

163 FERC ¶ 61,198  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

Footprint Power LLC  
Footprint Power Salem Harbor Operations LLC

Docket No. IN18-7-000

ORDER TO SHOW CAUSE AND NOTICE OF PROPOSED PENALTY

(Issued June 18, 2018)

1. Pursuant to Rule 209(a)(2) of the Commission's Rules of Practice and Procedure,<sup>1</sup> the Commission's Revised Policy Statement on Enforcement,<sup>2</sup> and the Commission's Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties,<sup>3</sup> the Commission directs the above-captioned respondents, Footprint Power LLC and Footprint Power Salem Harbor Operations LLC (collectively, Footprint<sup>4</sup>) to show cause why they should not be found to have violated the Transmission, Markets and Services Tariff (Tariff) of ISO-New England, Inc. (ISO-NE), Market Rule 1, §§ III.1.7.20(b) and (f), III.1.10.1A(d), and III.13.6.1.1.2 by submitting what the Office of Enforcement (Enforcement or staff) has concluded were false and misleading supply offers for Footprint's capacity resource—Unit 4 of Footprint's multi-unit Salem Harbor Power Plant in Salem, Massachusetts (Salem Harbor)—and by failing to report the fuel status and related operational status of the capacity resource to ISO-NE in June and July of 2013. The Commission also directs Footprint to show cause why it should not be found to have violated 18 C.F.R. §§ 35.41(a) and (b) (2017) by submitting what Enforcement has concluded were false and misleading supply offers in violation of a Commission-approved Tariff, and by submitting false or misleading information and/or omitting material information regarding the Salem Harbor plant and Unit 4 in its communications with ISO-NE.

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<sup>1</sup> 18 C.F.R. § 385.209(a) (2017).

<sup>2</sup> *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at PP 35–36 (2008).

<sup>3</sup> *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317, at P 5 (2006).

<sup>4</sup> Footprint Power Salem Harbor Operations, LLC is owned by Footprint Power LLC. See *Dominion Energy Salem Harbor, LLC, et al.*, 140 FERC ¶ 62,085, at 64,207–08 (July 27, 2012) (Sale Order).

2. The Commission further directs Footprint to show cause why it should not disgorge \$2,049,571 in Capacity Supply Obligation (CSO) payments for the portion of June and July of 2013 when Footprint was paid for capacity that staff found Unit 4 could not provide, and to show cause why it should not be assessed a civil penalty in the amount of \$4,200,000. Footprint may seek a modification of those amounts consistent with section 31(d)(4) of the Federal Power Act (FPA).<sup>5</sup> Pursuant to Rule 213(a) of the Commission's Rules of Practice and Procedure,<sup>6</sup> the Commission directs Footprint to file an answer with the Commission within 30 days of the date of this order. Enforcement staff may reply to Footprint's answer within 30 days of the filing of the answer. The Commission will consider these pleadings as part of its review in this proceeding.

3. This case presents allegations by Enforcement staff that Footprint violated the ISO-NE Tariff and 18 C.F.R. §§ 35.41(a) and (b). These allegations arise out of Enforcement staff's investigation of Footprint, and are described in the Enforcement Staff Report and Recommendation (Enforcement Staff Report).<sup>7</sup> However, per Commission practice, the issuance of this order does not indicate that the Commission adopts or endorses the factual assertions or legal theories set forth in the Enforcement Staff Report.

4. The Enforcement Staff Report alleges that from June 26 through July 25, 2013, Footprint submitted false and misleading supply offers for Salem Harbor Unit 4. Specifically, staff concluded that, during that time, in violation of Market Rule 1, §§ III.1.7.20(b) and (f), III.1.10.1A(d), and III.13.6.1.1.2, and 18 C.F.R. § 35.41(a), Footprint submitted supply offers that Unit 4 could not satisfy because Salem Harbor lacked usable fuel, and failed to report to ISO-NE that Salem Harbor's lack of usable fuel reduced Unit 4's output capabilities and availability as a capacity resource. In addition to the foregoing, staff alleges that Footprint omitted material information from and/or misrepresented the fuel status of Salem Harbor and related operational status of Unit 4 in its communications with ISO-NE, in violation of the above-cited ISO-NE Tariff provisions and 18 C.F.R. § 35.41(b).

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<sup>5</sup> We note that under section 31(d)(4) of the FPA, 16 U.S.C. § 823b(d)(4) (2012), the Commission may "compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed . . . at any time prior to a final decision by the court of appeals . . . or by the district court."

<sup>6</sup> 18 C.F.R. § 385.213(a) (2017).

<sup>7</sup> The Enforcement Staff Report is attached to this order as Appendix A. The Enforcement Staff Report describes the background of Enforcement staff's investigation, findings, and analysis, and recommended remedies and sanctions.

5. In light of the allegations contained in the Enforcement Staff Report, the Commission directs Footprint to respond to this order as set forth above.<sup>8</sup> This order also serves as the notice of proposed penalty required pursuant to section 31 of the FPA.<sup>9</sup> In the answer to this order, Footprint has the option to choose between either (a) an administrative hearing before an ALJ at the Commission prior to the assessment of a penalty under section 31(d)(2)(A), or (b) a prompt penalty assessment by the Commission under section 31(d)(3)(A). If Footprint elects an administrative hearing before an ALJ, the Commission will issue a hearing order unless it is determined that the matter can be resolved in a summary disposition; if Footprint elects a prompt penalty assessment, and if, after a review of the full record to be developed in this proceeding, the Commission finds a violation, the Commission will issue an order assessing a penalty. If such penalty is not paid within 60 days of assessment, the Commission will commence an action in a United States district court for an order affirming the penalty.<sup>10</sup>

6. The Commission authorizes Enforcement staff to disclose information obtained during the course of the investigation as necessary to advance this matter.

The Commission orders:

(A) Within 30 days of the date of this order, Footprint must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why it should not be found to have violated ISO-NE Tariff Market Rule 1, §§ III.1.7.20(b) and (f), III.1.10.1A(d), and III.13.6.1.1.2, and 18 C.F.R. §§ 35.41(a) and (b) of the Commission's regulations.

(B) Within 30 days of the date of this order, Footprint must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why its alleged violations should not warrant an order requiring Footprint to disgorge the amounts described in Paragraph 1 of this order, or a modification of that amount consistent with section 31(d)(4) of the FPA.

<sup>8</sup> Under 18 C.F.R. § 385.213(c), Footprint must file an answer that provides a clear and concise statement regarding any disputed factual issues and any law upon which it relies. Footprint must also, to the extent practicable, admit or deny, specifically and in detail, each material allegation contained in the Enforcement Staff Report and set forth every defense relied upon. Failure to answer an order to show cause will be treated as a general denial and may be a basis for summary disposition under Rule 217.

<sup>9</sup> 16 U.S.C. § 823b(d).

<sup>10</sup> FPA section 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B). See also Process for Assessing Civil Penalties, *supra* note 3.

(C) Within 30 days of the date of this order, Footprint must file an answer in accordance with Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, showing cause why its alleged violations should not warrant an order requiring Footprint to be assessed a civil penalty in the amount described in Paragraph 1 of this order, or a modification of that amount consistent with section 31(d)(4) of the FPA.

(D) In any answer, Footprint should address any matter, legal, factual or procedural, that it would urge in the Commission's consideration of this matter. To the extent that Footprint cites any material not cited in the Enforcement Staff Report, Footprint is directed to file non-publicly one (1) copy of such material on CD-ROM or DVD in the captioned docket and to serve a copy of same on Enforcement staff.

(E) Pursuant to section 31(d)(1) of the FPA, within 30 days of the date of this order, Footprint may also make an election to have the procedures set forth in section 31(d)(3) of the FPA apply to this proceeding. Under that provision, if the Commission finds a violation, the Commission will issue a penalty assessment and, if not paid within 60 days of the order assessing penalties, the Commission will institute an action in the appropriate United States district court. Should Footprint fail to make a timely election under section 31(d)(1), the procedures of section 31(d)(2) will apply.

(F) Within 30 days of the filing of the answer by Footprint, Enforcement staff may file a reply with the Commission.

By the Commission.

(S E A L)

Kimberly D. Bose,  
Secretary.

**FEDERAL ENERGY REGULATORY COMMISSION**

**Footprint Power LLC and Footprint Power Salem Harbor Operations LLC  
Docket No. IN18-7-000**

**Enforcement Staff Report and Recommendation**

Office of Enforcement

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## **I. EXECUTIVE SUMMARY**

The Office of Enforcement (Enforcement or staff) submits this report to the Federal Energy Regulatory Commission (Commission) setting forth its findings of fact and conclusions of law regarding the investigation of Footprint Power LLC and Footprint Power Salem Harbor Operations LLC.<sup>1</sup> Based upon the evidence, Footprint’s written response to staff’s preliminary findings, Footprint’s subsequent correspondence, and Footprint’s response to staff’s letter providing notice under 18 C.F.R. § 1b.19 that it would recommend that the Commission initiate a public proceeding against Footprint, Enforcement has concluded that Footprint violated several provisions of ISO-New England, Inc.’s (ISO-NE) Transmission, Markets, and Services Tariff, FERC Electric Tariff No. 3 (Tariff) related to accuracy in supply offers and reporting requirements. Staff concluded that for parts of June and July of 2013, Footprint submitted false and misleading supply offers for Unit 4 of Footprint’s multi-unit Salem Harbor Power Plant in Salem, Massachusetts (Salem Harbor). Staff found that during that time, Footprint submitted supply offers that Unit 4 could not satisfy because Salem Harbor lacked usable fuel, and failed to report to ISO-NE that Salem Harbor’s lack of usable fuel reduced Unit 4’s output capabilities and availability as a capacity resource. In addition, staff determined that by submitting what staff found to be false and misleading supply offers and omitting material information from and/or misrepresenting to ISO-NE the fuel status of Salem Harbor and related operational status of Unit 4, Footprint also violated 18 C.F.R. §§ 35.41(a) and (b) (2017).

During June and July 2013 (together, the “Relevant Period”), Footprint’s Unit 4 was a capacity resource that received \$4,357,931 in Capacity Supply Obligation (CSO) payments from ISO-NE for capacity that staff concluded Footprint could not provide, while submitting necessarily false and misleading supply offers and engaging in misleading communications with the ISO regarding fuel inventory and unit availability. Enforcement recommends that the Commission issue an Order to Show Cause and Notice of Proposed Penalty to Footprint requiring it to show cause why Footprint: (i) did not violate Tariff Market Rule 1, §§ III.1.7.20(b) and (f), III.1.10.1A(d), III.13.6.1.1.2, and 18 C.F.R. §§ 35.41(a) and (b); (ii) should not pay a civil penalty in the amount of \$4,200,000, and; (iii) should not disgorge \$2,049,571 in CSO payments for the portion of June and July 2013 when Footprint was paid for capacity that Unit 4 could not provide.

## **II. PROCEDURAL HISTORY**

This investigation arose out of a referral from ISO-NE’s Internal Market Monitor (IMM) regarding Salem Harbor Unit 4’s repeated inability to meet its CSO. The IMM’s referral also alleged that false or misleading Day-Ahead (DA) supply offers and verbal

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<sup>1</sup> Footprint Power Salem Harbor Operations, LLC is owned by Footprint Power LLC. See Dominion Energy Salem Harbor, LLC, *et al.*, 140 FERC ¶ 62,085, at 64,207-08 (July 27, 2012) (*Sale Order*). These entities are collectively referred to herein as “Footprint.”

communications were made to ISO-NE regarding Unit 4's availability. As discussed below, staff's investigation concluded that Footprint committed multiple tariff violations and violations of the Commission's regulations during the Relevant Period.

On July 30, 2013, ISO-NE's IMM referred Freepoint Commodities LLC (Freepoint) to Enforcement based on Salem Harbor's failure to "have sufficient fuel [for Unit 4] to operate at [its CSO] when dispatched" during certain periods in 2013.<sup>2</sup> Freepoint was the subject of the IMM's Referral because it served as Energy Manager and Lead Market Participant for Salem Harbor during the Relevant Period. As such, it was responsible for bidding, scheduling, and otherwise communicating with ISO-NE regarding Salem Harbor on Footprint's behalf. Freepoint also procured fuel on behalf of Footprint. However, under the terms of Footprint's Energy Management Agreement (EMA) with Freepoint, Footprint had the sole right and responsibility to "determine the amount and characteristics of Fuel available or to be supplied" and to "make all decisions and conduct all activities related to the operation and maintenance of Salem Harbor."<sup>3</sup> In other words, Footprint managed and oversaw Freepoint's operations with respect to Salem Harbor<sup>4</sup> and was directly involved in Salem Harbor's day-to-day operations.<sup>5</sup> Based on the foregoing, "Footprint" is referenced herein as the responsible party at times when Freepoint took a particular action (e.g., submitting DA bids), as Freepoint's actions were taken under the direction of Footprint.<sup>6</sup>

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<sup>2</sup> ISO-NE Referral to Office of Enforcement at 1 (July 30, 2013) (IMM Referral). Specifically, the IMM Referral states that the IMM looked at Freepoint's behavior on July 17–20, 2013. During the course of the investigation, Enforcement found additional violations in June and July of 2013.

<sup>3</sup> EMA Article IV, 4.1(b) (Freepoint-0001578, Footprint-02-00001631). Only when Footprint determined whether and how much fuel to procure could Freepoint attempt to secure fuel for Unit 4. *See also* Freepoint Response to Data Request No. 3 (Nov. 7, 2013).

<sup>4</sup> Investigative Testimony Transcript of Scott Silverstein, 14:5–15:9 (May 22, 2014) (Silverstein Tr.) ("We serve as the asset manager. So we oversee the operations of . . . the energy manager, Freepoint . . ."). Silverstein is the President and Chief Operating Officer of Footprint.

<sup>5</sup> *See* Footprint and Silverstein Response to Preliminary Findings at (July 16, 2015) (PF Response), Affidavit of Scott G. Silverstein at 3 (Silverstein Aff.) ("I was responsible for the day-to-day operation of the Salem Harbor facility"); Investigative Testimony Transcript of Glen Grayeb, 21:9–19 (July 16, 2014) (Grayeb Tr.) (stating with respect to his interactions with Scott Silverstein, "He was the somewhat -- not always daily, but almost daily call to discuss how the plant was operating, whether or not we had day-ahead awards from the ISO, any issues that were going on with the plant that might affect operations as well as cash flows, expected cash flows, forward hedging opportunities, fuel procurement options. He was the daily guy of here's what's going on with the power plants.").

<sup>6</sup> Staff does not consider Freepoint a subject of this enforcement matter based on the specific facts of the case.

The IMM Referral alleged that Unit 4 was offered at an amount equal to its CSO in July 2013 as the ISO-NE Tariff required,<sup>7</sup> but failed to produce energy at its CSO level when dispatched by the ISO because Salem Harbor lacked usable fuel. The IMM stated that by offering the unit at dispatch levels the unit could not meet, the unit's operating status was misrepresented, possibly in violation of the Tariff and 18 C.F.R. §§ 35.41(a) and (b). As discussed herein, staff's investigation substantiated the IMM's assertions.

On February 3, 2014, staff opened a preliminary investigation into the conduct described in the IMM's Referral. The investigation included taking the investigative testimony of Scott Silverstein, Footprint's President and Chief Operating Officer (COO), Murat Alptekin, Freepoint's Managing Director during the Relevant Period, and Glen Grayeb, Freepoint's Director of the Northeast Power Trading Desk during the Relevant Period. In addition, staff issued a data request for documents and information to both Footprint and Freepoint.<sup>8</sup> On May 18, 2015, staff issued a preliminary findings letter (PF) to Footprint. On July 10, 2015, staff received a PF response from Footprint,<sup>9</sup> which included affidavits from Footprint's retained expert Dr. Roy J. Shanker, and from its COO Scott Silverstein.

On August 5, 2015, staff and counsel held an in-person meeting during which they discussed the preliminary findings and, in particular, Footprint's claim that staff relied on assumptions rather than data to calculate Salem Harbor's usable fuel inventory in investigating when Footprint may have made false and misleading offers and misrepresentations. On September 2, 2015, Footprint's counsel sent staff a letter claiming that staff used the wrong data source to calculate Salem Harbor's usable fuel, even though Footprint had produced and relied on the same data source for its own fuel inventory calculations in its PF response.<sup>10</sup> Even after staff used the data source proffered by Footprint, use of that data source did not materially impact staff's calculations.<sup>11</sup> In response to staff's adjusted analysis, Footprint claimed that Unit 4's

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<sup>7</sup> See Tariff Market Rule 1, § III.13.6.1.1.1 effective January 15, 2013. A subsequent revision was effective May 1, 2013, but did not change this section.

<sup>8</sup> See December 4, 2013 Data Request from Staff to Footprint; October 15, 2013 Data Request from Staff to Freepoint.

<sup>9</sup> On July 16, 2015, Footprint submitted a corrected response, which fixed minor and mostly typographical errors in the original response. The corrected response is cited herein.

<sup>10</sup> See, e.g., PF Response at 23 n.36, 24 n.43, 26 n.57, 28 n.66, 30 n.76, 32 n.86, 77 n.255, 104–05 n.341 (relying on Salem Harbor Station Daily Report inventory readings taken daily at 4:00 AM, and citing, among other documents, e-mail report from D. Cunningham to C. Harrow, L. Beaudette, L. Arak, P. Furniss, S. Silverstein, S. Dulong and others re: Salem Harbor Station Daily Report (July 23, 2013 4:29 AM) (Footprint-02-00000507)).

<sup>11</sup> To determine Salem Harbor's oil inventory, staff relies on the same data source proffered by Footprint's counsel—the Salem Harbor Daily Fuel Inventory report generated by Kevin Cornacchio—when available. See Letter from Footprint's Counsel to Staff at 3 (Sept. 2, 2015)

offers were “feasible” because the unit did not have to operate in accordance with its CSO due to certain environmental limitations on NO<sub>x</sub> (nitrogen oxide) emissions reported by Footprint to ISO-NE in NX-12 forms.<sup>12</sup> Footprint subsequently communicated to staff that it previously withheld documents from staff related to this alleged environmental limitation because Footprint viewed them as non-responsive to staff’s data request, and that it identified other additional documents that had been “incorrectly marked as non-responsive.”<sup>13</sup>

On September 24, 2015, staff responded to the September 2, 2015 letter, and noted that it “contained several re-characterizations and apparent misunderstandings of staff’s findings.”<sup>14</sup> In its September 24 response, staff pointed out, among other things, that (1) it had relied on the same data source that Footprint had relied on in its PF response, (2) the NO<sub>x</sub>-related documents were responsive to staff’s December 4, 2013 data request and should have been produced at that time, (3) regardless of whether or not Unit 4 encountered an environmental limitation the Tariff still required resources to be offered accurately, and (4) the submission of NX-12 forms did not absolve a resource of its obligation to comply with the Tariff and other governing documents. On October 23, 2015, Footprint’s counsel informed staff that Footprint would produce all documents regarding the NX-12 forms and related materials, and subsequently produced additional documents on November 17, 2015.<sup>15</sup>

On February 9, 2018, after Footprint and staff had the opportunity to discuss settlement, staff issued a letter to Footprint providing notice of staff’s intent under 18 C.F.R. § 1b.19 to recommend that the Commission initiate a public proceeding against Footprint. Footprint submitted its response to Staff’s 1b.19 notice on March 12, 2018.

Staff carefully considered Footprint’s original 2015 written response to staff’s preliminary findings and its response to staff’s subsequent 1b.19 notice, as well as all other communications with Footprint and Freepoint. Although staff narrowed the set of

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(citing e-mail from K. Cornacchio to S. Silverstein, L. Beaudette, S. Dulong and others re: 7-15-2013.xlsx (July 15, 2013 6:29 AM) (Footprint 04-00012243); *see also* Salem Harbor Daily Fuel Inventory (Footprint-04-00012244) (attached to e-mail at Footprint 04-00012243). If a Salem Harbor Daily Fuel Inventory for a particular day was not available, staff extrapolated the fuel inventory reading for the day by using the last available Salem Harbor Daily Fuel Inventory and Unit 4’s hourly generation and fuel burn (*see* Footprint-05-00000001) (spreadsheet showing Unit 4’s hourly generation and fuel burn).

<sup>12</sup> *See* Letter from Footprint’s Counsel to Staff at 1-4 (Sept. 2, 2015).

<sup>13</sup> *See* Letter from Footprint’s Counsel to Staff at 3 (Oct. 23, 2015); Letter from Footprint’s Counsel to Staff at 1-2 (Nov. 17, 2015).

<sup>14</sup> *See* Letter from Staff to Footprint’s Counsel at 1 (Sept. 24, 2015).

<sup>15</sup> *See* Letter from Footprint’s Counsel to Staff at 3 (Oct. 23, 2015); Letter from Footprint’s Counsel to Staff at 1-2 (Nov. 17, 2015).

violations pursued in light of the additional information it received from Footprint and Freepoint, staff still concluded that the majority of Footprint's arguments were not supported by the evidence and did not alter staff's views that violations occurred.<sup>16</sup> Accordingly, staff recommends proceeding against Footprint for the reasons discussed below. Consistent with the penalty guidelines, staff seeks a civil penalty against Footprint of \$4,200,000. Staff also proposes disgorgement from Footprint in the amount of \$2,049,571 for CSO payments it received during the Relevant Period for capacity it could not provide.

### **III. BACKGROUND**

#### **A. Salem Harbor Power Plant**

On August 3, 2012, Footprint purchased Salem Harbor—a 748 MW fossil-fueled electric generating station with four units, two of which retired in 2011<sup>17</sup>—from Dominion Resources Services, Inc. (Dominion).<sup>18</sup> At the time of Footprint's purchase, units 3 and 4 were operational, and each had a CSO for both the Forward Capacity Auction 3 (FCA 3) Capacity Commitment Period (June 2012 through May 2013) and the FCA 4 Commitment Period (June 2013 through May 2014).<sup>19</sup> However, per a previous request submitted by Dominion to ISO-NE on May 11, 2011, units 3 and 4 were scheduled to retire effective June 1, 2014, coincident with the commencement of the FCA 5 Capacity Commitment Period.<sup>20</sup> Unit 3 was primarily a coal-fired unit and Unit 4 was a 437 MW oil-fired unit. Only Unit 4 is at issue in this investigation.

Salem Harbor also had two on-site fuel storage tanks—referred to by Footprint as tank B-3 and tank B-4—that each could hold roughly 200,000 barrels (bbl) of oil that could be used to supply Unit 4.<sup>21</sup> However, during the Relevant Period Footprint

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<sup>16</sup> While staff has narrowed the set of violations it is pursuing since issuing its preliminary findings in May 2015, all of the violations set forth herein were set forth in staff's preliminary findings.

<sup>17</sup> Units 1 and 2 retired in 2011. *See Sale Order*, 140 FERC at 64,207.

<sup>18</sup> *See* PF Response at 22. Silverstein and Furniss founded Footprint to purchase and convert end-of-life power plants into new generation. *See* Silverstein Tr. 29:18–30:16.

<sup>19</sup> *See ISO New England Inc.*, 130 FERC ¶ 61,145 (2010) (*FCA 3 Order*); *New England ISO Inc.*, 133 FERC ¶ 61,230 (2010) (*FCA 4 Order*).

<sup>20</sup> *See* Letter from K. Curtis (Dominion) to S. Rourke (ISO-NE) re: Non-Price Retirement Election for Salem Harbor Units 3 and 4 (May 11, 2011), [https://www.iso-ne.com/static-assets/documents/genrtion\\_resrcs/reports/non\\_prc\\_retremnt\\_ltrrs/2011/salem\\_retirement\\_election.pdf](https://www.iso-ne.com/static-assets/documents/genrtion_resrcs/reports/non_prc_retremnt_ltrrs/2011/salem_retirement_election.pdf). Footprint has since demolished the entire Salem Harbor plant and is replacing it with a natural gas combined-cycle facility.

<sup>21</sup> Silverstein Tr. 48:11–24.

pumped oil from tank B-3 into B-4, and then used only tank B-4 to fuel Unit 4.<sup>22</sup> In addition, as of July 1, 2013 (and perhaps earlier) through the rest of the Relevant Period, only tank B-4 could be used because B-3 had gone offline.<sup>23</sup> Thus, all fuel inventory readings that appear in staff’s analysis for the Relevant Period are from tank B-4. In this report, the term “Salem Harbor” refers to the plant—i.e., units 3 and 4 and the two fuel storage tanks. The term “Unit 4” refers only to that particular unit.

### **B. ISO-NE Determined That It Needed Salem Harbor for Reliability**

Through ISO-NE’s Forward Capacity Market (FCM), the ISO pays resources that provide capacity to the New England region. This ensures that the region secures sufficient capacity to maintain system reliability in the face of future load and reliability events.<sup>24</sup> Through an annual FCA, capacity resources compete to obtain a commitment to supply capacity in exchange for a market-priced capacity payment three years in the future. Resources that win a CSO must offer energy into the market at an amount equal to or greater than their CSO and must be available for commitment and dispatch unless excused by the ISO under specific limited exceptions. If a resource is physically available to produce energy at a level less than its CSO, it must offer at that lower level.<sup>25</sup>

During FCA 3 in 2009, Dominion submitted a “de-list” bid to retire Unit 4,<sup>26</sup> which the ISO rejected on the grounds that Salem Harbor was essential to “ensure the reliable operation of the New England power system (both to meet transmission security

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<sup>22</sup> See Silverstein Tr. 244:1–16. In fact, during the Relevant Period tank B-3 never had more than 642 bbl of oil in it. See, e.g., 1b.19 Response, Affidavit of Scott G. Silverstein (Silverstein Aff.), Ex. SGS-1 (Salem Harbor Daily Fuel Inventory for June 25 through July 26, 2013).

<sup>23</sup> See Silverstein Tr. 48:11–24. See also Footprint-01-00000588 (July 9, 2012); Footprint-02-00000511 (July 5, 2013); Footprint-01-00001330 (July 6, 2013) (e-mails among plant staff and Scott Silverstein discussing mechanical issues with tank B-3).

<sup>24</sup> See ISO-NE, Overview of New England’s Wholesale Electricity Markets and Market Oversight (May 6, 2014), [https://iso-ne.com/static-assets/documents/pubs/spcl\\_rpts/2014/2014\\_market\\_overview\\_050614.pdf](https://iso-ne.com/static-assets/documents/pubs/spcl_rpts/2014/2014_market_overview_050614.pdf).

<sup>25</sup> See Tariff Market Rule 1, § III.13.6.1.1.1 (“A Generating Capacity Resource having a Capacity Supply Obligation shall be offered into both the Day-Ahead Energy Market and Real-Time Energy Market at a MW amount equal to or greater than its Capacity Supply Obligation whenever the resource is physically available. If the resource is physically available at a level less than its Capacity Supply Obligation, however, the resource shall be offered into both the Day-Ahead Energy Market and Real-Time Energy Market at that level.”).

<sup>26</sup> Prior to selling Salem Harbor to Footprint, Dominion elected to permanently retire units 3 and 4 effective June 1, 2014.

requirements and to avoid thermal overloads on the transmission system).”<sup>27</sup> The next year, during FCA 4, Dominion again sought to de-list Unit 4, and the ISO again rejected the bids on the same reliability grounds.<sup>28</sup>

Consequently, Unit 4 had a CSO for the periods covered by the FCA 3 (June 2012 through May 2013) and FCA 4 (June 2013 through May 2014) Commitment Periods. Consistent with these CSOs, every day Unit 4 had to offer its CSO and, unless excused under the specific limited exceptions set forth in the Tariff, be available to produce the energy associated with its Economic Maximum (EcoMax),<sup>29</sup> which varied by season: 437 MW in the summer and 431 MW in the winter. At the time Footprint acquired Salem Harbor from Dominion, Unit 4’s stated Economic Minimum (EcoMin) was 160 MW.<sup>30</sup>

In exchange for keeping Unit 4 online and available to meet reliability needs, and by operation of the ISO-NE market rules, Dominion was not paid the pro-rated capacity auction clearing floor prices in FCAs 3 and 4, but instead received the unit’s cost of service—which was approximately double the amount received by other ISO-NE capacity resources.<sup>31</sup> Subsequently, Footprint collected CSO payments in the same

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<sup>27</sup> *FCA 3 Order*, 130 FERC ¶ 61,145 at P 5. ISO-NE conducts FCAs under which resources may bid to opt out of the market (“de-list bids”) *unless they are needed for reliability*, in which case the ISO rejects the bid.

<sup>28</sup> In *FCA 4 Order*, 133 FERC ¶ 61,230 at P 6, ISO-NE reviewed 281 de-list bids to determine whether it needed the bidding resources for reliability, and rejected only three (and the Commission approved). Two of the three rejected bids were for Salem Harbor units 3 and 4. *Id.* at P 7. The ISO conducted a transmission operability analysis to determine reliability needs and concluded that, due to Salem Harbor’s location on the system, it needed at least 460 MW from Salem Harbor. *Id.*

<sup>29</sup> EcoMax is the maximum available output, in MW, of a resource that a Market Participant offers to supply in the Day-Ahead Energy Market or Real-Time Energy Market, as reflected in the resource’s Supply Offer. This represents the highest MW output a Market Participant has offered for a resource for economic dispatch. A Market Participant must maintain an up-to-date EcoMax Limit for all hours in which a resource has been offered into the Day-Ahead Energy Market or Real-Time Energy Market. *See* Tariff Market Rule 1, § I (Definitions).

<sup>30</sup> *See, e.g.*, e-mail from S. Dulong to various other members of plant staff re: Unit 4 (May 23, 2012 9:40 AM) (Footprint-04-00015428) (noting Unit 4’s EcoMin). EcoMin is the maximum of either: (i) the Emergency Minimum Limit; (ii) a level supported by environmental and/or operating permit restrictions; or (iii) a level that addresses any significant economic penalties associated with operating at lower levels that cannot be adequately represented by three part bidding. *See* Tariff Market Rule 1, § I (Definitions).

<sup>31</sup> Dominion was awarded CSO payments for Unit 4 in the amount of \$5.005/kW-month for the FCA 4 Capacity Commitment Period (June 2013 through May 2014) based on cost information submitted by Dominion and reviewed by the IMM, compared to the “full cleared capacity” pro-rated clearing floor prices of \$2.516/kW-month. *See FCA 4 Order*, 133 FERC ¶ 61,230 at PP 5,

amount awarded to Salem Harbor when Dominion owned the plant. The CSO payments Footprint received during the months at issue were as follows: \$2,179,839 in June 2013 and \$2,178,092 in July 2013—a combined \$4,357,931.<sup>32</sup>

### **C. Footprint Acquired Salem Harbor and Sold Most of Its Stored Fuel**

On July 27, 2012, the Commission approved Footprint's acquisition of Salem Harbor from Dominion,<sup>33</sup> which Footprint purchased for a nominal price of \$1,000 and assumption of all obligations,<sup>34</sup> including Salem Harbor's CSO for both units 3 and 4 for the FCA 3 and FCA 4 Commitment Periods (June 2012 through May 2013 and June 2013 through May 2014, respectively). The transaction closed on August 3, 2012.<sup>35</sup>

Concurrent with its acquisition of Salem Harbor, Footprint hired Dominion's Salem Harbor plant staff, including managers Lamont ("Mick") Beaudette (Plant Manager) and Steve Dulong (Operations and Maintenance Manager).<sup>36</sup> At the same time, Footprint also sold most of Salem Harbor's fuel inventory back to Dominion (over 80,000 bbl of oil for about \$8 million) in a "Fuel Oil Put Agreement."<sup>37</sup> This left 40,000 bbl on site by December 2012,<sup>38</sup> an amount that Salem Harbor's plant staff believed was less than two days' worth of fuel. However, according to Footprint, though Unit 4 was needed for reliability, it had been called upon for an average of 123 hours per year prior to 2012, and 100 hours in 2013, and the 40,000 bbl approximated the amount of fuel used

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7. *See also* Silverstein Tr. 92:22–95:54; Tariff Market Rule 1, § III.13 (Forward Capacity Market).

<sup>32</sup> IMM Referral Supplement, Salem Harbor Payment Spreadsheet (May 2, 2017).

<sup>33</sup> *See Sale Order*, 140 FERC at 64,209–10.

<sup>34</sup> Silverstein Tr. 32:21–33:25. These other obligations included environmental liability and demolition of the fuel storage tanks.

<sup>35</sup> *See* PF Response at 22.

<sup>36</sup> Upon purchasing the plant, Footprint retained Dominion's plant operations staff who were employed through NAES, a third-party operation and maintenance provider. *See* Silverstein Tr. 13:22–14:4; Grayeb Tr. 22:16–23:15. Plant staff was responsible for the actual operation of the unit and responding to ISO-NE's requests as they were relayed to the plant's control room, such as starting up and shutting down the unit and moving load around. *See* Silverstein Tr. 20:15–21:7. Lamont Beaudette was a longtime employee at the Salem Harbor plant, with his tenure preceding both Footprint and Dominion's ownership. *See* Silverstein Tr. 66:3–10; Grayeb Tr. 23:10–12. Steve Dulong also worked for the Salem Harbor Plant while it was under Dominion's ownership. *See* Grayeb Tr. 23:13–15.

<sup>37</sup> *See* Virginia Power Energy Marketing Inc. and Footprint Power Acquisitions LLC, Fuel Oil Put Agreement (June 26, 2012) (Footprint-04-00000324); Silverstein Tr. 34:1–36:14.

<sup>38</sup> Fuel Oil Put Agreement (Footprint-04-00000324); Silverstein Tr. 35:6–38:14. *See also* Footprint Response to Data Request No. 4 (Jan. 10, 2014).

for the 12 months prior to Footprint’s acquisition of Salem Harbor.<sup>39</sup> Because the plant staff knew that Unit 4 burned between 14,000 to 16,000 bbl of fuel per day when operating at EcoMax,<sup>40</sup> they were aware that the remaining 40,000 bbl would not last longer than two days because only 29,000 bbl could be physically accessed from the tank due to an 11,000 bbl “heel” (i.e., the amount of fuel at the bottom of the tank that pumps could not physically access) under normal operation.<sup>41</sup>

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<sup>39</sup> See PF Response at 17–18. There appears to be a discrepancy between Footprint’s 40,000 bbl fuel burn estimate and data produced by Footprint indicating that approximately 181,000 bbl of oil was actually burned by Unit 4 in 2012. See Footprint-05-00000001 (spreadsheet showing Unit 4’s hourly generation and fuel burn); see also Footprint Response to Data Request No. 7 (Feb. 24, 2014). According to the spreadsheet produced at Footprint-05-00000001, the column labeled “U4 Fuel Oil Burned, Prev Hour Barrels” shows that Unit 4 burned approximately 181,000 bbl in 2012. See *id.* However, the unit was not “Firing” when some of this oil was burned, see *id.*, and there were “problems with the fuel usage meter that resulted in either erroneous or missing data” in the spreadsheet. See Footprint Response to Data Request No. 7 (Feb. 24, 2014). Footprint claims that it did not “endeavor[ ] to determine whether the fuel usage meter was properly functioning during this entire period and could not necessarily do so in hindsight, particularly for periods occurring before Footprint acquired the Salem Harbor Power Station.” *Id.*

<sup>40</sup> See e-mail from T. Morrissey to S. Dulong, L. Beaudette and others re: Salem Harbor Oil Inventory Status (June 26, 2012 4:29 PM) (Footprint-04-00002287) (assuming a 16,000 bbl/day fuel consumption rate for Unit 4 when operating at EcoMax); e-mail with charts of Unit 3 and 4 fuel consumption rates (July 23, 2013 3:41 PM) (Footprint-04-00018512). See also Footprint Response to Data Request No. 7 (Feb. 12, 2014) (discussing Unit 4’s fuel consumption rates). At EcoMin, Unit 4 burned 5,500 to 6,500 bbl of fuel per day (i.e., running for 24 hours). See *id.*

<sup>41</sup> At the time of Footprint’s acquisition, plant staff referenced a 12,000 bbl heel (see e-mail from S. Dulong to J. Hayes and others re: Salem Harbor Oil Inventory Status (June 26, 2012 1:34 PM) (Footprint-04-00015394) (“[t]he heel on this tank when using the supply pump for operating unit 4 will be 12,000 bbls.”)), but Footprint and its plant staff later learned that the heel was closer to 11,000 bbl because the unit tripped offline near this level in February 2013. See document titled “Unit 4 oil Storage 2/26/13” (Footprint-04-00019859) (stating “the tank Heal [*sic*] is 11,000 barrels; can’t run unit below this amount.”). For purposes of determining the fuel levels necessary to support offers during February, June, and most of July, Enforcement uses a heel of 11,000 bbl with a need for an additional 745 bbl for a cold start of Unit 4 in periods when Unit 4 had not recently run. As discussed in further detail below, Footprint claims that in mid-July it was able to re-configure its fuel pumps to reach a lower heel. Staff gave Footprint the benefit of the claimed lower heel of 9,300 bbl for July 18 through the rest of the Relevant Period.

### **D. Unit 4 Receives Its First DA Awards Under Footprint's Ownership and Depletes Most of the Fuel Left On-Site**

After Footprint took ownership of Salem Harbor in August 2012, it received its first DA award on January 24, 2013.<sup>42</sup> Unit 4 also received DA awards on February 2 and February 3, and was dispatched on February 3 and February 4.<sup>43</sup> ISO-NE subsequently dispatched Unit 4 for parts of the day on February 8, all day on February 9, and most of the day on February 10, at approximately 110 MW.<sup>44</sup> On February 22, Footprint's February 7 order of 30,000 bbl of fuel arrived.<sup>45</sup>

Unit 4 was not dispatched again until late June 2013. As of the morning of June 20, 2013, shortly before the Relevant Period, Salem Harbor had approximately 15,618 bbl in tank B-3 and 24,959 bbl in tank B-4, for a total of 40,577 bbl of oil at the plant.<sup>46</sup> Unit 4 received DA awards to run on June 22 to 25, and was dispatched off and on during those days.<sup>47</sup> By June 26, 2013, Salem Harbor essentially depleted tank B-3 and only had 26,356 bbl of fuel in tank B-4,<sup>48</sup> enough usable fuel for Unit 4 to operate at its

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<sup>42</sup> Footprint Power Salem Harbor Operations LLC, Unit 4 Response to ISO-NE Dispatch Instructions at row 31 (January 1, 2012 to December 16, 2014), Silverstein Tr. Exs. 13 and 13A (Footprint's Log of Dispatch Response).

<sup>43</sup> See PF Response at 23; Footprint's Log of Dispatch Response; Footprint-05-00000001 (spreadsheet showing Unit 4's hourly generation and fuel burn).

<sup>44</sup> See Footprint-05-00000001 (spreadsheet showing Unit 4's hourly generation and fuel burn).

<sup>45</sup> See PF Response at 25 (stating that Freepoint secured fuel on February 7, 2013 and citing Footprint-01-00000752, a Department of Energy (DOE) form OE-417 filed by Footprint stating that Salem Harbor secured fuel on February 7, 2013). However, the "trade date" on the fuel order is February 6, 2013. See Trade Confirmation (Feb. 6, 2013) (Freepoint-0000100) (delivery "Window: 2/16-28"). See also Footprint Response to Data Request No. 10 (Feb. 12, 2014) (as amended May 19, 2014); PF Response at 27.

<sup>46</sup> Salem Harbor Daily Fuel Inventory (June 20, 2013) (Footprint-04-00011011).

<sup>47</sup> Footprint's Log of Dispatch Response at rows 64-82.

<sup>48</sup> See e-mail from S. Dulong to S. Silverstein, G. Grayeb, L. Beaudette and several others (June 23, 2013 11:00 AM) (Footprint-02-00000682) ("All oil has been transferred from B3 to B4[.] B4 is at about 2-3" and is still pumping we will continue till the pump starts cavitating but in Essenes [*sic*] the tank is empty."). Cavitation is the formation of vapor bubbles within a liquid at low-pressure regions that occur in places where the liquid has been accelerated to high velocities, as in the operation of centrifugal pumps, water turbines, and marine propellers. Cavitation is undesirable because it produces, among other things, a significant reduction of efficiency because it distorts the flow pattern. See also Salem Harbor Daily Fuel Inventory (June 26, 2013) (Footprint-04-00011186) (642 bbl in tank B-3 and 26,356 bbl in tank B-4). Tank B-3's inventory of 642 bbl of oil was not replenished during the Relevant Period, and this small remaining amount could not likely be transferred into tank B-4.

EcoMax/CSO level for less than a day after accounting for the 11,000 bbl heel.<sup>49</sup> And Footprint’s plant staff knew that the 11,000 bbl heel was not a theoretical number—they had direct experience reaching the heel of tank B-4 when, in February 2013, Unit 4 tripped offline for lack of fuel pressure caused by the low level of usable fuel remaining in the tank, with a total of 11,187 bbl left in the tank (i.e., close to the tank’s estimated heel).<sup>50</sup>

Although Freepoint’s traders located additional available fuel on June 26, 2013, Footprint declined to purchase additional fuel at that time.<sup>51</sup> Footprint did not place a fuel order until mid-July, and that fuel did not arrive until the end of the month.<sup>52</sup> Staff concludes that, until then, every supply offer Footprint placed from June 26 through July 25 for Unit 4 was false and misleading because Salem Harbor lacked the usable fuel to satisfy the offer.<sup>53</sup> In addition, during that time, Footprint did not accurately report Salem Harbor’s fuel status and Unit 4’s availability to ISO-NE, and omitted material information from and/or misrepresented the fuel status of Salem Harbor and related operational status of Unit 4 in its communications with ISO-NE.

The Relevant Period, June 26 through July 25, 2013, is addressed in greater detail below.

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<sup>49</sup> See Salem Harbor Daily Fuel Inventory (June 26, 2013) (Footprint-04-00011186); *infra* note 115 for additional data sources. Footprint claims that during the Relevant Period, it kept enough fuel on-site for Unit 4 to run at EcoMax for three days. Contrary to Footprint’s assertion, during the Relevant Period, the largest amount of usable fuel Footprint had on-site, 26,356 bbl (15,356 bbl usable fuel plus an 11,000 bbl heel), would have permitted Unit 4 to run at EcoMax for *just under 24 hours*—and even that inventory steadily dropped throughout the Relevant Period. *Id.*

<sup>50</sup> See e-mail from L. Beaudette to S. Silverstein and B. Svendsen, copying D. Dulong and J. Howell re: oil tank submergence 40 MW calcs (Feb. 11–12, 2013) (Footprint-04-00000099) (confirming internally that Unit 4 “could not sustain operation at any significant load,” to which Svendsen, one of the operations personnel, replied that they were “really scraping the bottom of the barrel”); Footprint’s Log of Dispatch Response at row 62 (informing ISO-NE on February 12 that Unit 4 tripped “due to fuel oil supply.”).

<sup>51</sup> See e-mail from G. Grayeb (June 24, 2013 4:26 PM) (Freepoint-0002852) (Freepoint trader asking for “price and timing” for fuel delivery); see also Grayeb Tr. 128:6–132:2 (describing oil negotiations and how Freepoint’s oil desk found available oil, but Footprint would not approve the purchase). Footprint claims that it decided not to purchase more fuel at this point because it did not burn enough fuel during June 2013 “to justify procuring an additional shipment of fuel based on Unit 4’s historical usage.” PF Response at 29.

<sup>52</sup> See Trade Confirmation (Freepoint-0000120) (July 15, 2013) (showing delivery “Window: 7/20-25”).

<sup>53</sup> See chart attached as Exhibit A; *infra* note 115 for data sources.

#### IV. APPLICABLE LAW

Tariff Market Rule 1, § III.1.7.20(b) requires market participants to “supply to the ISO all applicable Offer Data,” and “continuously maintain all Offer Data concurrent with on-line operating information.”<sup>54</sup>

Tariff Market Rule 1, § III.1.7.20(f) states that market participants are responsible for reporting to the ISO anticipated availability and other information, including the ability to procure fuel and physical limitations that could reduce resource output for the pertinent operating day.

Tariff Market Rule 1, § III.1.10.1A(d) states that supply offers should reflect the physical operating characteristics and/or availability of the resource.

Tariff Market Rule 1, § III.13.6.1.1.2 states that capacity resources must re-declare to ISO-NE any changes to offer parameters that occur in real time (RT) to reflect the resource’s known capability; capacity resources that fail to comply with this requirement are subject to economic and availability penalties.<sup>55</sup>

In addition to the foregoing Tariff requirements, the Commission’s regulations provide that a “Seller” of electric energy and capacity services at market-based rates—as Footprint was during the Relevant Period<sup>56</sup>—must “operate and schedule” a resource, and “commit or otherwise bid supply in a manner that complies with the Commission-

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<sup>54</sup> For the Relevant Period, staff relies on Tariff Market Rule 1, § III.1 (Market Operations), effective June 15, 2013. A subsequent revision was effective July 1, 2013, but did not change this section.

<sup>55</sup> For the Relevant Period, staff relies on Tariff Market Rule 1, § III.13.6 (Forward Capacity Market), effective January 15, 2013. A subsequent revision was effective May 23, 2013, but did not change this section.

<sup>56</sup> Footprint incorrectly asserts that “none of the subjects of this potential enforcement action had market-based rate authority,” and therefore Footprint was not a Seller under 18 C.F.R. § 35.41. *See* Letter from Footprint’s Counsel to Staff at 3 (Oct. 23, 2015). Even if Footprint Power LLC did not have market-based rate authority, Footprint Power Salem Harbor Operations LLC did request and obtain market-based rate authority in connection with the *Sale Order* and related Notice of Succession, Conforming Tariff Amendments and Non-Material Change in Status dated August 15, 2012. In addition, Footprint Power LCC exercised significant control over Footprint Salem Harbor Operations LLC because the entities were owned and/or controlled by the same individuals. Scott Silverstein and Peter Furniss owned all membership interests in Footprint Power LLC, and Footprint Power LLC wholly-owns Footprint Power Salem Harbor Operations LLC. *See Sale Order*, 140 FERC at 64,208. Also, Silverstein, who directed the conduct under investigation, is President and COO of both entities, and admits he was “responsible for the day-to-day operation of the Salem Harbor facility.” *See* PF Response, Silverstein Aff. at 1, 3; Silverstein Tr. 13:1–4.

approved rules and regulations of the applicable market.”<sup>57</sup> The Commission’s regulations further state that “[a] Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with” any “Commission-approved independent system operators . . . unless Seller exercises due diligence to prevent such occurrences.”<sup>58</sup>

## V. STAFF’S FINDINGS

The following discussion explains Enforcement staff’s findings of fact and conclusions of law resulting from its investigation of Footprint during the Relevant Period and subsequent communications.

### A. Staff Finds That, From June 26 through July 17, 2013, Footprint Submitted False and Misleading EcoMax Offers, and Failed to Report or Misrepresented Fuel Status and Unit Availability to ISO-NE

As discussed above, by Wednesday, June 26, 2013, Salem Harbor only had 26,356 bbl of fuel in tank B-4,<sup>59</sup> enough usable fuel for Unit 4 to operate at its EcoMax/CSO level for less than a day after taking into account Footprint’s knowledge of the 11,000 bbl heel.<sup>60</sup> Nevertheless, from June 26 through July 17, Footprint submitted supply offers for Unit 4 at its EcoMax/CSO level even though Salem Harbor did not have enough usable fuel to satisfy those offers. In addition, staff concludes that, during that time Footprint declined to purchase fuel located by Freepoint on June 26,<sup>61</sup> manipulated data regarding its normal on-hand supply (NOHS) of fuel, relied on “theoretical” and untested lowered tank heel amounts,<sup>62</sup> and withheld information about its fuel status and unit availability

<sup>57</sup> 18 C.F.R. § 35.41(a). A “Seller” includes “any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates . . . .” 18 C.F.R. § 35.36(a)(1).

<sup>58</sup> 18 C.F.R. § 35.41(b).

<sup>59</sup> See *supra* note 48.

<sup>60</sup> See Salem Harbor Daily Fuel Inventory (June 26, 2013) (Footprint-04-00011186); *infra* note 115 for data additional sources.

<sup>61</sup> See e-mail from G. Grayeb (June 24, 2013 4:26 PM) (Freepoint-0002852) (Freepoint trader asking for “price and timing” for fuel delivery); see also Grayeb Tr. 128:6–132:2 (describing oil negotiations and how Freepoint’s oil desk found available oil, but Footprint would not approve the purchase).

<sup>62</sup> See e-mail from G. Fynan to S. Dulong and others re: Oil tank (July 19, 2013 9:24 AM) (Footprint-04-00001140) (“Steve: based on my theoretical calcs done previously as reported in my 2/11/13 email, 450 gpm drawn from the tank would need a minimum tank level of about 19” above the tank floor to avoid vortexing; 300 gpm drawn from the tank would require about 17” above the tank floor. This would be about 8800 bbl in the tank for 450 gpm and 7900 bbl for 300 gpm. NOTE THAT TESTING MAY RESULT IN HIGHER OR LOWER REQUIRED LEVELS.”).

from ISO-NE. For example, Footprint could have informed ISO-NE that it was a Limited Energy Resource, and made Limited Energy Generator offers—which would have reflected Unit 4’s limited fuel availability—but instead opted to submit supply offers it could not satisfy.

On Monday, July 8, 2013, Salem Harbor had less than 26,000 bbl of oil in its inventory, or 25,717 bbl.<sup>63</sup> Footprint considered 26,000 bbl of oil to be one-half the NOHS of fuel for Unit 4.<sup>64</sup> This is relevant because when a resource reaches one-half of its NOHS of fuel it is considered an emergency reliability event reportable to ISO-NE and the DOE, among other regulatory authorities, within six hours of occurrence, and requires Footprint to file DOE form OE-417.<sup>65</sup>

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<sup>63</sup> See Salem Harbor Daily Fuel Inventory (July 8, 2013) (Footprint-04-00011867) (showing 25,717 bbl), which includes an 11,000 bbl heel. Unit 4 had ultimately not been dispatched by ISO-NE between June 26 and July 14. However, according to Footprint’s hourly fuel burn data, tank B-4 lost approximately 1 bbl or less in some hours during this time period, though it is unclear why. Compare Salem Harbor Daily Fuel Inventory on June 26, 2013 (Footprint-04-00011186) (showing 26,356 bbl) to Salem Harbor Daily Fuel Inventory on July 12, 2013 (Footprint-04-00012118) (showing 25,717 bbl) and to spreadsheet showing hourly fuel burn for July 13 and 14, 2013 (Footprint-05-00000001).

<sup>64</sup> See e-mail from C. Harrow to L. Arak re: FO Storage (May 24, 2013 7:21 AM) (Footprint-04-00019858), attaching document titled “Unit 4 oil Storage Normal, Heal [*sic*], and 50% of normal 2-26-13” (Footprint-04-00019859) (stating that normal on-hand supply is 42,000 bbl, the tank heel is “11,000 barrels; can’t run unit below this amount,” and that “50% of Normal on hand supply is 26,000 barrels”), Silverstein Tr. Ex. 26.

<sup>65</sup> See e-mail from C. Harrow to S. Dulong re: Fuel (Dec. 4, 2012 7:19 AM) (Footprint-07-00002418) (regarding reporting one-half NOHS of fuel, Dulong writes “If we believe we are in violation we are supposed to report it [to] the DOE on form OE-417 within 6 hours. There is a requirement to notify NPCC [Northeast Power Coordinating Council, Inc.] and NERC [North American Electric Reliability Corporation] but this should be done through ISO-NE per Op-10 and attachment Appx B. When the ISO-NE is notified it will be determined if ISO-NE will submit [to] DOE on form OE-417 or we will.”), attaching among other documents, ISO-NE Operating Procedure No. 10 (Footprint-07-00002444) (“Market Participants shall report incidents as required by the DOE to ISO, their LCC and applicable state regulatory agencies, in addition to the DOE.”; “Market Participants shall notify ISO when fuel supply emergencies that could impact electric power system adequacy or reliability occur. ISO and the Market Participant together shall determine if the resource availability will affect the adequacy or reliability of the bulk power system. If this limited availability affects the adequacy or reliability of the bulk power system, the Market Participant shall notify the DOE in accordance with Form OE-417 requirements.”; “Market Participants shall notify the ISO for all incidents requiring a NERC and NPCC report.”) with Appendix A (Footprint-07-00002464) and Appendix B (Footprint-07-00002459).

Staff concludes that Footprint failed to report this fuel emergency event because it would risk ISO-NE discovering Salem Harbor's fuel status,<sup>66</sup> and that Footprint instead decided to use 19,500 bbl as its estimate for one-half the NOHS of fuel based on the theoretical possibility of lowering tank B-4's heel to 4,500 bbl, which Footprint knew was not operationally achievable.<sup>67</sup> This 4,500 bbl heel could not be reached while Unit 4 was operating, but rather could only be reached when transferring oil from one tank to another.<sup>68</sup> Even then, this "transfer" heel could only be reached if Footprint switched its tank pump to a lower capacity pump—a change that was never implemented during the Relevant Period.<sup>69</sup> In addition, staff concludes that Footprint believed using a lower

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<sup>66</sup> See, e.g., Tariff Market Rule 1, § III.1.7.20(f) and 18 C.F.R. § 35.41(b); see also e-mail chain from S. Dulong to S. Silverstein, copying L. Beaudette and others re: Fuel (Dec. 4, 2012) (Footprint-07-00000770) (per Footprint's own internal communications, Footprint knew it had to report "within 6 hours" that it had less than one-half of its normal fuel supply).

<sup>67</sup> See e-mail from L. Arak to C. Harrow, R. DeRosier, D. Sutherland, G. Fynan, G. Wilson and K. Cornacchio re: B3/B4 & S1/S2 Tank Gameplan (June 7, 2013 5:45 AM) (Footprint-04-00018552), attaching document titled "Fuel Oil Management Proposal draft 5-31-2013" (Footprint-04-00018553) (Footprint acknowledges that as February 2013, one-half of Salem Harbor's NOHS of fuel was 26,000 bbl, which included an 11,000 bbl heel for tank B-4. The document then describes as a "Proposed action," that "[t]he 11,000 barrel heel can be reduced with the use of a lower capacity pump and/or and [sic] creative use of recirculation systems. Lower flow allows for a lower heel, as vortex conditions are reduced. Estimates indicate the heel could be reduced to 4,500 barrels, allowing for a reduction in inventory required." Using these theoretical estimates, Footprint then re-calculates one-half of NOHS as 19,500 bbl); see also e-mail from G. Fynan to S. Dulong and others re: Oil tank (July 19, 2013 9:24 AM) (Footprint-04-00001140) (responding to S. Dulong's July 18, 2013 10:00 PM e-mail, and stating that Footprint's "theoretical" calculations from Fynan's February 11, 2013 were for attempting to reach an 8,800 bbl heel with a smaller 450 gallons per minute pump (gpm), or a 7,900 bbl heel with a 300 gpm pump, *not* a 4,500 bbl heel with a 300 gpm pump); e-mail from S. Dulong to L. Beaudette re: Unit 4 (July 18, 2013, 7:29 PM) (Footprint-04-00002715) (acknowledging that Unit 4 has only been operating on a 600 gpm pump (as opposed to a 300 gpm pump)).

<sup>68</sup> See e-mail from S. Dulong to T. Morrissey, L. Beaudette, C. Harrow and others re: Salem Harbor Oil Inventory Status (June 26, 2012 1:34 PM) (Footprint-04-00000108) ("Correction to this. When I was speaking to the fuel yard supervisor we were talking different pumps, My error, *We can go down to a 5000 bbl heel if we are transferring oil to another tank using the smaller transfer pump. The heel on this tank when using the supply pump for operating unit 4 will be 12,000 bbls.*") (emphasis added).

<sup>69</sup> See e-mail from S. Dulong to L. Beaudette re: Unit 4 (July 18, 2013, 7:29 PM) (Footprint-04-00002715) (acknowledging that Unit 4 has only been operating on a 600 gpm pump, as opposed to a 300 gpm pump, in response to Beaudette's e-mail expressing concern that the ISO expects to dispatch the unit at full load the next day but a smaller capacity pump would not allow the unit to reach full load).

capacity pump would physically limit Unit 4's capacity, making it incapable of producing its EcoMax or incapable of running at all.<sup>70</sup>

On Monday, July 15, in the midst of a heat wave, the ISO notified Footprint that it would dispatch Unit 4 “around the clock through Thursday” (July 18), mostly at minimum load (160 MW) but also at higher loads for five to six hours each day.<sup>71</sup> Only then did Footprint authorize Freepoint's traders to order 50,000 bbl of fuel.<sup>72</sup> At the time Footprint placed its order for more fuel, it had less than 26,000 bbl of inventory remaining and knew that the delivery window for its fuel purchase was between July 20 and July 25, days after the expected dispatch period communicated by ISO-NE.<sup>73</sup>

On Wednesday, July 17, after running for only a few hours at 160 MW (EcoMin), Footprint requested that ISO-NE reduce Unit 4's EcoMax for that day down to 130 MW and then 120 MW, due to “environmental issues with the [circulating] water temperature.”<sup>74</sup> With its low supply of fuel (20,650 bbl total, or 9,650 bbl usable with an 11,000 bbl heel),<sup>75</sup> Footprint began to consider the possibility of offering only 75 MW—far below Unit 4's EcoMax, while also commencing use of vortex reduction equipment that “theoretically” would lower the heel of the tank to an untested 8,800 bbl when operating at its EcoMax/CSO level, or possibly even 4,500 bbl when operating at lower maximum output.<sup>76</sup> Again, Footprint's own internal records demonstrate that the 4,500

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<sup>70</sup> See *id.*; see also e-mail from S. Dulong to L. Beaudette, S. Silverstein, and G. Grayeb re: Oil inventory (July 18, 2013 7:08 AM) (Freepoint-0002909) (warning, in reference to a 4,500 bbl heel estimate, that “[w]e do not know where the vortex may bite us again this was just a calculation based on pump flow”); e-mail from D. Sutherland to L. Beaudette re: Big Pp/Little Pp.?? (July 22, 2013 3:40 PM) (Footprint-04-00002530) (confirming that Footprint did not use the 300 gpm pump because “there was a strong chance we may have tripped the unit.”).

<sup>71</sup> See e-mail from S. Dulong to G. Grayeb, M. Alptekin, L. Beaudette, S. Silverstein and others re: Salem [U]nit 4 (July 15, 2013 10:26 AM) (Footprint-04-00002274).

<sup>72</sup> See Freepoint Response to Data Request No. 11 (Nov. 7, 2013); see also Trade Confirmation (Freepoint-0000120) (July 15, 2013) (showing delivery “Window: 7/20-25”).

<sup>73</sup> See Trade Confirmation (Freepoint-0000120) (July 15, 2013) (showing delivery “Window: 7/20-25”).

<sup>74</sup> See ISO-NE/Salem Harbor Audio Recording (July 17, 2013 12:36 PM); Footprint Response to Data Request No. 10 (Feb. 12, 2014) (as amended May 19, 2014).

<sup>75</sup> See Salem Harbor Daily Fuel Inventory (July 17, 2013) (Footprint-04-00012371) (showing 20,650 bbl), which includes an 11,000 bbl heel.

<sup>76</sup> See ISO-NE/Salem Harbor Audio Recording (July 17, 2013 5:09 PM) (stating to ISO-NE that Unit 4 can run through Friday, July 19, if dispatched at 75 MW); Footprint's Log of Dispatch Response at row 105 (July 17, 2013 5:13 PM) (telling ISO-NE that they hoped Footprint “would swap to the other oil pump to get us to a lower level in tank and thus run longer.”); PF Response at 64–65. Footprint theorized that a lower flow rate resulting from use of a lower capacity pump would create a smaller vortex point in the oil, which would then allow more fuel in the tank to be

bbl heel was not operationally achievable, that both the 4,500 bbl and 8,800 bbl heel calculations required using lower capacity pumps that Footprint never put in place during the Relevant Period, and that Footprint believed that using a lower capacity pump would physically limit Unit 4's capacity.<sup>77</sup>

However, Footprint also claims that on July 17 it removed one of the two fuel pumps connected to Unit 4, and thereby lowered the tank's heel and was able to access more fuel without reducing Unit 4's output.<sup>78</sup> As previously noted, staff's analysis of the evidence demonstrates that neither the 4,500 bbl heel nor the 8,800 bbl heel were valid heels. There is, however, some evidence suggesting that after Footprint began using one fuel pump instead of two on July 17, Unit 4 was able to operate at a heel of approximately 9,300 bbl from July 18 onward.<sup>79</sup> In addition, Footprint has conceded that Unit 4 never operated below 9,300 bbl without reducing its output, and that 9,300 bbl was its lowest tested heel.<sup>80</sup> Staff has credited Footprint for this lower 9,300 bbl heel beginning on operating day July 18 throughout the remainder of the Relevant Period.

Less than five hours after re-declaring its EcoMax on July 17, Footprint informed ISO-NE that Salem Harbor had less than one-half of its NOHS of fuel,<sup>81</sup> and that it only

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accessed before cavitation begins. *See, e.g.*, e-mail chain with L. Beaudette, G. Fynan, K. Cornacchio, L. Arak, D. Sutherland, S. Dulong and D. McCauley re. Oil tank (July 18–19, 2013) (Footprint-04-00001140) (discussing different vortex limits with 300 gpm, 450 gpm, and 600 gpm pumps).

<sup>77</sup> *See supra* notes 67–70.

<sup>78</sup> PF Response at 78 (“Plant staff had investigated and discovered a methodology that lowered the heel to 8,800 barrels without reducing the output of the unit.”) (citation omitted).

<sup>79</sup> Kevin Cornacchio measured 12,614 bbl in tank B-4 in the early morning on Friday, July 19. *See* Salem Harbor Daily Fuel Inventory (July 19, 2013) (Footprint-04-00012501). In order to get the inventory for July 20 (a weekend when Cornacchio did not make his daily measurements), staff summed the amount of oil burned from the morning of July 19 until 1:00AM on July 20 when ISO-NE stopped dispatching the unit (*see* Footprint-05-00000001) (spreading showing Unit 4's hourly generation and fuel burn), which totaled 3,335.31 bbl burned. Staff then subtracted 3,335 bbl from 12,614 bbl, which left approximately 9,279 bbl in total by July 20.

<sup>80</sup> *See* PF Response at 64 (“Enforcement gives no credit to this work to reduce the vortex so that the heel would be lower than 11,187 barrels, calling it ‘untested,’ when, in fact, the 9,300 barrel heel is the only tested value available.”) (citations omitted).

<sup>81</sup> *See* ISO-NE/Salem Harbor Audio Recording (July 17, 2013 5:09 PM); Footprint's Log of Dispatch Response at row 105 (“Notified ISO (Chris) that we are at an oil inventory of about 45% of normal.”). There is no evidence that at this time Footprint told ISO-NE how many actual barrels of oil remained. Reaching one-half of NOHS is a fuel supply emergency reportable to ISO-NE, the DOE, and other regulatory entities. *See, e.g.*, e-mail from C. Harrow to S. Dulong re: Fuel (Dec. 4, 2012 7:19 AM) (Footprint-07-00002418), attaching among other documents, ISO-NE Operating Procedure No. 10 (Footprint-07-00002444) with Appendix A (Footprint-07-00002464) and Appendix B (Footprint-07-00002459). As of July 8, when it was clear that

had enough oil to last until Friday, July 19, and only if Unit 4 ran at an emergency low limit of 75 MW.<sup>82</sup> ISO-NE told Footprint that it was expecting a capacity deficiency on Thursday, July 18, and reiterated that the ISO needed the unit.<sup>83</sup> ISO-NE also asked Footprint if additional fuel was on order.<sup>84</sup> According to Footprint, a barge was scheduled to deliver fuel on Sunday, July 21 or Monday, July 22.<sup>85</sup> Based on the foregoing, ISO-NE had no choice but to dispatch the plant down to 75 MW for the remainder of the day.

During the evening of July 17, ISO-NE again reiterated to Footprint that Unit 4 would definitely be “dispatched up” the following day, July 18.<sup>86</sup> When ISO-NE asked Footprint if it wanted to re-declare its EcoMax to 75 MW so that Unit 4 could run until Friday (given Salem Harbor’s low fuel and the fact that ISO-NE needed the unit for dispatch), Footprint declined.<sup>87</sup> Instead, Footprint volunteered that “the Unit is available to move to EcoMax of 437 MW (net) if ISO needs us.”<sup>88</sup>

Throughout this period, Footprint could have notified ISO-NE of its limited fuel supply by, among other things, informing ISO-NE that Unit 4 was a Limited Energy Resource (LER), defined under the Tariff as “[a] generating resource[] that, due to design considerations, environmental restriction on operations, cyclical requirements, such as the need to recharge or refill or manage water flow, *or fuel limitations*, [is] unable to operate continuously at full output on a daily basis.”<sup>89</sup> As an LER, Footprint could have submitted Limited Energy Generator (LEG) offers, which is an offer for a finite amount

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Salem Harbor actually had less than one-half its NOHS (or less than 26,000 bbl) and had a reportable fuel supply emergency, Footprint decided to use 19,500 bbl as its estimate for one-half of NOHS, which was based on a 4,500 bbl heel that Footprint knew was not operationally achievable.

<sup>82</sup> See ISO-NE/Salem Harbor Audio Recording (July 17, 2013 5:09 PM); Footprint’s Log of Dispatch Response at rows 101-08.

<sup>83</sup> See Footprint’s Log of Dispatch Response at row 105.

<sup>84</sup> See ISO-NE/Salem Harbor Audio Recording (July 17, 2013 5:09 PM).

<sup>85</sup> *Id.*

<sup>86</sup> ISO-NE/Salem Harbor Audio Recording (July 17, 2013 9:02 PM).

<sup>87</sup> See ISO-NE/Salem Harbor Audio Recording (July 17, 2013 9:02 PM).

<sup>88</sup> See Footprint’s Log of Dispatch Response at row 108; ISO-NE/Salem Harbor Audio Recording (July 17, 2013 9:02 PM). Unit 4 was expected to operate at its summer EcoMax of 437 MW, but only had enough usable fuel to run for approximately 10 hours at EcoMax. See *infra* note 115 for data sources.

<sup>89</sup> Tariff Market Rule 1, § I.2.2 (defining “Limited Energy Resource”); see ISO-NE Manual for Market Operations Manual M-11 § 2.5.3(9) (Revision 42, effective Jan. 4, 2013) (emphasis added).

of energy over a finite time period that reflects the limitations of the LER. Staff determined from the evidence that Footprint knew that it could submit LEG offers by no later than February 2013, when outside consultant Bob Stein—who Footprint described as its “go to guy” for questions about market rules, tariffs, and ensuring that Footprint submitted “proper notifications” to ISO-NE<sup>90</sup>—sent an e-mail to Footprint advising it about LERs and LEG offers. In that e-mail, Stein advised Footprint that it “should (actually need[s] to) report [its] fuel situation to the [ISO-NE] control room” when its fuel was low.<sup>91</sup> If Footprint failed to do so, Stein warned that it risked being viewed by ISO-NE as “not acting prudently by not obtaining fuel.”<sup>92</sup> But, contrary to Stein’s advice in February, Footprint continued to submit supply offers at Unit 4’s unachievable EcoMax/CSO level in June and early July, rather than submit LEG offers that accurately reflected Unit 4’s fuel limitations.

**B. Staff Finds That, From July 18 through July 25, 2013, Footprint Submitted False and Misleading LEG Offers, and Failed to Report or Misrepresented Fuel Status and Unit Availability to ISO-NE**

Given Footprint’s offers and contradictory communications, ISO-NE contacted Footprint the morning of Thursday, July 18 to monitor Salem Harbor’s remaining fuel inventory and availability to run. ISO-NE informed Footprint that it would call every two hours for an update on Salem Harbor’s fuel supply.<sup>93</sup> The ISO also told Footprint that it would dispatch Unit 4 the next day (July 19) at “full load for a few hours in the afternoon.”<sup>94</sup> Under continued ISO scrutiny, Footprint began to alter Unit 4’s offers, but continued to submit what staff concludes were false and misleading offers and omit material information from and/or misrepresent the fuel status of Salem Harbor and related operational status of Unit 4 in its communications with ISO-NE. Specifically, although Footprint began to submit LEG offers at this point, the Tariff still required those LEG offers to be accurate—which staff found they were not.

From July 18 through July 25 (for operating days July 19 through 26), Footprint submitted DA offers for Unit 4 to run as an LER, with a LEG offer of 1,800 MWh for the operating day at an EcoMin of 75 MW (Unit 4 could generate 1,800 MWh by running at

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<sup>90</sup> Silverstein Tr. 158:4–23.

<sup>91</sup> See e-mail from B. Stein to S. Silverstein re: LEG rules (Feb. 8, 2013 12:53 PM) (Footprint-01-00000028), Silverstein Tr. Ex. 14.

<sup>92</sup> *Id.* In that same e-mail, Stein also advised, “If you get very low on fuel talking to the Market Monitor might make sense.” *Id.*

<sup>93</sup> See ISO-NE/Salem Harbor Audio Recording (July 18, 2013 10:15 AM); ISO-NE/Salem Harbor Audio Recording (July 18, 2013 10:27 AM).

<sup>94</sup> See e-mail from S. Dulong to S. Silverstein, P. Furniss, G. Grayeb and others re: Unit 4 (July 18, 2013 4:03 PM) (Footprint-04-00002713).

its 75 MW emergency minimum for 24 hours) and an EcoMax of 160 MW. However, even assuming that a heel of 9,300 bbl was achievable on these days, Footprint still did not have enough usable fuel inventory to satisfy Unit 4's July 18 through July 25 DA LEG offers.<sup>95</sup>

Although at the time Footprint submitted its July 18 DA LEG offer (for operating day July 19) it had enough fuel inventory to satisfy that offer, staff concludes that Footprint knew based on its fuel inventory and previous notification from ISO-NE regarding how Unit 4 would be dispatched on July 18, that it would no longer have enough usable fuel to satisfy that DA LEG offer in RT on Friday, July 19. Specifically, Footprint knew that Unit 4 would be dispatched around the clock through July 18, potentially at high levels, and needed to account for both the fuel it had already burned since the time of the morning inventory reading and for the fact that it would be running and consuming fuel over the remaining hours of July 18.<sup>96</sup>

As of 6:00 AM on the morning of July 18, Footprint had a total of 14,791 bbl of fuel (or 5,491 bbl usable with a 9,300 bbl heel).<sup>97</sup> At the time Footprint placed its DA LEG offer at 10:00 AM on July 18, it had a total of 14,058 bbl of fuel remaining (or 4,758 bbl usable with a 9,300 bbl heel), which was enough to run for approximately 29 hours at 75 MW.<sup>98</sup> However, from 10:00 AM on July 18 until the unit was released at 7:00 PM that day, Footprint burned approximately 1,584 bbl of fuel, which left a total of 12,474 bbl of fuel (or 3,174 bbl usable with a 9,300 bbl heel), enough to run for only 20 hours at 75 MW the next day.<sup>99</sup> Notwithstanding Footprint's advanced knowledge of how ISO-NE would dispatch Unit 4, and Unit 4's inability to run on July 19 in

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<sup>95</sup> See chart attached as Exhibit A; *infra* note 115 for data sources.

<sup>96</sup> See e-mail between various Freepoint and Footprint employees, including S. Silverstein, re: Salem [U]nit 4 (July 15, 2013 10:26 AM) (Footprint-04-00002274) ("Just got off phone with R. Milardo of the ISO. He said they expect unit 4 to run around clock through Thursday. At min load most of the time but 5-6 hours each day moving up on load."). Footprint's Log of Dispatch Response at row 105 (ISO-NE informed Footprint at approximately 5:13 PM on July 17 that Unit 4 would be needed on July 18 because the ISO was expecting a capacity deficiency); ISO-NE/Salem Harbor Audio Recording (July 17, 2013 9:02 PM) (ISO-NE reiterated to Footprint that Unit 4 would definitely be "dispatched up" on July 18).

<sup>97</sup> See e-mail from S. Dulong to L. Beaudette, S. Silverstein, and G. Grayeb re: Oil inventory (July 18, 2013 8:50 AM) (Footprint-02-00000636), attaching *corrected* "oil consumption" spreadsheet (Footprint-02-00000637) (showing fuel inventory reading of 14,791 as of 6:00 AM on July 18, and an hourly fuel burn of approximately 180 bbl/hr when operating at 75 MW).

<sup>98</sup> From 6:00 AM to 10:00AM, Footprint's burned 733 bbl of fuel, leaving 14,058 bbl of fuel (or 4,758 bbl usable fuel plus the 9,300 bbl heel). See Footprint-05-00000001 (spreadsheet showing Unit 4's hourly generation and fuel burn); *infra* note 115 for additional data sources.

<sup>99</sup> See *id.*

accordance with the DA LEG offer, Footprint still submitted what staff found to be a false and misleading DA LEG offer and failed to update that offer on July 18.

In addition, staff concludes that Footprint continued to misrepresent the unit's fuel inventory and actual availability in communications it had with ISO-NE that day.<sup>100</sup> First, Footprint misrepresented that it had 10,000 bbl in usable fuel, when in fact by dawn of July 17, Salem Harbor already had less than 10,000 bbl of usable fuel (approximately 9,650 bbl remained) and, after running for that entire day, had much less than that by dawn on July 18.<sup>101</sup> Second, Footprint provided estimates for the number of days Unit 4 could run, 50 hours at 75 MW and 30 hours at 160 MW, that were based on a theoretical heel of 4,500 bbl that Footprint knew was not operationally achievable.<sup>102</sup>

On Friday, July 19, Unit 4 was dispatched for most of the day, at approximately 75 MW.<sup>103</sup> On Saturday, July 20, ISO-NE took Unit 4 offline and contacted Footprint to get an update on the unit's status.<sup>104</sup> During those communications, Footprint continued to misrepresent Unit 4's availability to the ISO, claiming that once online, the unit could run for 20 hours at 75 MW (EcoMin) and 3 hours at 437 MW (EcoMax).<sup>105</sup> In reality, Salem Harbor had approximately 9,300 bbl of fuel left, its estimated heel during this period, and had no usable fuel for Unit 4 to run for even one hour at 75 MW let alone its EcoMax of 437 MW.<sup>106</sup>

By Sunday, July 21, Footprint's fuel order had not yet arrived as Footprint had claimed in a July 17 communication to ISO-NE.<sup>107</sup> Nevertheless, over the next few days, July 21 to July 25, Footprint continued to submit DA LEG offers that it did not have enough usable fuel to satisfy, while failing to inform the ISO that it still did not receive the fuel it claimed would be delivered on July 21 or July 22.<sup>108</sup> On Thursday, July 25, a

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<sup>100</sup> See, e.g., Tariff Market Rule 1, § III.1.7.20(f); 18 C.F.R. § 35.41(b).

<sup>101</sup> See ISO-NE/Salem Harbor Audio Recording (July 18, 2013 10:27 AM) (Salem Harbor plant staff tells ISO-NE that Salem Harbor has 10,000 bbl of "usable" fuel, and that Unit 4 could run for 50 hours at 75 MW and 30 hours at 160 MW—even though Salem Harbor had not re-declared Unit 4's EcoMax in the DA or RT for July 18).

<sup>102</sup> See *id.*; see also *supra* notes 67–70.

<sup>103</sup> See IMM Referral.

<sup>104</sup> ISO-NE/Salem Harbor Audio Recording (July 20, 2013 11:03 AM).

<sup>105</sup> See, e.g., ISO-NE/Salem Harbor Audio Recording (July 20, 2013 11:37 AM); ISO-NE/Salem Harbor Audio Recording (July 20, 2013 11:44 AM).

<sup>106</sup> See *infra* note 115 for data sources.

<sup>107</sup> See ISO-NE/Salem Harbor Audio Recording (July 17, 2013 5:09 PM).

<sup>108</sup> See, e.g., Tariff Market Rule 1, §§ III.1.7.20(b) and (f); Market Rule 1, § III.1.10.1A(d); Market Rule 1, § III.13.6.1.1.2; and 18 C.F.R. §§ 35.41(a) and (b).

barge carrying Footprint's July 15 fuel order arrived at approximately 4:00 PM.<sup>109</sup> The next day, July 26, Footprint informed the ISO that it had received more fuel.<sup>110</sup> At that point, Footprint stopped relying on LEG offers.

In a July 2013 Salem Harbor Operating Report prepared by plant staff, including Salem Harbor's Plant Manager Lamont Beaudette, and Operations and Maintenance Manager Steve Dulong, "Low fuel oil inventory" was listed as one of "the most significant operating problems that took place during the Month of July."<sup>111</sup> Still, Footprint received a June 2013 CSO payment of \$2,179,839 and a July 2013 CSO payment of \$2,178,092. Due to its limited ability to operate during those two months, staff determined that those payments should be reduced by \$363,306 and \$1,686,265 for June and July, respectively.

**C. Staff Finds That Footprint Committed Two Sets of Tariff Violations and Violated the Commission's Regulations**

Staff concludes that during the Relevant Period, Footprint (i) submitted false and misleading supply offers that Unit 4 could not satisfy and (ii) failed to comply with reporting requirements, in violation of Market Rule 1 §§ III.1.7.20(b) and (f), III.1.10.1A(d), and III.13.6.1.1.2.<sup>112</sup> Staff also concludes that during the Relevant Period Footprint violated 18 C.F.R. §§ 35.41(a) and (b).

*1. Footprint Submitted False and Misleading Offers*

Staff finds that Footprint violated Market Rule 1, §§ III.1.7.20(b), III.1.10.1A(d) and III.13.6.1.1.2 of the Tariff because it submitted false and misleading supply offers for Unit 4 to run at its EcoMax/CSO level or as an LER when it knew that it had insufficient fuel to meet those offers, and failed to provide and update all applicable offer data for its supply offers. Market Rule 1 § III.1.7.20(b) requires market participants to "supply to the ISO all applicable Offer Data," and "continuously maintain all Offer Data concurrent with on-line operating information." Market Rule 1, § III.1.10.1A(d)(vi) requires that supply offers reflect the physical availability of the resource. In addition, Market Rule 1,

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<sup>109</sup> See e-mail from K. Cornacchio to S. Dulong re: Barge/Inspection Discharge Nomination - ~ 5-MB – Penn 410 – Freepoint Ref: 596789/596787 (July 25, 2013 10:05 AM) (Footprint-04-00012906). On the morning of July 23, Footprint knew that the barge was not estimated to arrive until the late afternoon on July 25. See *id.* e-mail from C. Fahey (Freepoint) to K. Cornacchio and others (July 23, 2013 11:17 AM) ("Penn 410 giving an eta of July 25th 17:00 hrs. Barge will deliver approx. 52,300 bbls.")

<sup>110</sup> See ISO-NE/Salem Harbor Audio Recording (July 26, 2013 6:39AM).

<sup>111</sup> See Salem Harbor Operating Report for July 2013 at 3 (Footprint-03-00002797).

<sup>112</sup> See Preliminary Findings at 7 and n.12–15.

§ III.13.6.1.1.2 requires that “[r]esources must re-declare to the ISO *any changes to the offer parameters that occur in real time to reflect the known capability of the resource.*”

Footprint failed to comply with these tariff rules because its supply offers were false and misleading when it was submitting DA offers at its EcoMax/CSO level (i.e., June 26 – July 18), and also after it began submitting DA LEG offers (i.e., July 19 – July 25). Before the LEG offers, its regular energy offers falsely indicated that Unit 4 could perform at its EcoMax/CSO level for the day when in fact Unit 4 was unable to do so due to Salem Harbor’s lack of usable fuel. While Unit 4 did have a “must offer” obligation under Market Rule 1, § III.13.6.1.1.1, which required that Unit 4 offer every day into the DA and RT energy markets at its EcoMax/CSO level,<sup>113</sup> the Tariff also required Footprint to provide and update the ISO with all applicable Offer data—including limits on its ability to run, and to make offers at the relevant lower level if the unit was physically available for less than its CSO level.<sup>114</sup> After the LEG offers, Footprint still failed to provide ISO-NE with accurate limited energy supply offers, as Unit 4 could also not run in accordance with its LEG offers due to a lack of usable fuel.

Staff concludes that, as evident from the chart attached as Exhibit A,<sup>115</sup> for 30 operating days from June 26 through July 25, Footprint either (i) offered to produce 24 hours of EcoMax from Unit 4, or (ii) submitted LEG offers that were impossible to fulfill if dispatched because Salem Harbor did not have the necessary amount of fuel.<sup>116</sup> On each of these days, Footprint submitted offers knowing that Unit 4 would not be physically available for commitment and dispatch in accordance with those supply offers unless the fuel was already on-site (which it knew on each day it could not be), but

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<sup>113</sup> See Tariff Market Rule 1, § III.13.6.1.1.1 (effective Nov. 26, 2012, until superseded on June 9, 2014). Under § III.13.6.1.1.1, capacity resources must offer into and be available for commitment and dispatch during the DA and RT at an amount at least equal to their CSO, unless excused under specific limited (and here inapplicable) exceptions; in which case a resource physically available at a level less than its CSO must offer at that lower level. Exceptions included a force majeure event or physical unavailability.

<sup>114</sup> See *id.*

<sup>115</sup> The data sources for the chart attached at Exhibit A are the Kevin Cornacchio Salem Harbor Daily Fuel Inventory reports; the documents bearing production numbers Footprint-02-0000506 (fuel reading for July 18, 2013 as of 6:00 AM), Freepoint-0000446 (DA supply offers), Footprint-05-000001 (hourly generation and fuel burn), Freepoint-0002902 (formula used by Footprint to calculate the number of hours Unit 4 would have been able to run—based on the fuel tank’s known heel, fuel inventory, and heat rate curve/input), and Footprint-04-00019859 (estimated heel of 11,000 bbl for tank B-4); FERC Order No. 760 data (DA and RT supply offers and dispatch data); PF Response at 64 (estimated tank heel of 9,300 bbl for July 18 through remainder of Relevant Period).

<sup>116</sup> Although July 16, 2013 is a violation day, Staff does not include disgorgement for that day in its calculations, as Unit 4 was on outage for non-fuel reasons for a number of hours.

nevertheless made supply offers that violated the Tariff and the Commission's regulations.<sup>117</sup>

Staff further concludes that, by falsely indicating that Unit 4 could perform at its EcoMax/CSO level or LEG offer for days when it could not, Footprint violated Tariff Market Rule 1, § III.1.7.20(b), which required Footprint to provide and continuously update the ISO with all applicable Offer Data; Tariff Market Rule 1, § III.1.10.1A(d)(vi), which required Footprint's supply offers to reflect the physical availability of the resource and thus be accurate; and Tariff Market Rule 1, § III.13.6.1.1.2, which required Footprint to accurately update, in RT, previously submitted offer parameters to the extent the unit was no longer capable of running in accordance with those previous offer parameters.

## 2. *Footprint Failed to Satisfy Reporting Requirements*

Staff concludes that Footprint also violated separate reporting requirements of the Tariff by failing to report to ISO-NE that Salem Harbor's lack of usable fuel reduced Unit 4's output capabilities. Tariff Market Rule 1, § III.1.7.20(f) (subsection (f) was added effective June 15, 2013) requires market participants to report to the ISO anticipated availability and other information, including their "*ability to procure fuel and physical limitations that could reduce Resource output.*" For 30 operating days, from June 26 to July 25, Footprint failed to inform the ISO that Salem Harbor's limited fuel severely decreased Unit 4's ability to perform—reducing Unit 4's output to a level below its supply offers or below the levels Footprint represented in its communications with the ISO.

## 3. *Footprint Violated 18 C.F.R. §§ 35.41(a) and (b)*

Staff also concludes that Footprint violated 18 C.F.R. §§ 35.41(a) and (b), because its false and misleading supply offers violated the Tariff, and it omitted material information from and/or misrepresented to ISO-NE the fuel status of Salem Harbor and related operational status of Unit 4. For every tariff violation discussed above, as well as the specific communications discussed below, Footprint violated the Commission's regulations.

Section 35.41(a) requires a seller to bid supply in a manner that complies with the Commission-approved Tariff, which Footprint failed to do based on the same set of facts

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<sup>117</sup> Footprint asserts that staff attempts to create an unprecedented requirement that it maintain a quantity of fuel "beyond what would be necessary to meet a unit's day-ahead commitment."<sup>117</sup> This assertion is incorrect. Staff simply finds that Footprint made *false and misleading offers* because they were impossible to satisfy with the amount of usable fuel that it had, as Footprint knew at the time. Staff does not suggest that there is a specific quantity of fuel that a market participant must store on-site.

supporting the Tariff violations discussed above. Section 35.41(b) requires sellers to provide accurate and factual information and not submit false or misleading information, or omit material information in communications with ISOs. Staff found that Footprint omitted material information from and/or misrepresented to ISO-NE the fuel status of Salem Harbor and related operational status of Unit 4 throughout the entire Relevant Period, as well as in direct communications with ISO-NE on at least four occasions:

- i. From July 8 through July 16, 2013, Footprint failed (omitted) to inform ISO-NE that Salem Harbor had reached one-half of its NOHS of fuel and faced a fuel supply emergency that could impact electric power system adequacy or reliability.<sup>118</sup> One-half of Salem Harbor's NOHS of fuel was 26,000 bbl, and by the morning of July 8, the plant had 25,717 bbl (which includes an estimated heel of 11,000 bbl).<sup>119</sup> Instead of reporting this emergency event, Footprint decided to use 19,500 bbl as its estimate for one-half of Salem Harbor's NOHS of fuel, which was based on a theoretical tank heel of 4,500 bbl that Footprint knew was not operationally achievable.<sup>120</sup>
- ii. During a July 18, 2013, 10:27 AM call with ISO-NE, Footprint reported to the ISO that Salem Harbor had 10,000 "usable" barrels remaining, and that Unit 4 could run 50 hours at 75 MW and 30 hours at 160 MW. This representation was misleading and omitted the material fact that Footprint's estimate of unit availability was based on a theoretical 4,500 bbl heel that Footprint knew was not operationally achievable.<sup>121</sup>
- iii. During a July 20, 2013, 11:44 AM call with ISO-NE, Footprint reported to the ISO that Unit 4 could run for 20 hours at 75 MW or 3 hours at 437 MW.<sup>122</sup> In reality, Unit 4 did not have enough usable fuel to operate for even one hour at 75 MW let alone its 437 MW EcoMax.
- iv. Footprint failed (omitted) to inform ISO-NE from July 22 through July 25, 2013, that it did not receive a new shipment of fuel on July 21 or July 22. Footprint did not contact ISO-NE about its fuel status again until July 26, the day after its

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<sup>118</sup> See e-mail from C. Harrow to S. Dulong re: Fuel (Dec. 4, 2012 7:19 AM) (Footprint-07-00002418), attaching among other documents, ISO-NE Operating Procedure No. 10 (Footprint-07-00002444) with Appendix A (Footprint-07-00002464) and Appendix B (Footprint-07-00002459) (discussing requirements for reporting fuel supply emergencies).

<sup>119</sup> See e-mail from C. Harrow to L. Arak re: FO Storage (May 24, 2013 7:21 AM) (Footprint-04-00019858), attaching document titled "Unit 4 oil Storage Normal, Heal [*sic*], and 50% of normal 2-26-13" (Footprint-04-00019859) (stating that normal on-hand supply is 42,000 bbl, the tank heel is "11,000 barrels; can't run unit below this amount," and that "50% of Normal on hand supply is 26,000 barrels").

<sup>120</sup> See *supra* notes 67–70.

<sup>121</sup> See ISO-NE/Salem Harbor Audio Recording (July 18, 2013 10:27 AM); *supra* notes 67–70.

<sup>122</sup> See ISO-NE/Salem Harbor Audio Recording (July 20, 2013 11:44 AM).

shipment arrived, but in the interim continued to submit DA LEG offers that it could not satisfy.

The ISO-NE Tariff provisions at issue here, and the Commission's requirement that they be followed, exist for several reasons. Among them is to give ISOs and regional transmission organizations (RTOs) the ability to efficiently dispatch electricity when and where it is needed. In order to do that, however, the ISOs must receive accurate data and information from resources. The obligation to do this ultimately falls on resource owners, who have the most information about their resources and are in the best position to understand and communicate their capabilities and availability. Resource owners also have the obligation to determine how to manage their fuel supply to meet their commitments, including when and where to source fuel and how much fuel to maintain on-site.

The problems Footprint experienced at Salem Harbor, particularly in the summer of 2013, were not the result of unforeseeable events or circumstances. The problems were of Footprint's own making, driven at least in part by its desire to avoid the cost of purchasing fuel and by its lack of due diligence. Footprint—managed by sophisticated business people who purchased a power plant—was responsible for ensuring that Unit 4 could meet the obligations that Footprint assumed when it purchased Salem Harbor for \$1,000 from Dominion. However, as the evidence demonstrates, Footprint failed to do this.

**D. Staff Concludes That the Evidence Does Not Support Footprint's Arguments and Defenses**

Staff carefully reviewed and considered each argument and defense raised by Footprint during the course of the investigation. Footprint's arguments and defenses are set forth in detail in its PF response and 1b.19 response. Upon completing its review, staff maintains its conclusion that Footprint committed tariff violations and violated the Commission's regulations. Staff responds to the most prominent arguments and defenses here.

*1. Argument/Defense: Footprint Claims That It Had No Economic Motive To Engage In the Conduct Alleged By Staff*

Footprint claims that Enforcement believes that Footprint made allegedly false offers in order to avoid losing capacity market revenues, and that Footprint had no incentive to do so because it cost Footprint the same to keep Unit 4 available regardless of how much capacity was available to offer at any given time.<sup>123</sup> However, staff concluded that the economic incentive for Footprint's behavior was the desire to avoid the cost of buying fuel for what Footprint believed was a unit that ISO-NE had dispatched infrequently in the past. The evidence demonstrates that after ISO-NE began

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<sup>123</sup> 1b.19 Response at 19–20.

to dispatch Unit 4 in early 2013, Footprint sought to avoid the cost of purchasing additional oil before Unit 4's scheduled retirement the following year.

At the time Footprint purchased Salem Harbor from Dominion, it knew that the plant had two older operational units that were scheduled to retire effective June 1, 2014. Footprint had plans to demolish the plant and build a new facility in its place, and purchased Salem Harbor at a nominal price and assumption of all obligations, including the CSOs for units 3 and 4. Footprint understood that until units 3 and 4 retired, it would continue to receive the higher cost-based CSO payments that Dominion had been entitled to receive through FCA 3 and 4. The evidence indicates, however, that Footprint believed that the cost-based payments it received for Unit 4's CSO were inadequate compensation for buying and storing enough oil to operate the unit in accordance with its supply offers.

Specifically, Footprint believed that “[s]pending the approximately \$5 to \$6 million it would have cost to buy 50,000 barrels of oil in 2013, when oil prices still were very high, posed a ‘lumpy investment’ that the ISO-NE tariff was not designed to compensate.”<sup>124</sup> In Footprint's view, “[a] unit that will operate for years could perhaps justify higher inventory because the oil would eventually be burned,” while “a unit about to be retired does not necessarily have the option of burning excess oil down the road.”<sup>125</sup> Footprint also believed that it faced the added complication that putting any new oil it purchased into tank B-4—which already contained “Used Specification Fuel” oil subject to certain state regulatory requirements and which Footprint claims “was not as fungible” as unregulated oil—would reduce the new oil's value if Footprint wanted to sell any excess from the tank.<sup>126</sup> Thus, a primary motive for Footprint's behavior was to avoid what it perceived to be the high cost of buying fuel and disposing of any excess. According to Footprint, because it ultimately had to purchase fuel to run in accordance with its supply offers for Unit 4, Footprint was faced with “a stranded investment” of over \$1 million.<sup>127</sup>

The evidence indicates that Footprint's concern about this so-called “stranded investment” led it to submit false and misleading supply offers and misleading communications to ISO-NE about Salem Harbor's actual fuel status and Unit 4's availability. Footprint gambled that it could continue to receive Salem Harbor's higher cost-based CSO payments without ever buying fuel, because the unit had been dispatched

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<sup>124</sup> PF Response at 6–7. *See also* Silverstein Tr. 43:18–45:1 (describing purchasing fuel as a “lumpy” decision, and noting that “most barges are roughly 50,000 barrels that come to our dock. So most of the time, you’re looking at a 50,000-barrel barge.”).

<sup>125</sup> PF Response at 7.

<sup>126</sup> *Id.* at 7, 33 (citing Silverstein Aff. at 15–16).

<sup>127</sup> *See id.*

infrequently in the past. As long as ISO-NE did not discover Unit 4’s true fuel status and its impact on Unit 4’s availability before units 3 and 4 retired, Footprint could continue to receive payments for capacity that it knew Unit 4 could not provide and without ever having to “invest” in fuel.

In addition to the foregoing, internal documents show that plant staff—under both Footprint and Dominion—*did believe* that Unit 4’s CSO payments would be forfeited if the unit was unavailable to perform in accordance with its CSO.<sup>128</sup>

2. *Argument/Defense: Footprint Claims That It Did Not Submit False and Misleading Supply Offers Because It Had A “Good Faith” Belief that Salem Harbor Had Enough Fuel*

Footprint argues that Unit 4’s EcoMax/CSO supply offers and LEG offers were submitted with a good faith belief that Salem Harbor had sufficient fuel to satisfy them, in large part because Footprint thought that it could lower the tank’s heel, thereby increasing the amount of usable fuel inventory in the tank.<sup>129</sup> However, these claims regarding the tank’s heel are inconsistent with the evidence.

As a preliminary matter, even if Footprint’s claim that it had a “good faith” belief that it could meet Unit 4’s EcoMax/CSO supply offers and LEG offers were true, it would not negate its liability under the relevant Tariff provisions and 18 C.F.R. § 35.41(a), none of which contain a *scienter* requirement or recognize “good faith” as a defense. Similarly, 18 C.F.R. § 35.41(b) does not contain a *scienter* requirement. Section 35.41(b) provides a defense only for resources that exercised due diligence to prevent the submission of false or misleading information in, or the omission of material information from, communications with a Commission-approved ISO.<sup>130</sup> Here, the evidence demonstrates that Footprint did not exercise such due diligence. Specifically, Footprint’s argument that it had sufficient fuel to run in accordance with its supply offers is premised on its use of theoretical and unachievable heel calculations.

Footprint’s internal records show that a 4,500 bbl heel could not be reached while Unit 4 was operating, but rather could only be reached when transferring oil from one

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<sup>128</sup> See, e.g., e-mail from R. Sauer to J. Hayes (Dominion), copying L. Beaudette (Salem Harbor Plant Manager) and others (Apr. 18, 2012 2:02 PM) (Footprint-07-00001062), attaching a presentation dated April 19, 2012 and titled “Salem Harbor Station Meeting Capacity Market and Emission Requirements” at 3 (Footprint-07-00001064) (“Not meeting SH4 [Unit 4] CSO due to an inadequate NOx bank places the capacity payments at risk,” and listing the capacity payments Unit 4 received for FCAs 3 and 4).

<sup>129</sup> See PF Response at 57–69.

<sup>130</sup> See 18 C.F.R. § 35.41(b).

tank to another.<sup>131</sup> Also, both the 4,500 bbl and 8,800 bbl heel calculations required using lower capacity pumps that Footprint never put in place during the Relevant Period.<sup>132</sup> In addition, Footprint believed that using a lower capacity pump would physically limit Unit 4's capacity, making it incapable of producing its EcoMax or incapable of running at all.<sup>133</sup> Indeed, Footprint knew that Unit 4 had tripped offline due to lack of fuel pressure with just 11,187 bbl left in the tank in February 2013, near Footprint's then-estimated heel. Even more, Footprint has conceded that even after Unit 4 began operating with only one fuel pump in mid-July, Unit 4 never operated below 9,300 bbl without reducing its output, and that 9,300 bbl was its lowest tested heel.<sup>134</sup>

Footprint also argues that its July 18 through 25, 2013 DA LEG offers did not misuse the LER process because "other than raising the 'LEG flag,' there were no viable options available to Footprint once they recognized the fuel limitations for Salem Harbor Unit 4."<sup>135</sup> Footprint's use of the LER, in and of itself, does not appear to violate a specific Tariff provision. However, Salem Harbor still did not have enough usable fuel inventory to run in accordance with the LEG offers it submitted for Unit 4 on those days, and as such, those LEG offers were also false.<sup>136</sup>

Despite having internal records and formulas to track Salem Harbor's fuel inventory and Unit 4's availability based on that inventory, Footprint did not diligently monitor usable fuel levels and misrepresented Salem Harbor's fuel inventory and Unit 4's availability during the Relevant Period. Even if Footprint had acted in "good faith," which it did not, a "good faith" belief is not a substitute for due diligence.<sup>137</sup>

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<sup>131</sup> See *supra* notes 67–70.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*; see also e-mail from S. Dulong to L. Beaudette, S. Silverstein, and G. Grayeb re: Oil inventory (July 18, 2013 7:08 AM) (Freepoint-0002909) (warning, in reference to a 4,500 bbl heel estimate, that "[w]e do not know where the vortex may bite us again this was just a calculation based on pump flow").

<sup>134</sup> See PF Response at 64 ( "Enforcement gives no credit to this work to reduce the vortex so that the heel would be lower than 11,187 barrels, calling it 'untested,' when, in fact, the 9,300 barrel heel is the only tested value available.") (citation omitted).

<sup>135</sup> PF Response, Shanker Aff. at 42, 46.

<sup>136</sup> See chart attached as Exhibit A; *supra* note 115 for data sources.

<sup>137</sup> See *Coaltrain Energy, L.P., et al.*, 155 FERC ¶ 61,204, at P 273 (2016) ("it is irrelevant whether [the subject's] data response certifications were made in good faith because section 35.41(b) only requires due diligence, and the evidence shows [that the subject] . . . failed to exercise due diligence . . .").

3. *Argument/Defense: Footprint Claims That Its Communications With ISO-NE Regarding Fuel Inventory Were Made In “Good Faith”*

Footprint argues that its communications with ISO-NE regarding fuel inventory were made in good faith, and that it did not intend to deceive ISO-NE when it inaccurately reported its fuel inventory or delayed in reporting its fuel level when it dropped below one-half of Salem Harbor’s NOHS of fuel on July 8, 2013.<sup>138</sup> Staff believes that the evidence demonstrates otherwise. As earlier discussed, despite having internal records and formulas to track Salem Harbor’s fuel inventory and despite its knowledge of Salem Harbor’s NOHS of fuel and tank heel, Footprint failed to (1) diligently monitor usable fuel levels, (2) omitted material information from and/or misrepresented Salem Harbor’s fuel status in its communications with ISO-NE, and (3) failed to have a process in place for assuring the accuracy of the fuel inventory information it communicated to ISO-NE. Moreover, Footprint’s conduct does not constitute due diligence, and even if Footprint had acted in “good faith,” which it did not, a “good faith” belief is not a substitute for due diligence.<sup>139</sup>

4. *Argument/Defense: Footprint Claims That Unit 4 Was Unable to Run At Its EcoMax for 24 Hours in Any One Calendar Day Due to Environmental Limitations*

Footprint also argues that Unit 4 was able to run for no more than 15 hours at maximum output in any one calendar day because Salem Harbor’s air permit, among other things, limited its average daily NOx output.<sup>140</sup> According to Footprint, ISO-NE

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<sup>138</sup> See PF Response at 69–78.

<sup>139</sup> See *Coaltrain*, 155 FERC ¶ 61,204 at P 281 (stating that in determining whether section 35.41(b)’s due diligence exception applies, the Commission looks at whether the seller that submitted the information had processes in place to assure the accuracy and sufficiency of the information submitted); see also *supra* note 137.

<sup>140</sup> Letter from Footprint’s Counsel to Staff at 2 (Sept. 2, 2015); 1b.19 Response at 1–8. Notably, Unit 4 was capable at running at 400 MW for 24 hours *without* violating the so-called NOx limitation. See e-mail from R. Sauer to L. Beaudette and others re: Salem NOx Strategy Update Feb 2012 v2 rws.pptx (Feb. 15, 2012 8:19 AM) (Footprint-07-00001129), attaching a draft presentation titled “Salem Harbor Station Meeting Capacity Market and Emission Requirements” at 15 (Feb. 8, 2012 11:00 AM) (Footprint-07-00001130). Also, contemporaneous e-mails suggest that by reducing Unit 4’s EcoMin from 160 MW down to 75 MW and running at 75 MW, Unit 4 could potentially hit its so-called NOx limitation (presumably because running at that lower level is less efficient). See e-mail from L. Arak to S. Silverstein and P. Furniss re: Fuel Oil Management Strategy – Update (June 26, 2013 11:29 AM) (Footprint-03-00000580) (noting that Unit 4’s EcoMin had previously been 75 MW but was changed to 160 MW for “CCA test [Claimed Capability Audit test]/daily NOx management issues”); e-mail from S. Dulong to L. Arak and S. Silverstein re: Oil (July 15, 2013 11:05 AM) (Footprint-02-00000567) (“I see no issue with going to 75mw eco min other than our daily NOx

was aware of this limitation through annual NX-12 forms<sup>141</sup> that both Dominion and Footprint submitted to the ISO electronically, though Footprint has not produced any evidence that it filed an NX-12 form in 2013, the year of the conduct at issue. Footprint also claims that it did have enough fuel to perform in accordance with its supply offers once the NOx limitation is taken into account, and that it believed that ISO-NE's software systems were accounting for Unit 4's NOx limitation when running the unit based on its submission of the NX-12 forms.<sup>142</sup> However, staff believes that the express language of the Tariff as well as contemporaneous documents produced by Footprint regarding the NOx limitation make this defense unconvincing, as discussed below.

i. The Tariff Required Footprint to Submit Accurate Supply Offers and Report Anticipated Availability (Including Fuel Status) and Any Real-Time Changes In Offer Parameters

Tariff Market Rule 1, § III.1.7.20(b) requires market participants to “supply to the ISO all applicable Offer Data,” and “continuously maintain all Offer Data concurrent with on-line operating information.” Market Rule 1, § III.1.7.20(f) states that market participants are responsible for reporting to the ISO anticipated availability and other information, including the ability to procure fuel and physical limitations that could reduce resource output for the pertinent operating day. Market Rule 1, § III.1.10.1A(d) requires that DA supply offers reflect the physical operating characteristics and/or availability of the resource. In addition, Market Rule 1, § III.13.6.1.1.2, requires capacity resources to re-declare to ISO-NE any RT changes to offer parameters that change the

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average. We may need to bump load up to 160 for a portion of the day to make sure we stay in compliance with this limit.”).

<sup>141</sup> See 1b.19 Response, Decl. of Dr. Roy J. Shanker (Shanker Decl.), at 5 (“ISO-NE was provided with information regarding this constraint every year as part of the required Form NX-12.”)

<sup>142</sup> See 1b.19 Response at 8, 18–19. Footprint also claims that it is its current understanding that Dominion offered Unit 4 in the same way that Footprint did during the Relevant Period—at EcoMax, with no daily notification to ISO-NE of its actual availability based on the NOx limitation. *Id.* at 7–8. However, internal communications with Footprint's plant staff demonstrate that this was not the case. These communications are discussed in further detail below. See, e.g., e-mail from R. Sauer to J. Hayes (Dominion), copying L. Beaudette (Salem Harbor Plant Manager) and others (Apr. 18, 2012 2:02 PM) (Footprint-07-00001062), attaching a presentation dated April 19, 2012 and titled “Salem Harbor Station Meeting Capacity Market and Emission Requirements” at 3 (Footprint-07-00001064) (discussing ways to manage CSO and NOx limitation, including “[c]oordinating Unit 4 operations with ISO-NE” by, among other things, “[m]aintain[ing] adequate NOx bank at Salem” and “[c]ommunicat[ing] NOx bank to ISO-NE”); and stating “[t]he banking strategy manages the risk to preserve the capacity supply obligation (CSO)” and “[n]ot meeting SH4 [Unit 4] CSO due to an inadequate NOx bank places the capacity payments at risk.”); e-mail from S. Dulong to various other members of plant staff re: Unit 4 (May 23, 2012 9:40 AM) (Footprint-04-00015428) (discussing re-declaring Unit 4's EcoMax from 437 MWs down to 160 MWs in an effort to comply with the NOx limitation).

resource's known capability. Accordingly, staff believes that these Tariff provisions also required Footprint to reflect in its supply offers the limited energy that Unit 4 was available to provide due to environmental restrictions on the unit's operations, to report the unit's anticipated availability, and to update its offer parameters in real time. Footprint knew that when it submitted a "bid for all hours" at a particular energy output, that supply offer would be viewed as a representation that Unit 4 "had enough [fuel] to get through the full day" in accordance with that supply offer.<sup>143</sup> Nevertheless, Footprint failed to reflect Unit 4's alleged NOx limitation in its supply offers, even though the evidence shows that it understood that there were various ways to do this.<sup>144</sup>

For example, Footprint could have communicated this information directly to ISO-NE by specifically raising the issue in its regular telephone conversations with the ISO.<sup>145</sup> Additionally, ISO-NE's Manual for Market Operations Manual M-11 § 2.5.3(9) provided that—

For Limited Energy Resources, a Market Participant shall submit into the Day-Ahead Energy Market, as part of the normal Supply Offer for the Generator, an estimate of the total Energy that unit is capable of producing for the Operating Day. In Real-Time, the Market Participant can manage the use of energy from any portion of a Limited Energy Resource through the use of limited energy hourly maximum levels for the associated Limited Energy Resource.<sup>146</sup>

Again, LERs are "generating resources that, due to design considerations, *environmental restriction on operations*, cyclical requirements, such as the need to recharge or refill or manage water flow, or fuel limitations, are unable to operate continuously at full output

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<sup>143</sup> See Silverstein Tr. 165:17–23; see also Investigative Testimony Transcript of Murat Alptekin, 37:24–39:12 (July 16, 2014) (Alptekin Tr.) ("To my knowledge, the plant needs to operate for the period that's being bid in. And in this case, a 24-hour period, so it has to have fuel to operate for the 24-hour period.").

<sup>144</sup> See, e.g., Silverstein Tr. 156:13–157:10 (noting that Footprint could have submitted a LEG, among other things, to reflect any environmental limitation on Unit 4 and stating with respect to the LEG process, "I said 'the process.' I should have said a process, because obviously, we've talked about discussions with the control room. There are conversations with market monitoring that the lead participant could have, but this is one avenue in the ISO system to make those kind of notifications.").

<sup>145</sup> See *id.*

<sup>146</sup> ISO-NE Manual for Market Operations Manual M-11 § 2.5.3(9) (Revision 42, effective Jan. 4, 2013). Although staff is not pursuing this provision as a violation, the provision is nonetheless relevant because it confirms staff's interpretation of the Tariff and demonstrates that Footprint violated it.

on a daily basis.”<sup>147</sup> Footprint understood these LEG rules and their applicability to Unit 4.<sup>148</sup> During the Relevant Period, Footprint could have submitted DA offers seeking to have Unit 4 designated as an LER due to the unit’s NOx limitation. However, from June 26 to July 17 (for operating days June 27 to July 18), Footprint continued to submit offers at its EcoMax/CSO level that failed to reflect what Footprint now argues was an inability to produce more than 15 hours at its EcoMax.

ii. Footprint’s Plant Staff Knew That Submission of NX-12 Forms Did Not Absolve Footprint of Its Obligation To Comply with the Tariff and Other Governing Documents

Further, staff believes that Footprint knew that Salem Harbor’s NOx limitation did not absolve Unit 4 of the requirement to submit accurate and timely information to ISO-NE regarding the unit’s capability and availability or to be available in accordance with its supply offers. On March 15, 2012, plant employees Lamont Baudette, Steve Dulong, and Louis Arak<sup>149</sup> were forwarded an e-mail from ISO-NE related to its legal review of Salem Harbor’s revised NX-12. Although the e-mail predates Footprint’s August 3, 2012 acquisition of Salem Harbor, the same plant staff that received and responded to the e-mail chain continued to work as plant staff for Footprint. In addition, Steve Dulong, Salem Harbor’s Operations and Maintenance Manager who was on the March e-mail, was the main point of contact between the Salem Harbor plant and ISO-NE with respect to the NX-12 forms during both Dominion and Footprint’s ownership.<sup>150</sup> In its e-mail, ISO-NE stated, in response to Dominion updating the NX-12 form for the first time to reflect Salem Harbor’s NOx limitation—

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<sup>147</sup> Tariff Market Rule 1, § I.2.2 (defining “Limited Energy Resource”) (emphasis added).

<sup>148</sup> See e-mail from B. Stein to S. Silverstein re: LEG rules (Feb. 8, 2013 12:53 PM) (Footprint-01-00000028), Silverstein Tr. Ex. 14 (discussing LEG rules with Silverstein); Silverstein Tr. 156:13–157:10 (“The way it applies in the market is it’s a designation you can put on your unit to indicate to the ISO that there’s an issue with the amount of energy you can generate over a particular period of time, whether it’s a fuel issue or an environmental issue, a limitation that the unit has. Basically my understanding is you essentially tell the ISO I can generate this number of megawatts over this period of time, you guys determine do you want me to go full load for half a day or half load for a full day, or however the calculation works out. But it’s the process in the ISO system to notify the ISO when you have an issue like that.”).

<sup>149</sup> Louis Arak was Footprint’s Technical Services and Procurement Manager during the Relevant Period.

<sup>150</sup> See, e.g., Footprint-07-00000868 (Dominion NX-12 Form, submitted Feb 22, 2012 with requested effective date of Mar. 15, 2102); Footprint-07-00001648 (Footprint NX-12 Form, submitted July 23, 2012, with requested effective date of August 1, 2012). Further, as Footprint has highlighted to staff on multiple occasions, most of the employees operating Salem Harbor had been there long before Footprint or even Dominion owned the facility. See, e.g., 1b.19 Response, at 15 n. 30.

The information that you provide in the Additional Information section 8 of the NX-12 forms for Salem 3 and 4 is helpful for the ISO in understanding the environmental limitations under which Salem 3 and 4 are operating. To that end we have no objections to Dominion including the language in the NX-12 forms. *We would like to note, however, that including this information in the NX-12 forms does not absolve Dominion of its obligation to comply with the ISO New England tariff and other governing documents relating to participation in the wholesale markets and operation of the units.* For example, including this information in the NX-12 does not create a waiver from the application of Shortage Event penalties in the Forward Capacity Market *or with obligations to comply with the ISO's dispatch instructions.* *In addition, Dominion remains obligated to inform the ISO in real time regarding unit availability, including anticipated outages and forced outages.*<sup>151</sup>

In forwarding the e-mail to plant staff, Tim Morrissey—then-manager of NEPOOL Operations for Dominion—notes that the same conclusion reached by ISO-NE regarding Unit 4's obligations had also been reached internally. Morrissey writes—

The outcome of their review is summarized below in the yellow highlighted text. In brief, it appears to conclude similar to our own internal analysis that SH4 [Unit 4] must be prepared to fully meet its Capacity Supply Obligations through FCA4 which includes offering the unit into the Day Ahead & Real Time markets and otherwise responding to ISO-NE dispatch instructions when available. Failure to do so will expose Salem to potential financial and other penalties, irrespective [*sic*] the NOx limitation. Moreover, accurate and timely communication concerning unit operating capability and availability remains an ongoing imperative, especially given the underlying limitations.<sup>152</sup>

Staff concludes that Footprint's plant staff thus knew, both independently and through its communications with ISO-NE, that Unit 4's availability "irrespective [*sic*] the NOx limitation" must be accurately and timely reported to the ISO. In fact, plant staff implemented a "Salem Harbor Communication Protocol" for communicating with ISO-

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<sup>151</sup> E-mail from T. Morrissey to L. Beaudette, S. Dulong, L. Arak re: Generator NX-12 #553 and 554 >>> Section 8 Language Added<<<Effective 3/15/2012 – Ask ISO 5293 (Mar. 15, 2012 12:53 PM) (Footprint-07-00000846) (forwarding Mar. 14, 2012 9:27 AM e-mail from J. Schulte at ISO-NE) (emphasis added).

<sup>152</sup> *Id.*

NE about Unit 4's availability in the event that the unit was called to run at maximum output, or 437 MW. Specifically, during a period in May of 2012, Dominion re-declared Unit 4's EcoMax from 437 MWs down to 160 MWs in an effort to comply with the NOx limitation.<sup>153</sup> Further, while Footprint suggests that the NX-12 was an annual form that Footprint was required to submit to ISO-NE every year,<sup>154</sup> Footprint has not produced any evidence that it filed an NX-12 form in 2013, the year of the conduct at issue. In addition to the foregoing, Footprint repeatedly filed contradictory data *in other forms submitted to ISO-NE* regarding whether Unit 4 had environmental limitations. Specifically, Footprint represented in its fuel surveys to the ISO that Unit 4 did not have any "environmental restrictions that limit operation on oil for less than 5 continuous days at maximum output."<sup>155</sup>

iii. Footprint's NOx Defense Is Unpersuasive and Is A Post-Hoc Rationalization of Conduct that Violated the Tariff

Notably, after Footprint first raised this argument in October 2015, it claimed that the NX-12 forms and related documents were not previously produced because Footprint deemed them as not responsive to staff's December 2013 data request seeking, among other things, all communications, including those with ISO-NE, related to Unit 4's dispatch, outages, capacity and fuel supply.<sup>156</sup> Specifically, Request No. 8 of staff's December 4, 2013 data request sought:

All documents relating to communications with (i) ISO-New England, including, without limitation the Market Monitoring Unit, or (ii) any other person relating to dispatch, outages, capacity and fuel supply of Salem Harbor Unit 4, not to exclude internal communications by, between and/or among Footprint, Freepoint and/or Salem Harbor Power Station employees.<sup>157</sup>

<sup>153</sup> See e-mail from S. Dulong to various other members of plant staff re: Unit 4 (May 23, 2012 9:40 AM) (Footprint-04-00015428).

<sup>154</sup> See 1b.19 Response, Shanker Decl., at 5 ("ISO-NE was provided with information regarding this constraint every year as part of the required Form NX-12.")

<sup>155</sup> See, e.g., Freepoint-0000081 and attachment at Freepoint-0000082 (fuel survey submitted Feb. 12, 2013); Footprint-01-00001148 and attachment at Footprint-01-00001150 (fuel survey submitted Mar. 8, 2013); Footprint-01-00003113 and attachment at Footprint-01-00003115 (fuel survey submitted Apr. 4, 2013); Footprint-01-00001196 and attachment at Footprint-01-00001198 (fuel survey submitted May 20, 2013); Footprint-02-00000734 and attachment at Footprint-02-00000736 (fuel survey submitted June 24, 2013); Freepoint-0000093 and attachment at Freepoint-0000094 (fuel survey submitted July 30, 2013).

<sup>156</sup> See Letter from Footprint's Counsel to Staff (Oct. 23, 2015).

<sup>157</sup> See December 4, 2013 Data Request from Staff to Footprint.

Documents subsequently produced by Footprint fell squarely within staff's data request.<sup>158</sup>

Internal communications indicate that Footprint's owners, Peter Furniss and Scott Silverstein, were aware of Salem Harbor's NOx limitation by February 2012 (if not before).<sup>159</sup> Nevertheless, Footprint did not produce the NX-12 forms or plant staff's March 2012 communications with ISO-NE regarding Footprint's obligation to comply with Unit 4's CSO and the Tariff regardless of Salem Harbor's NOx limitation, until November 17, 2015.<sup>160</sup> In other words, Footprint thought these documents were irrelevant to staff's investigation until approximately two years after staff first requested the documents, six months after staff provided Footprint with its preliminary findings, months after Footprint submitted its original and revised written responses to the preliminary findings, after an in-person meeting with staff in August 2015, and after exchanging letters with staff regarding the investigation. Notwithstanding the foregoing, Footprint's primary defense to staff's findings that Footprint submitted false and misleading supply offers and misrepresented its fuel inventory and unit availability in communications with ISO-NE now appears to be that Salem Harbor's alleged NOx limitation created a safe-harbor from potential enforcement actions for that conduct. Salem Harbor's alleged NOx limitation created no such safe harbor.

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<sup>158</sup> See, e.g., presentation dated April 19, 2012 and titled "Salem Harbor Station Meeting Capacity Market and Emission Requirements" at 3 (Footprint-07-00001064) (discussing ways to manage CSO and NOx limitation, including "[c]oordinating Unit 4 operations with ISO-NE"; and stating that "[n]ot meeting SH4 [Unit 4] CSO due to an inadequate NOx bank places the capacity payments at risk." The document also contains a summary of a January 10, 2012 meeting with ISO-NE regarding the NOx limitation); e-mail from C. Harrow to S. Dulong re: Fuel (Dec. 4, 2012 7:19 AM) (Footprint-07-00002418) (discussing reporting fuel supply emergencies). These are clearly documents "relating to communications with [ ] ISO-NE" and the "capacity and fuel supply of Salem Harbor Unit 4."

<sup>159</sup> See e-mail chain between P. Furniss, S. Silverstein and others re: Emissions (Feb. 27–28, 2012) (Footprint-07-00000098).

<sup>160</sup> In fact, as late as its March 12, 2018 1b.19 Response, Footprint produced *additional documents* involving January 2014 communications between Footprint and ISO-NE regarding the NOx limitation. See 1b.19 Response, Silverstein Aff. at 8–10, Exs. SGS-2 to SGS-7 (attaching a series of e-mails between Footprint and ISO-NE regarding the NOx limitation). These documents were responsive to staff's data request but were nevertheless not previously produced until Footprint submitted its 1b.19 response, and notwithstanding staff's December 2013 data request seeking this information, staff's explicit request for the NOx documents once it learned in September of 2015 that Footprint had withheld them, and Footprint's ongoing obligation to provide "supplemental responses as soon as further information is located or obtained that is responsive to the request." See December 4, 2013 Data Request from Staff to Footprint, Attachment B, "General Instructions, Specifications and Definitions," at P 1(h).

5. *Argument/Defense: Footprint Claims That Staff's Case Presents Fair Notice Problems Regarding the ISO-NE Tariff Requirements*

Footprint argues that this case presents fair notice problems based on its incorrect assumption that staff has taken the position that the Tariff required Footprint to self-select an hourly MW schedule that took the NO<sub>x</sub> limitation into account, rather than offer at EcoMin and EcoMax for every hour. Staff finds that these arguments are without merit. Staff has not prescribed *how* Footprint should have notified ISO-NE in its supply offers and communications about its actual availability, per Tariff Market Rule 1, § 13.6.1.1.2 or any other Tariff or regulatory provision cited herein, but rather that Footprint *was required to comply with the Tariff, rules, and regulations to which it was subject*. That is, Footprint was required to provide accurate supply offers and information to the ISO, but failed to do so.

6. *Argument/Defense: Footprint Claims That the Tariff Does Not Permit Sanctions for Footprint's Conduct, and That the Commission Excused the Conduct At Issue In Its NEPGA I and NEPGA II Orders*

Footprint also argues that the Tariff did not and still does not permit sanctions under Appendix B for “a failure to perform” unless it occurs during a shortage hour, and there were none during the Relevant Period.<sup>161</sup> Additionally, Footprint argues that staff’s investigation constitutes discriminatory enforcement because the Commission granted what Footprint characterizes as “blanket amnesty” to gas generators in *New England Power Generators Association v. ISO-New England Inc.*, 144 FERC ¶ 61,157 (2013) (*NEPGA I*) and *New England Power Generators Association v. ISO-New England Inc.*, 145 FERC ¶ 61,206 (2013) (*NEPGA II*), for what Footprint claims is similar conduct.<sup>162</sup>

As an initial matter, staff finds that Footprint’s argument that the Commission or the Tariff either permitted or excused the fraudulent conduct at issue here is without merit. The fact that Footprint’s failure to perform did not occur during shortage hours does not mean that the Tariff permitted Footprint to submit false and misleading supply offers and misrepresent its fuel and unit status in communications with ISO-NE. Footprint’s conduct violated not only the Tariff, but also the Commission’s regulations at 18 C.F.R. §§ 35.41(a) and (b). Further, the Commission is not constrained by the penalty schedule set forth in the applicable Tariff with respect to Footprint’s fraudulent conduct.<sup>163</sup>

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<sup>161</sup> See PF Response at 2–3, 49–50 (citing Tariff Market Rule 1, Appendix B, § III.B.3.2.6) (Certain Economic Decisions Excused)).

<sup>162</sup> See *id.* at 35.

<sup>163</sup> See, e.g., Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (2010) (Penalty Guidelines), § 1A1.1 (“Where an organization has engaged in multiple acts of fraud, anti-competitive conduct, or other rule, tariff, and order violations, in which the penalty is determined under section 2B1.1 of these Penalty Guidelines; or made multiple

In addition, the Commission’s decisions in *NEPGA I* and *NEPGA II* are not relevant here, as this case is about Footprint violating the ISO-NE Tariff by making offers that were false and misleading because Footprint could not physically produce what it offered, and by failing to accurately report fuel status and unit availability to the ISO. *NEPGA I* and *II* addressed, among other things, circumstances under which certain capacity resources could be excused from Tariff non-compliance. Notwithstanding the foregoing, because Footprint dedicates a significant portion of its written responses to the *NEPGA I* and *II* orders, staff will briefly address the substance of those decisions here.

Contrary to Footprint’s assertions, staff’s understanding is that in *NEPGA I* the Commission did not grant “blanket amnesty” to gas-fueled resources nor did it foreclose enforcement actions against entities like Footprint that engaged in the conduct under investigation here. Rather, the Commission closed the “pending enforcement referrals from the IMM that [were] based solely on an alleged inability to procure natural gas.”<sup>164</sup> The Commission further concluded that the determination of whether a capacity resource was either unable to procure fuel or simply made the economic decision not to procure available fuel is a fact-specific inquiry, and that such determinations need to be made on a case-by-case basis.<sup>165</sup> In other words, the Commission did not foreclose or even address cases involving the submission of false and misleading supply offers and misrepresentations and omissions in communications with ISO-NE. As previously noted, staff found that the facts in this investigation involve Footprint’s submission of false and misleading supply offers and related misrepresentations and omissions.

7. *Argument/Defense: Footprint Claims That the Applicable Statute of Limitations Bars Staff’s Claims for At Least Part of the Relevant Period*

Footprint also raised a statute of limitations defense, claiming that any civil penalties sought by the Commission for at least part of the Relevant Period are time-barred under a five-year statute of limitations period set forth in 28 U.S.C. § 2462, which provides that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . .”<sup>166</sup>

Footprint argues that the Commission’s commencement of an administrative assessment proceeding (initiated by the issuance of an order to show cause) within five years of the alleged violation, and subsequent initiation of a federal court action to

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misrepresentations or false statements in which the penalty is determined under section 2C1.1 of these Penalty Guidelines, each act will be treated as a separate violation.”).

<sup>164</sup> *NEPGA I*, 144 FERC ¶ 61,157 at P 60.

<sup>165</sup> *Id.* P 62.

<sup>166</sup> 28 U.S.C. § 2462.

enforce the penalty within five years of the conclusion of the administrative assessment proceeding, does not satisfy 28 U.S.C. § 2462.<sup>167</sup> Instead, Footprint argues that the statute can only be satisfied through the initiation of a federal court action to enforce the penalty within five years of the alleged violation.<sup>168</sup> Footprint further claims that the dispositive factor to consider in determining whether the Commission’s administrative assessment proceeding satisfies 28 U.S.C. § 2462, is that when a party elects to challenge the Commission’s issuance of a civil penalty through a *de novo* action in federal district court pursuant to 16 U.S.C. § 823b(d)(3) (i.e., § 31(d)(3) of the Federal Power Act, or FPA), it is the court that adjudicates liability and not the Commission.<sup>169</sup> According to Footprint, the only thing the Commission is authorized to decide through its administrative assessment proceeding is “whether to prosecute the case.”<sup>170</sup> Footprint thus concludes that the *two* five-year limitations periods set forth in the First Circuit’s seminal decision in *United States v. Meyer*— to (1) commence an administrative assessment proceeding within five years, and then (2) commence an action seeking review or enforcement of that penalty within five years after the conclusion of the administrative assessment proceeding<sup>171</sup>—do not apply, and only *one* five-year limitations period governs and is satisfied only by initiating an action to review or enforce the penalty.<sup>172</sup>

Footprint’s argument, which is the subject of ongoing litigation in other cases pending in federal court, is contrary to the facts and applicable law. Under *Meyer*, the dispositive factor for determining whether an administrative assessment proceeding meets the requirements of 28 U.S.C. § 2462 is whether “assessment of an administrative penalty is a statutory prerequisite to the bringing of an action judicially to enforce such penalty. . . .”<sup>173</sup> Here, the Commission was required under the express terms of the FPA to “assess [a] penalty, by order” after “notice and opportunity for public hearing.”<sup>174</sup> Only after the subject fails to pay the assessed penalty can the Commission “institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty.”<sup>175</sup> Because the Commission’s penalty “assessment” and issuance of an order to show cause after an agency proceeding is a “statutory

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<sup>167</sup> See 1b.19 Response at 23.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 24.

<sup>170</sup> *Id.*

<sup>171</sup> See *United States v. Meyer*, 808 F.2d 912, 922 (1st Cir. 1987).

<sup>172</sup> 1b.19 Response at 24–28.

<sup>173</sup> *Meyer*, 808 F.2d at 922.

<sup>174</sup> 16 U.S.C. §§ 823b(c), (d) (2012); 16 U.S.C. § 825o-1(b) (2012).

<sup>175</sup> 16 U.S.C. § 823b(d)(3)(B).

prerequisite” to bringing an action to judicially enforce the penalty, it falls squarely within *Meyer* and the requirements of 28 U.S.C. § 2462. Under the FPA, the Commission’s regulations and controlling case law, the Commission’s adjudication—via the issuance of an order—is a “proceeding” that meets the first statute of limitations, and the Commission’s later action to enforce the penalty only “accrues” once the subject fails to pay.<sup>176</sup>

## **VI. RECOMMENDED REMEDIES AND SANCTIONS**

### **A. Disgorgement**

When an entity has committed a violation resulting in pecuniary gain, the Commission directs disgorgement of the full amount of the gain plus interest.<sup>177</sup> The CSO payments Footprint received for Unit 4 were premised on the unit being available for the reliability of the grid. However, Footprint received millions of dollars in cost-based payments for capacity it could not provide and knew it could not provide because Salem Harbor lacked usable fuel to satisfy its supply offers.

Footprint received CSO payments of \$2,179,839 in June and \$2,178,092 in July 2013, for a total of \$4,357,931 for both months. Staff finds that Footprint violated the applicable Tariff provisions and Commission regulations discussed herein on five days in June 2013 and 25 days in July 2013 when it submitted false and misleading supply offers that Unit 4 could not meet and made related misrepresentations to ISO-NE. Staff then pro-rated Footprint’s June CSO payment by five days (\$363,306) and Footprint’s July CSO payment by 25 days (\$1,686,265) to calculate the amount of unearned CSO payments Footprint received. Staff concluded that Footprint should be required to disgorge a total of \$2,049,571 in unearned CSO payments for its violations.

### **B. Civil Penalties**

The civil penalties recommended here are well within the Commission’s statutory authority to impose penalties of up to \$1,238,271 per day per violation.<sup>178</sup> As Congress

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<sup>176</sup> The Commission has argued this position in federal court, and the issue is currently pending in *Federal Energy Regulatory Commission v. Silkman, et al.*, No. 1:16-cv-00205-JAW (D. Me. Apr. 13, 2016) and *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC, et al.*, No. 3:15-cv-00452 (MHL) (E.D. Va. July 31, 2015). *But see Federal Energy Regulatory Commission v. Barclays Bank PLC, et al.*, No. 2:13-cv-02093, 2017 WL 4340258, at \*12–14 (E.D. Cal. Sept. 29, 2017).

<sup>177</sup> See Penalty Guidelines at § 1B1.1(a); Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 43 (2008) (Policy Statement on Enforcement) (requiring disgorgement “is consistent with long-standing Commission practice . . . and the practice of other enforcement agencies . . .”) (citations omitted).

<sup>178</sup> FPA Section 316A, 16 U.S.C. § 825o-1(b); 18 C.F.R. § 385.1602(d) (2018).

indicated, the Commission is to determine the amount of civil penalties within the statutory caps by assessing two factors: (1) the seriousness of the violation, and (2) efforts to remedy the violation.<sup>179</sup> Here, Footprint’s violations were serious because it received millions of dollars in CSO payments from ISO-NE for capacity that Unit 4 could not provide, while submitting false and misleading supply offers and engaging in misleading communications with the ISO regarding fuel inventory and unit availability. As the owner of a capacity resource that was needed for the reliability of the ISO-NE system, Footprint’s conduct could have jeopardized system reliability. Further, instead of trying to remedy its violations, for 30 days Footprint continued to engage in the conduct described above in order to avoid the cost of purchasing additional fuel.

Accordingly, staff recommends that the Commission impose a civil penalty of \$4,200,000 on Footprint, consistent with staff’s application of the Penalty Guidelines set forth below.

First, to determine civil penalties under Part C of the Penalty Guidelines, staff began by using the applicable Chapter Two guideline to determine the Base Violation Level and then applied, in the order listed, any appropriate adjustments contained in that guideline.<sup>180</sup> Footprint’s violations fall under § 2B1.1 of Chapter Two, which applies to “Fraud, Anti-Competitive Conduct and Other Rule, Tariff and order Violations.” This section provides for a Base Violation Level of six (6).<sup>181</sup> Based the specific violation characteristics, additional levels are added to the base level.<sup>182</sup> Here, because the loss caused by Footprint’s conduct exceeded \$1,000,000, staff added 16 levels, increasing the level from six (6) to 22.<sup>183</sup> Next, because the violation continued for more than two days, staff added another two levels, increasing the total Violation Level to 24.<sup>184</sup>

Second, staff then considered the Base Penalty, which is the greatest of either (1) the amount from the table in § 1C2.2(b) corresponding to the Violation Level determined under § 1C.2.1—i.e., \$2,100,000 for a Violation Level of 24; or (2) the pecuniary gain to

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<sup>179</sup> Penalty Guidelines at P 16; Policy Statement on Enforcement at P 51.

<sup>180</sup> See Penalty Guidelines at § 1C2.1 (Violation Level).

<sup>181</sup> *Id.* at § 2B1.1(a).

<sup>182</sup> *Id.* at § 2B1.1(b)(1)–(3).

<sup>183</sup> *Id.* at § 2B1.1(b)(1)(I).

<sup>184</sup> *Id.* at § 2B1.1(b)(2)(D). Per the Penalty Guidelines, staffs applies the greater of the following enhancements: (1) if the violation involved more than 10,000 MWh (add two levels), 20,000 MWh (add four levels), or 100,000 MWh of electricity (add six levels); or (2) continued for more than ten days (add two levels), 50 days (add four levels) or 250 days (add six levels). Staff could have increased the penalty by at least four levels, as the violation likely involved more than 20,000 MWh of electricity. However, exercising its discretion, staff relied on the length of the violation rather than the quantity of power involved.

the organization from the violation or pecuniary loss from the violation caused by the organization—i.e., \$2,049,571.<sup>185</sup> Accordingly, staff applied a Base Penalty of \$2,100,000.

Third, staff then considered Footprint’s level of culpability to calculate its Culpability Score.<sup>186</sup> That Culpability Score is then used to determine which multipliers to apply to Footprint’s Base Penalty in order to calculate a civil penalty range.<sup>187</sup> In determining the Culpability Score, staff considers (1) the involvement in or toleration of the violations by Footprint employees with substantial authority,<sup>188</sup> (2) Footprint’s prior history of violations, (3) whether the instant violations violated a judicial or Commission order or an injunction, (4) whether Footprint willfully obstructed or impeded justice, or attempted, aided, abetted, or encouraged obstruction of justice during the investigation, (5) whether Footprint had an effective compliance program in place at the time of the violations, and (6) whether Footprint is entitled to credit for self-reporting, cooperating or accepting responsibility for the violations.<sup>189</sup> Under the Penalty Guidelines, staff starts

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<sup>185</sup> *Id.* at § 1C2.1(b).

<sup>186</sup> *Id.* at §§ 1C2.3(a)–(g).

<sup>187</sup> *Id.* at § 1C2.4 (Minimum and Maximum Multipliers) and § 1C2.5(a) and (b) (Guideline Penalty Range – Organizations, which provides that the minimum and maximum penalty range is determined by multiplying the Base Penalty by the minimum and maximum multipliers, respectively).

<sup>188</sup> This adjustment applies to organizations that have 10 or more employees. *See id.* at § 1C2.3(b). Although the Footprint corporate entity appears to have had fewer than 10 employees during the Relevant Period, Footprint had approximately 105 plant staff employed at Salem Harbor during the Relevant Period. *See Silverstein Tr.* 20:15–21:17. However, in an exercise of discretion by staff, this adjustment—which would have led to a two-point Culpability Score increase—was not applied. If staff had applied the adjustment, it would have resulted in a Culpability Score of seven (7), which corresponds to a multiplier of range of 1.4 to 2.8 and a civil penalty range of \$2,940,000 to \$5,880,000.

<sup>189</sup> *See* Penalty Guidelines at §§ 1C2.3(b)–(g). Staff does not believe that Footprint should be given cooperation credit because of its failure to (1) timely provide documents responsive to staff’s December 4, 2013 data request, (2) conduct a thorough search for responsive documents, and (3) supplement its previous data request responses promptly when further information responsive to the request was located or obtained. *See id.*, Application Notes (“To be timely, the cooperation must begin essentially at the same time as the organization is notified by the Commission or Commission staff of an investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization.”); December 4, 2013 Data Request from Staff to Footprint, Attachment B, “General Instructions, Specifications and Definitions,” at P 1(h). For example, Footprint failed to provide pertinent communications with ISO-NE regarding the NOx limitation and Unit 4’s capacity and fuel status until November 2015, almost two years after staff’s data request issued. In fact, Footprint provided responsive documents as late as March 2018, in its 1b.19 Response, when it produced additional communications with ISO-NE regarding the NOx limitation.

with a base of five (5) culpability points, and either adds or subtracts points based on the specific facts of Footprint's violations. Staff concluded that none of the foregoing adjustments applied, which resulted in a Culpability Score of five (5). A Culpability Score of five (5) corresponds with a multiplier range of 1.0 (minimum multiplier) to 2.0 (maximum multiplier).<sup>190</sup>

Finally, applying those multipliers to the Base Penalty of \$2,100,000 produced a civil penalty range of \$2,100,000 to \$4,200,000 under the Penalty Guidelines. Staff recommends that the Commission impose a civil penalty on Footprint on the high end of this range of \$4,200,000, consistent with the application of the Penalty Guidelines.

## **VII. CONCLUSION**

Staff concludes that, for parts of June and July of 2013, Footprint submitted false and misleading supply offers for Unit 4. Staff's analysis of the evidence indicates that Footprint knew that Unit 4 could not satisfy the supply offers because Salem Harbor lacked usable fuel, and that Footprint violated separate reporting requirements of the Tariff by failing to report to ISO-NE that Salem Harbor's lack of usable fuel reduced Unit 4's output capabilities. In addition, by submitting what staff concludes were false and misleading supply offers and omitting material information from and/or misrepresenting to ISO-NE the fuel status and related operational status of Unit 4, Footprint violated the Commission's regulations.

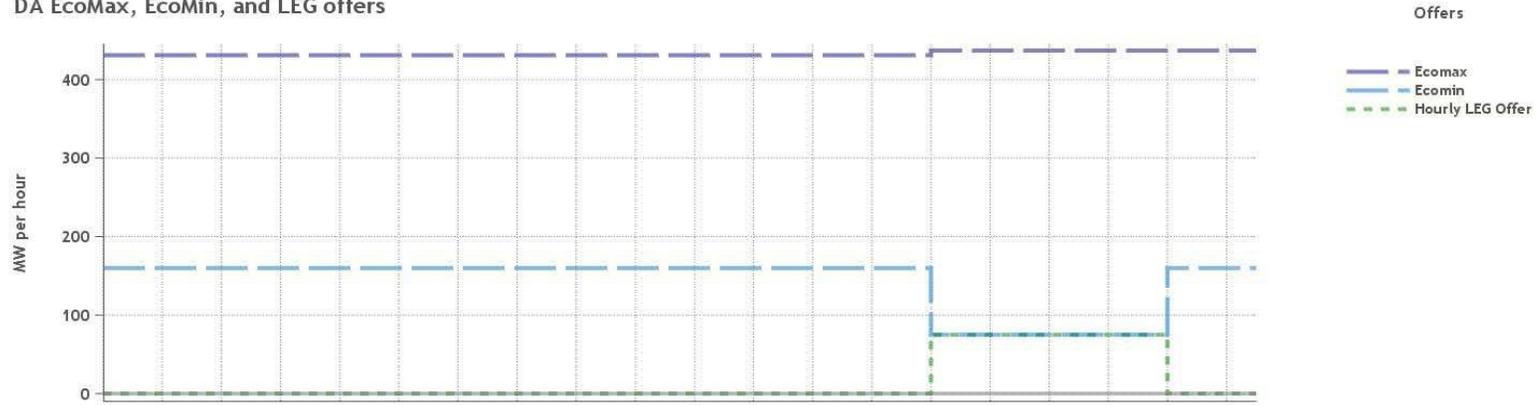
For the reasons discussed above, Enforcement recommends that the Commission issue an Order to Show Cause and Notice of Proposed Penalty to Footprint requiring it to show cause why Footprint: (i) did not violate Tariff Market Rule 1, §§ III.1.7.20(b) and (f), III.1.10.1A(d), III.13.6.1.1.2, and 18 C.F.R. §§ 35.41(a) and (b); (ii) should not pay a civil penalty in the amount of \$4,200,000, and; (iii) should not disgorge \$2,049,571 in CSO payments that Footprint received in June and July of 2013 for capacity that staff found Unit 4 could not provide.

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<sup>190</sup> Penalty Guidelines at § 1C2.4.

EXHIBIT A - Salem Harbor Unit 4 Supply Offers and Fuel Storage Level for June-July 2013

DA EcoMax, EcoMin, and LEG offers



Oil Requirements and Inventory



Top Graph: shows how Footprint offered Unit 4 over the Relevant Period. LEG offers = when the green dotted line moves away from 0.

Bottom Graph: shows the amount of oil in Unit 4’s fuel tank (black line) during the Relevant Period. When the black line drops below the blue line, the tank no longer has enough usable oil to run for a full day at Unit 4’s EcoMax/CSO level, and the offers submitted at that level are false (area of false offer shaded red). The LEG offers submitted are also false, and on those days the tank’s usable oil inventory hovers just above or at its heel. When the black line drops to the green dashed line, the unit has reached the bottom of the tank (heel) and can reach no more fuel.

Document Content(s)

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