UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

ISO New England, Inc. Docket No. ER03-849-000

ORDER ON PROPOSED TARIFF REVISIONS

(Issued July 9, 2003)

1. In this order, the Commission accepts for filing proposed revisions submitted by ISO New England, Inc. (ISO-NE), which would amend New England Power Pool Market Rule 1 and Appendix A to Market Rule 1 (which contain the rules for general mitigation) (General Mitigation Proposal). As discussed below, we will further direct ISO-NE to include information in its state of the market report, which addresses whether its market design, including mitigation measures, lead to compensatory, not excessive, prices. This action will benefit the New England market by limiting the potential for the exercise of market power.

Background

2. In mid-2002, the New England Power Pool (NEPOOL) and ISO-NE, submitted a joint filing on New England Standard Market Design (SMD-NE), in which the parties proposed to continue the general mitigation provisions of prior Market Rule 17, which included "first level mitigation."[1] The general mitigation provisions were replicated in the SMD-NE.

3. By order issued September 20, 2002 (September 20 Order),[2] the Commission accepted in part and modified in part the SMD-NE proposal and required NEPOOL and ISO-NE to submit additional support and justification for the application of first level mitigation in unconstrained areas in addition to the $1000/MWh safety-net bid cap that is

---

[1]The first level of mitigation occurs when there are no transmission constraints.

[2]New England Power Pool, 100 FERC ¶ 61,287 at P 42 (2002).

in place market-wide. ISO-NE submitted the requested information on October 7, 2002 (October 7, 2002 Filing).

4. By order issued December 20, 2002 (December 20 Order),[3] the Commission rejected ISO-NE's proposal for first level mitigation. While the first level mitigation proposal referred to pivotal suppliers that have market power at certain times, the Commission found that ISO-NE did not identify these suppliers or the number of hours in which each individual supplier is pivotal. Nor did ISO-NE explain how the proposed mitigation would mitigate only individual pivotal suppliers without also targeting other non-pivotal suppliers. Accordingly, the Commission rejected the filing without prejudice to a filing that evaluates any remaining structural problems and a proposal that targets only those suppliers that obtain market power as a result of these structural problems.[4] As directed by the Commission, NEPOOL and ISO-NE submitted a compliance filing on January 21, 2003, which removed from Market Rule 1 those provisions that enabled first level mitigation.

5. On May 16, 2003, ISO-NE filed the General Mitigation Proposal in this proceeding, proposing to revise the rules for general mitigation under NEPOOL Market Rule 1 and Appendix A. ISO-NE states that it developed the General Mitigation Proposal through the NEPOOL stakeholder process, but that when the proposal was presented to the NEPOOL Participants Committee (NPC) on May 2, 2003, it failed to receive the necessary two-thirds super-majority vote for approval. ISO-NE states that it decided to forego submitting possible changes to the General Mitigation Proposal to the NPC, as a timely solution, in light of the approaching Summer 2003 peak load period, would not be likely. Instead, ISO-NE determined that the General Mitigation Proposal should be submitted to the Commission under Section 205 of the Federal Power Act (FPA),[5] pursuant to the authority given to ISO-NE by Section 6.17(e) of the ISO-NE Agreement.[6]

---

[3]New England Power Pool, 101 FERC ¶ 61,344 at P 28 (2002).

[4]Id.

[5]16 U.S.C. § 824(d) (2000).

[6]Section 6.17(e) grants ISO-NE authority to adopt emergency Market Rules and emergency modifications to existing Market Rules, subject to Commission approval, if ISO-NE determines in good faith that: (1) the failure to immediately implement a new rule or modification would substantially and adversely affect (a) system reliability or security, or (b) the competitiveness or efficiency of the NEPOOL Market; and (2) invoking the rulemaking procedures of the relevant NEPOOL Committee would not allow

(continued...)

6. ISO-NE states that the proposed revisions address the structural problems identified in the December 20 Order, and satisfy the Commission's requirement that general mitigation measures be targeted at specific, identified structural problems. ISO-NE believes that the market flaws addressed by the General Mitigation Proposal, if uncorrected, would substantially and adversely affect the efficiency and competitiveness of the NEPOOL Markets by permitting uncompetitive higher bids, and subsequently higher prices during certain periods when the ability to exercise market power is increased.

7. In the General Mitigation Proposal, ISO-NE seeks to implement a pivotal supplier trigger that would provide for the evaluation of pivotal suppliers' energy supply offers for mitigation. A pivotal supplier is defined as a market participant whose aggregate energy supply offers for a particular hour are greater than the NEPOOL Supply Margin.[7] ISO-NE explains that pivotal suppliers may charge any price for their energy supply with confidence that their generating resources will be dispatched. ISO-NE further states that the General Mitigation Proposal targets pivotal suppliers for additional conduct and impact evaluations consistent with New England's existing mitigation structure.[8]

8. Pursuant to the General Mitigation Proposal, ISO-NE will determine the supply margin and designate pivotal suppliers and related generating resources prior to the Day-Ahead or Real-Time market clearing processes for each hour in the Day-Ahead and Real-Time markets. In the Day-Ahead Energy Market, the ISO Load Forecast shall be used in making the above determination. Only designated pivotal suppliers would be subject to evaluation for mitigation.

9. Under the General Mitigation Proposal, the following thresholds would be used for identifying economic withholding (i.e., ISO-NE will investigate the reasons for, and market impact of, any offers from a pivotal supplier that exceed the following thresholds): (1) Energy Offer Price - a 300 percent increase or an increase of $100/MWh above the reference level, whichever is lower, but excluding offers under $25; (2) Startup and No-load Offer Price - a 200 percent increase above the reference level; (3) Regulation Offers

---

[6](...continued)
for timely redress of ISO-NE's concerns.

[7]The NEPOOL Supply Margin is defined in Section 5.2.2 of Appendix A to Market Rule 1 as "the total energy Supply Offers (up to and including Economic Max) for such hour, less total system load (as adjusted for net interchange with other Control Areas and including Operating Reserve)."

[8]See Original Sheet No. 213A of Appendix A.

- a 300 percent increase or an increase of $25/MW above the reference level, whichever is lower, but excluding bids under $5; (4) Time Based Offer Parameters - an increase greater than two hours in elements of a generation resource's offer data that are expressed in time (e.g., minimum run time, minimum down time, cold start time, hot start time) or greater than six hours for any combination of such time-based offer data compared to the unit's reference levels; (5) Offer Parameters Expressed Other than in Time or Dollars - a 100 percent increase for Offer Data that are minimum values, or a 50 percent decrease for Offer Data that are maximum values (including, but not limited to, ramp rates and maximum starts per day).[9]

10. The General Mitigation Proposal further provides that the effect of an offer exceeding the economic withholding thresholds will be considered material if it is found to be in excess of either of the thresholds contained in Section 1 of Appendix A, including: (1) an increase of 200 percent or $100/MW, whichever is lower, in the locational marginal price (LMP); and (2) 200 percent or $25, whichever is lower, in any other NEPOOL market.[10]

11. Pivotal supplier offers identified for mitigation shall be subject to the imposition of a default bid.[11]

12. ISO-NE adds that, based on calendar year 2002 data, the number of hours that suppliers would have been evaluated for mitigation for that period under the proposed changes would have been 8.3 percent for the largest supplier, 1.8 percent for the second largest supplier and 1.7 percent for the third largest supplier.

Notice of Filing and Responsive Pleadings

13. Notice of ISO-NE's filing was published in the Federal Register,[12] with comments, protests, and interventions due on or before June 2, 2003. Timely motions to intervene raising no substantive issues were filed by Dominion Energy Marketing, Inc.; Long Island Power Authority and LIPA; Keyspan-Ravenswood, LLC; and Mirant Americas Energy Marketing, LP, Mirant New England, LLC, Mirant Canal, LLC, and Mirant Kendall, LLC.

---

[9] See proposed Sections 5.3.1 and 3.1.1 of Appendix A.

[10] See proposed Section 5.5.2 of Appendix A.

[11] Default bids are determined under Section 5.7.3 of Appendix A.

[12] 68 Fed. Reg. 31,696 (2003).

14. Northeast Utilities Service Company; Select Energy, Inc.; NEPOOL Industrial Customer Coalition; Luminescent Systems, Inc.; the New England Conference of Public Utilities Commissioners (as amended); and the Vermont Department of Public Service (as amended) each filed a timely motion to intervene and comments in support of the filing. The Maine Public Utilities Commission filed a notice of intervention and supporting comments.

15. Timely motions to intervene and protests were filed by NPC; Calpine Eastern Corporation (Calpine); Connecticut Department of Public Utility Control (CT DPUC); USGen New England, Inc. (USGenNE); PSEG Power LLC and PSEG Energy Resources & Trade LLC (PSEG); Exelon Corporation (Exelon); jointly, Massachusetts Municipal Wholesale Electric Company (MMWEC) and Connecticut Municipal Electric Energy Cooperative (CMEEC); and the NRG Companies (NRG) (as amended).

16. On June 17, 2003, ISO-NE filed an answer to NRG's protest.

17. We address the comments and protests and ISO-NE's answer below.

Discussion

Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), each timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding, and the Maine Public Utilities Commission's notice of intervention serves to make it a party to this proceeding. In addition, while Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits answers to protests unless ordered by the decisional authority, we will allow ISO-NE's answer, as it has provided information that has aided us in better understanding the matters at issue in this proceeding.

Analysis

19. As discussed below, the Commission finds that the General Mitigation Proposal satisfactorily addresses the concerns raised in the December 20 Order, and accordingly, we will accept the proposal to become effective on the date of issuance of this order. We agree with ISO-NE that a structural problem exists when suppliers become pivotal; pivotal suppliers have market power because at least a portion of their offers must be accepted, no matter how high the offer price, in order to maintain reliability. It is reasonable to evaluate the supply offers of pivotal suppliers in order to determine whether the suppliers are attempting to exercise market power, and thus, whether their offers should be mitigated.

20. In taking this action, the Commission grants waiver of the 60-day prior notice requirement so that ISO-NE can implement the General Mitigation Proposal prior to the Summer 2003 peak load period.[13]

ISO-NE's Authority to File

Protests

21. As indicated above, ISO-NE states that since the General Mitigation Proposal did not receive the requisite super-majority vote of the NPC, it makes this filing pursuant to Section 205 under the authority given to ISO-NE by Section 6.17(e) of the ISO-NE Agreement. As required by Section 6.17(e), ISO-NE avers that it has determined in good faith that the failure to implement the General Mitigation Proposal immediately would substantially and adversely affect the competitiveness and efficiency of the NEPOOL Markets and that further invoking the rulemaking procedures of the relevant NEPOOL Committee would not allow for timely redress of the ISO-NE's concerns. ISO-NE maintains that there would not have been any benefit to resubmitting the General Mitigation Proposal to the NPC for another vote. In addition, ISO-NE states that any such delays would impair its ability to implement the proposed improvements by the Summer 2003 peak load period. ISO-NE contends that these circumstances satisfy the criteria for submitting a rule change pursuant to Section 6.17(e).

22. PSEG protests ISO-NE's invocation of Section 6.17(e). It states that there is a wealth of data illustrating the competitive conditions likely to prevail in New England's

---

[13] See Central Hudson Gas & Electric Corporation, 60 FERC ¶ 61,106 at 61,338, order on reh'g, 61 FERC ¶ 61,089 (1992).

electricity markets, and the limited potential of pivotal suppliers to manipulate market prices.[14] Therefore, according to PSEG, the ISO-NE did not determine in good faith that the failure to immediately implement the General Mitigation Proposal would substantially and adversely affect the competitiveness or efficiency of the NEPOOL market. PSEG argues that the Commission should treat the General Mitigation Proposal as a petition pursuant to Section 206 of the FPA,[15] rather than a filing under Section 205, and require ISO-NE to meet the higher burden of proof of showing that the existing regime of market mitigation is unjust and unreasonable.

23. NPC does not take any position regarding the merits of the General Mitigation Proposal but requests that, if the Commission accepts the proposal, the Commission specifically indicate whether it is doing so under either Section 205 or Section 206. NPC does argue that, if the proposal indeed must be in place for Summer 2003, there is no question that there was no time to further utilize NEPOOL processes. NPC adds that, if the Commission decides to invoke Section 206, it must find that ISO-NE's mitigation provisions currently on file "would not produce just and reasonable rates during times that the General Mitigation Proposal would otherwise affect those bids that are accepted to set Energy prices."[16]

24. MMWEC and CMEEC support ISO-NE's General Mitigation Proposal and voted in favor of it before both the NEPOOL Markets Committee and the NPC. However, they raise concerns about ISO-NE's use of its "emergency" authority under Section 6.17(e) as the basis for this Section 205 filing and ask the Commission to closely examine whether ISO-NE has satisfied the criteria set forth in that section. They state that, if the Commission determines that ISO-NE has failed to make the requisite showing, then its filing should be treated as having been submitted under Section 206.

Commission Response

---

[14]PSEG cites the December 20 Order and the NEPOOL Forecast Report of Capacity, Energy, Loads and Transmission.

[15]16 U.S.C. § 824e (2000).

[16]NPC Comments at 7.

25. We find that ISO-NE has properly invoked its authority under Section 6.17(e) of the ISO Agreement in order to make this filing under Section 205. We have previously stated that it is appropriate for ISO-NE to exercise its power under Section 6.17(e) to adopt, subject to the Commission's approval, emergency modifications to its market rules, if ISO-NE believes in good faith that the failure to immediately implement a modification would substantially and adversely affect the competitiveness or efficiency of the NEPOOL Market, and invoking the rulemaking procedures of the relevant NEPOOL Committee would not allow for timely redress of ISO-NE's concerns.[17] As discussed below, we believe that pivotal suppliers may have the ability to set prices through economic withholding, and that measures to limit that ability should be in place for the Summer 2003 peak load period. We further find that, even if ISO-NE could identify changes that might increase the level of NEPOOL support, there would not be adequate time to vet any modified proposal, satisfy the requisite notice requirements for NEPOOL action, and wait the requisite 10 business days before filing a NEPOOL-approved proposal, in order to have that proposal in place by Summer 2003.

26. Further, PSEG's interpretation of publicly available information (including the December 20 Order) as indicating only a limited potential of pivotal suppliers to manipulate market prices is just that, i.e., PSEG's interpretation of that information, and it does not persuade us that ISO-NE did not make this Section 205 filing in good faith, as required by Section 6.17(e).

27. Accordingly, we will consider the General Mitigation Proposal in accordance with Section 205.

Pivotal Suppliers

---

[17]See ISO New England, Inc., 96 FERC ¶ 61,255 at 62,005 (2001), order granting clarification, Calpine Eastern Corporation, et al. v. ISO New England, Inc., 97 FERC ¶ 61,078 (2001) (citing New England Power Pool, ISO New England, Inc., et al., 96 FERC 61,228 (2001)).

Protests

28. Calpine argues that it is neither necessary nor appropriate to grant ISO-NE general mitigation authority over generator bids into the Day-Ahead market. Calpine states that, given the way the market functions, the vertical demand curve basis upon which ISO-NE's pivotal supplier justification relies does not exist in the Day-Ahead market. Calpine explains that, where a transitory high price emerges in the Day-Ahead market on one day, it is expected that Load Serving Entities (LSEs) would adjust their demand bids down to hedge against purchases above a particular price.

29. CT DPUC states that, with this filing, ISO-NE attempts to move toward mitigating market power in uncongested areas and during periods without congestion. However, it states that the proposal provides insufficient protection and deterrents against market power abuses. CT DPUC believes that the proposed pivotal supplier definition is too restrictive, since it only applies to certain suppliers that must be chosen in order for the market to operate reliably. CT DPUC states that the definition ignores those suppliers that do not have to be chosen, but can nevertheless push the market clearing price up by bidding certain units higher. CT DPUC states that the definition also ignores those instances when there are not any suppliers that have to be chosen, but the market is not competitive.

30. Exelon agrees that pivotal suppliers may exist during certain hours. However, it states that this fact has little bearing on whether additional mitigation measures are needed. Exelon does not believe that ISO-NE proves that, in the absence of the General Mitigation Proposal, there is risk that a pivotal supplier could and would act to take advantage of that position. Exelon further states that market rules and mitigation measures currently in effect adequately mitigate the incentive to exercise market power.

31. NRG states that ISO-NE fails to explain how pivotal suppliers would be able to set price, nor does it identify any feasible or realistic bidding strategies that would allow such a supplier to profit from attempting to set prices. NRG argues that economic withholding of a pivotal supplier's entire portfolio is not generally feasible in a market that dispatches individual units based on whether their bids are lower than other competing bids, thus every supplier is subject to competitive pressure. NRG further states the Commission previously determined that mitigation should not limit the ability of needed units to

recover their fixed and variable costs of operation.[18] NRG requests that the Commission consider whether the ability of any supplier, pivotal or not, to set prices during a reserve shortage warrants mitigation measures beyond the Peak Unit Safe Harbor (PUSH) mitigation mechanism approved in Devon Power.

32. PSEG states the General Mitigation Proposal seems to apply the Commission's Supply Market Assessment (SMA) on an hourly basis in a region where the Commission has chosen not to apply the SMA at all. PSEG states that ISO-NE currently has in place the necessary mitigation measures to prevent market power.

33. USGenNE argues that ISO-NE cannot point to a single hour in 2002 in which a pivotal supplier attempted to withhold energy or otherwise attempted to exercise market power. Further, USGenNE maintains that ISO-NE fails to demonstrate that, during the five months since first level mitigation was lifted, any pivotal supplier has engaged in anti-competitive conduct. USGenNE further states that many of the resources that fall into the pivotal supplier category are located in Designated Constrained Areas (DCAs) and other constrained areas that already have substantial mitigation measures. Therefore, according to USGenNE, there is no need for further mitigation for resources that will be located in areas with high demand. In addition, USGenNE believes it would be difficult for a pivotal supplier to accurately predict when conditions leading to potential market power will occur. It cites the fact that bids must be entered into the Day-Ahead market in which demand and supply conditions would not be known, and that some units may be under Reliability-Must-Run (RMR) or bid mitigation contracts. Therefore, USGenNE states, since ISO-NE's justification for mitigation relies on generators being able to know in advance what even ISO-NE cannot predict, ISO-NE's proposal should be rejected.

Commission Response

34. The Commission finds that ISO-NE's proposal to mitigate pivotal suppliers is reasonable. Calpine argues that mitigation of day-ahead bids for pivotal suppliers is not necessary because the availability of the real-time market provides protection against market power in the day-ahead market. We disagree, for two reasons. First, the availability of the real-time market does not provide complete protection against market power, because inflated bids in the day-ahead market can reduce supply and inflate prices in the real-time market. Calpine argues that buyers are unlikely to agree to pay a price in

---

[18] Devon Power LLC, et al., 103 FERC ¶ 61,082 (2003) (Devon Power).

the day-ahead market that is higher than the price they expect will arise in the real-time market. However, the price in the real-time market depends on the amount of supply that is available in the real-time market, and generators could inflate their day-ahead bids so as to make some of their capacity unavailable. In particular, some generators must incur start up costs to warm up before they can produce energy to sell into the market. If a generator's start up and energy bids in the day-ahead market are so high that they are not accepted in the day-ahead market, the generator may not start up in advance of the real-time market. As a result, real-time supply will decrease and real-time energy prices will increase. Second, mitigation of pivotal suppliers should dovetail with New England's existing bid mitigation measures for areas with transmission constraints, and these existing measures are applied to both the day-ahead and real-time markets.

35. We disagree with NRG's assertion that pivotal suppliers would not be able to set clearing prices because economic withholding of an entire portfolio is not generally feasible. It is not necessary for a supplier to withhold its entire portfolio in order to engage in economic withholding. A single resource, within a larger portfolio of resources that becomes pivotal, can set the clearing price above the competitive level.

36. With regard to assertions that pivotal suppliers have not exercised market power in the past, the December 20 Order did not require a demonstration that the identified structural market flaw has resulted in the exercise of market power to date. ISO-NE adds that, based on calendar year 2002 data, the number of hours that suppliers would have been evaluated for mitigation for that period under the proposed changes would have been 8.3 percent for the largest supplier, 1.8 percent for the second largest supplier and 1.7 percent for the third largest supplier. As indicated above, the Commission rejected the SMD-NE proposal without prejudice to a filing that evaluates any remaining structural problems and a proposal that targets only those suppliers that obtain market power as a result of these structural problems. We find that ISO-NE's General Mitigation Proposal meets those requirements.

37. In response to USGenNE's argument, we do not think it is useful to speculate on how difficult it may be for a supplier to predict when conditions will exist that would render the supplier to be pivotal. We agree with ISO-NE that a supplier has market power when it is pivotal. Thus, it is appropriate to evaluate a supplier's offers when it is pivotal, to determine whether the supplier is attempting to exercise market power.

38. While it is true that ISO-NE has authority under its current market monitoring and mitigation procedures to address economic withholding in its markets, such ex post facto

market action results in market disruptions and generates uncertainty for all market participants. It is also a contentious and difficult process. The General Mitigation Proposal makes the decision ex ante and avoids the problems associated with ex post facto market corrections. The Commission believes that the General Mitigation Proposal thus should help alleviate at least some of the market uncertainty associated with ISO-NE's current mitigation procedures.[19]

PUSH Bids

Protests and Answer

39. NRG takes issues with what it believes are inconsistencies between the General Mitigation Proposal and the PUSH mechanism accepted in Devon Power. NRG requests that the Commission specify that pivotal suppliers that are eligible to submit PUSH bids will not be subject to the first level mitigation, and the lowering of bids, if their bids are at or below their applicable PUSH ceiling.

40. In its answer to NRG's protest, ISO-NE notes that other proposed market rule revisions propose to implement PUSH bids.[20] Under those revisions, moreover, bids will only be mitigated down to the generators' established PUSH reference levels (i.e., marginal costs plus a fixed cost adder), and not to lower short run marginal costs, as NRG fears.

Commission Response

41. ISO-NE's proposal in Docket No. ER03-563-007 addresses NRG's concerns, where the other proposed market rule revisions are pending.

Scarcity Pricing

---

[19]As to PSEG's suggestion that the General Mitigation Proposal is a de facto application of the SMA, we disagree. In any event, we note that, as explained in this order, the record before us in this proceeding warrants our acceptance of the General Mitigation Proposal, irrespective of our approach to date on our SMA.

[20]Currently pending before the Commission in Docket No. ER03-563-007.

Protests and Answer

42. NRG argues that the General Mitigation Proposal would hamper the development of efficient prices because it fails to determine whether bidding behavior identified for mitigation is contributing to efficient scarcity prices or, alternatively, is producing prices in excess of those needed to provide for the recovery of fixed and variable costs by needed resources. NRG requests that the Commission reject ISO-NE's proposal until ISO-NE develops and incorporates the following corrective measures: (1) an accurate means to identify the specific circumstances in which suppliers can successfully set prices; (2) a means to distinguish between efficient price-setting behavior and the abuse of market power, e.g., setting average prices above long-run marginal cost; and (3) a mechanism that includes in energy prices the true marginal cost to the system of all extraordinary or emergency actions required prior to or during reserve shortages.

43. PSEG states that the Commission should reject the General Mitigation Proposal, because it is contrary to the need for proper price signals in scarcity conditions. PSEG state that the General Mitigation Proposal would address only a small fraction of hours at a time when ISO-NE's own capacity forecasts show, according to PSEG, that competitive conditions are likely to prevail in the vast majority of hours. PSEG believes that existing mitigation measures adequately address the bulk of potentially anti-competitive behavior in the market. Also, according to PSEG, the General Mitigation Proposal is inconsistent with the ISO-NE's pending scarcity pricing proposal.[21] PSEG states that that scarcity pricing proposal would set bids equal to the safety-net threshold of $1,000/MWh in the Real-Time market, but do so at a time when many suppliers are likely to be subject to mitigation under the General Mitigation Proposal.

44. ISO-NE, in its answer to NRG, responds that the General Mitigation Proposal will not adversely affect or improperly interact with the market rule changes at issue in the pending scarcity pricing proposal. During periods of reserve shortages, ISO-NE asserts that the General Mitigation Proposal will not prevent: (1) supply offers from dispatchable external transactions setting the energy price; (2) resources that provide operating reserves from receiving opportunity costs; or (3) the automatic setting of the LMP at

[21]Currently pending before the Commission in Docket No. ER03-854-000.

$1000/MWh to assure that the price of energy properly reflects its value as either energy or operating reserves.[22]

Commission Response

45. As an initial matter, we find that PSEG's concerns regarding scarcity pricing are the subject of another proceeding in Docket No. ER03-854-000, in which ISO-NE's scarcity pricing proposal is pending before the Commission, and are more appropriately addressed there.

46. Separately, the Commission rejects NRG's argument that we should reject the General Mitigation Proposal until ISO-NE implements certain corrective measures. The Commission has accepted the use of conduct and impact tests in the detection of market power by setting specific tests for market participants' conduct and resulting market impacts that warrant mitigation (and has found that use of these tests does not deny scarcity prices).[23] The General Mitigation Proposal adopts the same approach here. We are not persuaded that it is necessary to adopt the measures proposed by NRG here.

Delisted Resources

Pleadings

47. Calpine asks the Commission to require ISO-NE to clarify that general mitigation authority should distinguish between "listed" and "delisted" resources[24] and limit mitigation of delisted resources in the Real-Time market. Calpine argues that, since delisted resources do not receive ICAP payments, they must depend upon energy market bids to recover all of their costs. Calpine states that, if the Commission accepts the

---

[22] ISO-NE Answer at 4.

[23] E.g., Midwest Independent Transmission System Operator, Inc., 103 FERC ¶ 61,280 at P 40-82 (2003); accord New York Independent System Operator, Inc., 99 FERC ¶ 61,246 (2002).

[24] A delisted resource is one that has requested delisting from ISO-NE as a qualified ICAP resource. A delisted resource may sell ICAP into another control area, such as PJM or NYISO, and is not obligated to bid in the ISO-NE Real-Time market.

General Mitigation Proposal, and deems it necessary to allow mitigation of a delisted resource's energy bids, mitigation should be limited to substitution of a mitigated bid that still assures the delisted resource the higher of LMP or its unmitigated bid price.

Commission Response

48. We are unpersuaded by Calpine's argument. The Commission views the distinction of being listed or delisted as a business decision made by the resource owner and finds no cause to grant special treatment to delisted resources with respect to market power mitigation. While delisted resources do not receive ICAP payments, they also avoid some of the obligations faced by listed ICAP resources. For example, ICAP resources are required to offer energy and ancillary services into the New England market (even when energy prices are higher in other markets), while delisted resources are free to sell firm energy into markets outside of New England. Thus, while delisted resources do not receive ICAP payments, they have greater opportunities to receive higher energy prices for firm energy sales in markets outside of New England. We do not agree that delisted resources are entitled to exercise market power in New England. ICAP payments to ICAP resources compensate for these ICAP obligations; the payments are not a compensation for giving up the right to exercise market power. However, under ISO-NE's proposal, a supplier (regardless of whether it is listed or delisted) whose bid is mitigated and accepted in the spot market auction would receive a price at least as high as its mitigated bid, and it would receive the applicable LMP if the LMP is higher than the mitigated bid.

Hardwired Mitigation Authority

Protests

49. Calpine states that the Commission should require ISO-NE to provide a complete inventory of all "hardwired mitigation" authority (e.g., restrictions placed on bids on unconstrained generator participation in markets) and justify their continued need, if any. That is, Calpine requests ISO-NE provide a complete inventory of all restrictions on timing, frequency of update, and level of generator offers. Calpine requests that ISO-NE justify the need for them, remove those that are no longer necessary and determine for any remaining restrictions whether it would be more equitable to incorporate them as terms and conditions of the sale of a defined market product.

Commission Response

50. The Commission will grant Calpine's request, to the extent that Calpine seeks a report on ISO-NE's mitigation experience with regard to pivotal suppliers. We direct ISO-NE to include in its quarterly reports to the Commission, per Market Rule 1, Section 11.2.2, for pivotal suppliers all instances of mitigation, including: the price bid, the mitigated bid, the duration of mitigation, the system load and available supply at that time. ISO-NE is directed to report this information for one year following implementation of the pivotal supplier trigger. ISO-NE may file this information confidentially, consistent with its tariff, or may file publicly without identifying the unit's owner, as long as information to be reported is reported on a unit-by-unit basis.

51. On the other hand, the Commission finds that what Calpine refers to as "hardwired mitigation" are simply the rules that bidders must follow to participate in the market. Calpine's arguments in this regard are beyond the scope of this proceeding and constitute a collateral attack on the Commission's prior acceptance of Market Rule 1.[25] Accordingly, we will deny Calpine's request in this proceeding for a "hardwired mitigation" inventory.

52. Nevertheless, we agree with Calpine that ISO-NE should assess, in each of its future annual state of the market reports (provided pursuant to ISO-NE's tariff, Market Rule 1, Appendix A, Section 11.3), the operation of its market design, including its mitigation measures. In the context of a bid-based market design like that found in New England (and taking into account all of the elements of that market design, including mitigation), we are particularly interested whether there are both adequate incentives to attract and retain needed investment as well as rates that are not excessive. We thus direct ISO-NE to assess, in each of its future annual state of the market reports, whether all of the elements of its market design, including mitigation, achieve these goals. The net revenue analysis currently used in that report may be one component considered in making that assessment.[26]

NEPOOL Supply Margin

Protests

---

[25]See supra notes 2-3.

[26]As stated in the reports made to date, the net revenue analysis is appropriately interpreted in the context of a supply/demand balance.

53. Calpine maintains that the proposed definition of "NEPOOL Supply Margin" understates competitive pressure at the New York Interface and biases the proposed calculation. Calpine states that, under the proposed calculation, if the net interchange is a net export to New York, the NEPOOL Supply Margin would be decreased to the extent of that net export, increasing the possibility that mitigation in New England may suppress pricing and introduce further divergence in the prices between New England and New York. Calpine requests that the Commission require ISO-NE to modify the definition of "NEPOOL Supply Margin" to require the calculation to reflect an increase in the NEPOOL Supply Margin based on the "level of net imports [into New England] possible over the New York-New England interface." Calpine further states that the proposed adjustment to system load embedded in that calculation for "net interchange with other Control Areas" should then be modified to refer to only the New Brunswick and Hydro Quebec Control Areas.

Commission Response

54. While ISO-NE proposes to examine bids, Calpine would have ISO-NE consider the total possible import capacity without regard to whether energy is available and the desire (or lack of desire) to make such energy available. The Commission believes that actual bids represent a more accurate level of available energy. Accordingly, we find ISO-NE's approach, which is to examine actual bids, to be the correct approach, and thus deny Calpine's requested change.

Bidding and Market Impact Thresholds

Protests

55. CT DPUC requests that the Commission require ISO-NE to lower the conduct and impact thresholds. The CT DPUC believes the lower thresholds that apply in "Other Congestion Areas"[27] are more suitable for pivotal suppliers than those being proposed.

Commission Response

56. The Commission finds that the conduct and impact thresholds proposed by ISO-NE to address the identified structural problems are a reasonable starting point for addressing the potential exercise of market power due to economic withholding. If, after some experience with these thresholds, the ISO-NE's market monitor determines that the thresholds should be lowered, ISO-NE may propose to the Commission lower conduct and impact thresholds.

Refunds and Fines

Protests

57. CT DPUC states that, in order for mitigation to be effective, the mitigation must include refunds or fines levied against the offending bidders so that pivotal suppliers are deterred from exercising market power through economic withholding or otherwise engaging in anti-competitive behavior. More specifically, CT DPUC contends that pivotal suppliers that are caught attempting to engage in economic withholding should be penalized by the amount of the calculated impact of their bid or bids on increasing the LMP or other NEPOOL market price, multiplied by the MWs associated with the pivotal suppliers' unit or units that would have been affected by the increased price. CT DPUC adds that, in Docket No. EL01-118-000, the Commission considered allowing refunds as part of an overarching prohibition against anti-competitive behavior or exercises of market power,[28] and that the same framework should be considered here.

Commission Response

---

[27]Other Congestion Areas are defined in Section 5.3.3 of Appendix A.

[28]CT DPUC refers to Investigation of Terms and Conditions of Market-Based Rate Authorization, 97 FERC ¶ 61,220 (2001).

58. The Commission rejects CT DPUC's argument that, in order to be effective, the General Mitigation Proposal must include refunds or fines, in addition to the imposition of a default bid. We have accepted the imposition of default bids as an effective tool for mitigating, and providing a deterrent to, the exercise of market power, and we are not persuaded at this time that it is necessary, in this proceeding, to require ISO-NE to impose refunds or fines in the General Mitigation Proposal. We further note that, although in Docket No. EL01-118-000, we discussed the possibility of addressing anti-competitive behavior through the imposition of refunds, we did not propose to impose refunds in conjunction with a default bid.[29]

The Commission orders:

(A) ISO-NE's General Mitigation Proposal is hereby accepted, to become effective on the date of issuance of this order, as discussed in the body of this order.

(B) ISO-NE is hereby directed to include in its quarterly reports to the Commission (per Market Rule 1, Appendix A, Section 11.2.2), for one year following implementation of the pivotal supplier trigger, information regarding all instances of mitigation of pivotal suppliers, as discussed in the body of this order.

(C) ISO-NE is hereby direct to include in each of its future annual state of the market reports (provided pursuant to Market Rule 1, Appendix A, Section 11.3) an assessment of its market design, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[29]By order issued June 26, 2003, in Docket Nos. EL01-118-000 and EL01-118-001, the Commission sought comments on proposed revisions to market-based rate tariffs and authorizations. Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 103 FERC ¶ 61,349 (2003).