO-NE are not a proxy for a determination of just and reasonable rates under the Federal Power Act. Second, the majority’s determination neglects to recognize that in referencing these elements, ISO-NE itself notes that “[t]here is a fundamental tension among these three elements, such that *it is not possible to honor all three of them perfectly.*”<sup>12</sup> Third, assuming the majority is correct in its myopic focus on these three design elements, the majority’s own MOPR directive fails this standard. Notably, a MOPR attempts to satisfy elements 2 (preventing new OOM capacity from distorting the market for existing capacity) and 3 (ensuring the total purchases do not exceed the ICR) at the expense of element 1 (allowing new OOM capacity to clear and obtain a capacity supply obligation).<sup>13</sup> Accordingly, I believe ISO-NE’s two-tiered pricing proposal strikes the right balance among competing interests.

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FERC ¶ 61,250 (2007), *order denying rehearing*, 123 FERC ¶ 61,129 (2008) (conditionally accepting proposed ICR for 2010/2011 Capability Year).

<sup>9</sup> See Majority Decision at n.112.

<sup>10</sup> ISO-NE argues that the APR is trying to balance three high-level design elements “(1) allowing new capacity submitting [OOM] offers to clear in the FCA and to provide capacity; (2) ensuring that the market for existing resources is not distorted by the presence of that OOM capacity; and (3) ensuring that total purchases do not exceed the [ICR].” ISO-NE Second Brief at 5, *cited in* Majority Decision at P 95.

<sup>11</sup> Majority Decision at P 161-64.

<sup>12</sup> ISO-NE Third Brief at 11 (emphasis added). “It is simply not possible to allow OOM capacity to clear in the FCA while perfectly insulating existing resources from the price effects of that OOM capacity *and* perfectly insulating load from any costs associated with purchases above ICR.” ISO-NE Second Brief at 6.

<sup>13</sup> ISO-NE Second Brief at 5, 8 (“[A]llowing OOM capacity to clear in the FCA and to provide capacity . . . has been an element of the FCM design since its inception. . . . [I]t is not possible to allow OOM capacity to clear in the FCA and to cap total purchases at the ICR without harming existing resources, except in unusual

For the foregoing reasons, I believe the Commission should not require ISO-NE to institute a MOPR as the mechanism to mitigate buyer-side mitigation and instead, should accept ISO-NE's two-tiered pricing proposal. For these reasons, I respectfully dissent in part from this order.

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Marc Spitzer  
Commissioner

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circumstances. With purchases capped at the ICR, the presence of any OOM resources at low prices in the supply curve would result in a lower price for all existing resources than would be observed had those OOM resources offered competitively, and some existing resources would be displaced from clearing entirely.”).