

135 FERC ¶ 61,147  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER11-3034-000

ORDER ACCEPTING INFORMATIONAL FILING  
AND WAIVING QUALIFICATION DEADLINE

(Issued May 19, 2011)

1. On March 8, 2011, ISO New England Inc. (ISO-NE) submitted an informational filing reporting on the qualification of capacity resources to participate in the fifth Forward Capacity Auction (FCA)<sup>1</sup> for the 2014-2015 Capacity Commitment Period (March 8 filing). In this order, the Commission accepts the March 8 filing and grants a waiver of the qualification deadline for certain resources to submit additional information, as discussed below.

**I. Background**

**A. Forward Capacity Market**

2. ISO-NE operates a forward market for capacity, in which capacity resources compete to provide capacity to New England on a three-year-forward basis by participating in an annual FCA. Providers whose capacity clears the FCA acquire Capacity Supply Obligations, which they must fulfill three years later. Section III.13.8.1(a) of the Forward Capacity Market (FCM) market rules<sup>2</sup> requires ISO-NE to submit to the Commission an informational filing no later than 90 days prior to each FCA. That filing must include, *inter alia*, the details of the resources accepted or rejected in the qualification process for participation in the FCA.

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<sup>1</sup> The fifth FCA is scheduled for June 6, 2011.

<sup>2</sup> ISO-NE Transmission, Markets, & Services Tariff (Tariff), section III.13.8.1(a).

3. Existing resources may submit de-list bids to opt out of the capacity auction.<sup>3</sup> In its informational filing, ISO-NE must provide information relating to de-list bids. For de-list bids rejected by ISO-NE's Internal Market Monitor (IMM),<sup>4</sup> the filing must include the IMM's determination and alternate bid of the resource's net risk-adjusted going forward costs and opportunity costs.<sup>5</sup> At that point, a resource may elect to either (1) use the Internal Market Monitor's alternate de-list bid in the auction, or (2) challenge that alternate bid before the Commission prior to the FCA.<sup>6</sup>

4. Additionally, pursuant to section III.13.1.1.2.6 of the Tariff, the IMM reviews any offer submitted by a new capacity resource below 0.75 times CONE. If the IMM determines that the offer is inconsistent with the long-run average costs of the resource, net of expected non-capacity revenues, then the amount of capacity associated with such offer that clears will be considered Out-of-Market (OOM) Capacity for the purpose of determining the applicability of the Alternative Capacity Price Rule (APR).<sup>7</sup> Section III.13.8.1(a)(vii) of the Tariff requires ISO-NE to make an informational filing prior to each FCA to provide the IMM's determinations regarding offers below 0.75 times CONE. The informational filing includes information regarding each of the elements considered in the IMM's determination (other than revenues from ISO-NE's administered markets) and whether that element was included or excluded in the determination of whether the offer is consistent with the resource's long-run average costs net of expected net revenues other than capacity revenues.

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<sup>3</sup> See Tariff, section III.13.2.3.2(c).

<sup>4</sup> The IMM reviews bids from Existing Generating Capacity Resources that seek to permanently or statically de-list by bidding above 1.25 times the Cost of New Entry (CONE) and 0.8 times CONE, respectively, and new resources that seek to offer below 0.75 times CONE.

<sup>5</sup> Tariff, section III.13.1.2.3.2.1.1.

<sup>6</sup> The resource may also choose to abandon its attempt to de-list and participate in the auction as a price taker.

<sup>7</sup> In an order issued on April 13, 2011, the Commission directed ISO-NE to revise these market power mitigation rules. *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011).

**B. The Instant Filing**

5. ISO-NE states in its March 8 filing that the Installed Capacity Requirement (ICR) for the 2014-2015 Capacity Commitment Period is 34,154 MW.<sup>8</sup> After accounting for 954 MW per month of Hydro Quebec Interconnection Capability Credits (HQICC), the net amount of capacity that ISO-NE must procure in the FCA to meet the ICR is 33,200 MW. De-list bids totaling 408 MW will be submitted into the FCA. Additionally, 23 existing resources submitted Non-Price Retirement Requests, including all four units at the Salem Harbor Station. ISO-NE states that it will make a determination on whether one or more units at the Salem Harbor Station are needed for reliability no later than May 10, 2011, and if any of the resources are retained for reliability they will be included in the auction as Existing Generating Capacity Resources. ISO-NE states that it qualified 669 MW of New Generating Capacity Resources, 1,073 MW of New Import Capacity Resources, and 601 MW of New Demand Resources after de-rating. Overall, the qualification process for the fifth FCA resulted in 170 new projects, totaling 2,343 MW, and 37,735 MW of existing resources<sup>9</sup> competing to provide 33,200 MW, after accounting for HQICCs, to the New England control area for the 2014-2015 Capacity Commitment Period.

6. The IMM accepted a total of 28 new resources, providing approximately 1,255 MW, that offered below 0.75 times CONE.<sup>10</sup> However, the IMM determined that 907 MW of offers below 0.75 times CONE were inconsistent with the long run average costs net of expected non-capacity revenues and therefore, pursuant to section III.13.1.3.5.6.2

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<sup>8</sup> In Docket No. ER11-3048-000, ISO-NE submitted the 2014-2015 ICR filing for the Commission's approval. The Commission accepted that filing on May 13, 2011. *ISO New England Inc.*, 135 FERC ¶ 61,135 (2011). The 34,154 MW ICR value does not reflect a reduction of 954 MW per month in capacity requirements relating to Hydro Quebec Interconnection Capability Credits.

<sup>9</sup> On May 6, 2011, ISO-NE filed an errata with the Commission noting that it had omitted to list three existing Generating Capacity Resources (the Kendal Steam Units 1-3), with a total capacity of 53 MW, thus bringing the amount of Existing Generating Capacity Resources for the 2014-2015 Capacity Commitment Period from approximately 32,892 MW to approximately 32,946 MW.

<sup>10</sup> The breakdown of the 28 new resources is as follows: 12 New Generating Capacity Resources totaling 92 MW, 9 New Import Capacity Resources totaling 1,051 MW, and 7 New Demand Resources totaling 111 MW.

of the Tariff, will be considered OOM Capacity for the purpose of determining the applicability of the Alternative Capacity Price Rule.<sup>11</sup>

## II. Procedural Issues

7. Notice of the filing was published in the *Federal Register*, with interventions and protests due on or before March 23, 2011.<sup>12</sup> The New England Power Pool Participants Committee (NEPOOL), the Massachusetts Attorney General and Connecticut Office of Consumer Counsel (New England Advocates), the New England Conference of Public Utilities Commissioners (NECPUC), Northeast Utilities Service Company (NUSCO), Public Service of New Hampshire (PSNH), Dominion Resources Services Inc. (Dominion), the Connecticut Department of Public Utility Control (CT DPUC), Massachusetts Department of Public Utilities (Mass DPU), National Grid USA (National Grid), and NSTAR Electric Company (NSTAR) filed timely motions to intervene or notices of intervention. NECPUC, Joint Challengers,<sup>13</sup> Dominion, CT DPUC, Mass DPU, Vermont Public Service Board (VT PSB), and New England Advocates filed timely protests or comments. The New Hampshire Public Utilities Commission (NHPUC), United Illuminating Company (UI), the Conservation Law Foundation, NRG Companies, GenOn Parties, and the New England Power Generators Association (NEPGA) filed motions to intervene out of time. UI and NEPGA filed untimely protests or comments. ISO-NE and NEPOOL filed answers to the protests.

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely-filed unopposed motions to intervene and the notices of intervention serve to make the entities filing them parties to this proceeding.<sup>14</sup>

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<sup>11</sup> March 8 Filing at 4-6.

<sup>12</sup> 76 Fed. Reg. 14,964 (2011).

<sup>13</sup> The Joint Challengers are: NUSCO, on behalf of its member companies Western Massachusetts Electric Company (WMECO) and PSNH (collectively, the NU Companies); National Grid, on behalf of itself and its New England utility operating subsidiaries New England Power Company, Massachusetts Electric Company, The Naragansett Electric Company, and Granite State Electric Company; NSTAR; and Unitil, on behalf of Fitchburg Gas and Electric Light Company (Fitchburg) and Unitil Energy Systems, Inc. (UES).

<sup>14</sup> We note that, with regard to the members of Joint Challengers, NUSCO, National Grid, and NSTAR all timely sought to intervene in this proceeding. However, Unitil (participating in the Joint Challengers' protest on behalf of Fitchburg and UES) did

(continued...)

We will grant the motions to intervene out-of-time by the NHPUC, UI, the Conservation Law Foundation, NRG Companies, GenOn Parties, and NEPGA, given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by ISO-NE and NEPOOL because they have provided information that has assisted us in our decision-making process.

### **III. Discussion**

#### **A. OOM Determinations**

##### **1. Joint Challengers**

10. Joint Challengers are a group of entities that are developing new energy efficiency Demand Resources which they submitted into the FCA at prices lower than 0.75 times CONE. They state that they have not fully understood what data is sufficient to support the qualification of offers from new Demand Resources below 0.75 times CONE, and this lack of understanding may have led to misunderstandings by the IMM during its review of some resources. Joint Challengers believe that, as a result of these misunderstandings, the IMM may have incorrectly determined several new Demand Resources to be OOM.<sup>15</sup> They further assert that this OOM capacity could potentially be carried forward to future FCAs and have a significant impact on the price of all capacity in the FCM by triggering higher prices through the operation of the APR rule. Joint Challengers ask the Commission to: (1) direct ISO-NE to disregard the premature and

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not. We note that absent seeking intervention, joining in a protest does not operate to make an entity a party to a proceeding.

<sup>15</sup> Joint Challengers assert that the IMM qualified 111 MW of new Demand Resources with offers below 0.75 times CONE to be In Market, but found approximately 151 MW worth of new Demand Resources with offers below 0.75 times CONE (including 9 MW offered by the NU Companies, 140 MW offered by National Grid, and 1.463 MW offered by Unitil) to be OOM capacity. Joint Challengers also state that NSTAR offered a Demand Resource into the auction at a price below 0.75 times CONE that was determined to be In Market during the qualification process, but NSTAR still seeks to challenge the IMM's determinations, because of their possible market impacts. Joint Challengers Protest at 2, 5.

incorrect classification of the NU Companies', National Grid's, and Unitil's new Demand Resources as OOM in the FCA qualification process for the limited purpose of determining whether the APR should be invoked in the current and future FCAs; and (2) order ISO-NE to improve the information collection and review process for new Demand Resources that offer capacity in future auctions.

11. According to Joint Challengers, under the FCM rules, new Demand Resources that intend to offer prices below 0.75 times CONE must submit sufficient data to allow the IMM to determine whether the offer is consistent with the long-run average costs (LRAC) of the resource, net of expected net revenues for Demand Reduction Values (i.e., the amount of value created by the reduction of demand) other than FCM revenues.<sup>16</sup> They note that sufficient documentation and information must be included in the package that a resource submits during the qualification process, including a completed Cost Justification template and a completed New Demand Response Project Description Form. If the IMM determines that a resource's offer is not consistent with its LRAC net of applicable expected revenues, the resource is considered OOM capacity for purposes of applying the APR. Joint Challengers state that “[s]uccess in the FCA qualification process for below 0.75 times CONE New Demand Response offers depends on providing accurate and unambiguous data in the Demand Response Project Description Form, in a manner acceptable to the IMM, to permit them to perform a thorough LRAC analysis.”<sup>17</sup>

12. Joint Challengers aver that they made a good faith effort to comply with data requirements, but they admit that some data were either erroneously reported or were not explicit enough to allow the IMM to make its determination. However, they further state that some data have been misinterpreted, misunderstood, or abruptly deemed insufficient by the IMM without sufficient follow-up with the offerors. Joint Challengers ask the Commission to give the resource sponsors an opportunity to cure these misunderstandings and lack of follow-up opportunity, as follows:

- **WMECO:** With regard to the project developed by the NU Companies for WMECO, the IMM stated:

WMECO has failed to document its original submissions, including estimates and assumptions. In particular,

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<sup>16</sup> According to section III.13.1.4.2.4(b) of the ISO-NE Tariff, the LRAC of a New Demand Response resource is that resource's total cost (including opportunity costs, as appropriate) less the customer's avoided electric energy charge at the point of delivery, on a levelized, net present value basis over the resource's Measure Life.

<sup>17</sup> Joint Challengers Protest at 6.

WMECO submitted data corrections to IMM . . . [h]owever, WMECO provided its corrected spreadsheet data as an image document, rather than providing the data in a usable format. . . .

Additionally, when IMM requested that WMECO document its assumptions, WMECO provided a written explanation of assumptions, but failed to provide documentation to substantiate those assumptions.<sup>18</sup>

- **PSNH**: With regard to the project developed by the NU Companies for PSNH, the IMM stated:

PSNH has failed to . . . document its original submission, including estimates and assumptions. . . . PSNH's estimates suggest that its administrative costs are an annual ('per year') value. Despite an attempt by IMM to elicit documentation from PSNH for its administrative costs, PSNH's response does not readily indicate the basis of its estimates. . . .

The IMM was unable to determine, without significant additional effort by IMM, whether this (administrative costs) is in fact an annual cost or a present value estimate.<sup>19</sup>

- **National Grid**: National Grid sought to develop five Demand Resources, all of which the IMM found to be OOM capacity. National Grid states that, with regard to one of its resources, the IMM stated that it could not determine that the resource's bid below 0.75 times CONE was appropriate "[g]iven likely erroneous data and a lack of appropriate planning data and documentation."<sup>20</sup> National Grid asserts that, despite its efforts to provide the IMM with necessary and correct data, it made some errors, such as

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<sup>18</sup> Joint Challengers Protest at 7-8 (citing January 28, 2011 Qualification Determination Notice (QDN)).

<sup>19</sup> Joint Challengers Protest at 9 (citing January 28, 2011 QDN).

<sup>20</sup> *Id.* at 10.

incorrectly reporting certain revenues,<sup>21</sup> but also that National Grid misunderstood a question asked by the IMM, and so provided a response that did not address the IMM's concerns. National Grid states that the process of resource qualification did not provide it with the opportunity to provide the information that the IMM required.<sup>22</sup>

- **Unitil:** Two Unitil companies, Fitchburg and UES, developed energy efficiency Demand Resources which the IMM found to be OOM.

As to Fitchburg's project, the IMM stated that "[Fitchburg]'s estimates suggest that [a measure of refrigeration] has an implied retail rate exceeding \$2000/MWh."<sup>23</sup> Fitchburg states that it does not understand how the IMM calculated the implied retail rate. The IMM also stated that "[t]he majority of non-electric benefits included in [Fitchburg's] estimates appear to be associated with lighting programs, [whereas Fitchburg] appears to suggest in its response to the IMM's questions that some portion of its benefits are derived from avoided natural gas and other fuel costs."<sup>24</sup> Fitchburg asserts that in its response to the IMM's question, it provided information that directed the IMM to a document showing the avoided costs for other fuels, and that, if there had been an opportunity for follow-up on this question, Fitchburg would have provided additional information that did address non-electric benefits associated with lighting.

In its QDN to UES, the IMM stated that "UES' estimates suggest that its administrative costs are an annual ('per year') value," and the IMM could not determine whether this was a present value estimate or an annual value, in which case UES' offer would exceed the 0.75 times CONE threshold.<sup>25</sup> UES states that it too would have been able to provide information that

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<sup>21</sup> National Grid states that it mistakenly reported some revenues as multi-family housing rather than single-family housing retrofits, and also reported certain measures as having an abnormally high utilization rates. *Id.*

<sup>22</sup> *Id.* at 11.

<sup>23</sup> *Id.* at 12 (citing January 28, 2011 QDN).

<sup>24</sup> Joint Challengers Protest at 13 (citing January 28, 2011 QDN).

<sup>25</sup> Joint Challengers Protest at 14 (citing January 28, 2011 QDN).

addressed the IMM's concerns if there had been an opportunity for further interaction.

13. WMECO, PSNH, Fitchburg, and UES state that they believe that their resources are In-Market capacity, that they responded correctly and in good faith to all of ISO-NE's information requests, but that they did not have an opportunity, during the determination process, to understand and provide exactly what ISO-NE believes is lacking. Joint Challengers allege that the IMM has failed to convey what information it needs to make accurate In-Market or OOM determinations. While Joint Challengers acknowledge that these resource sponsors may have been partly responsible for the IMM's determinations, they assert that those determinations may be erroneous, and that such errors could have long-term negative effects on the entire FCM. Joint Challengers point to the FCM's APR rule, under which, in an order issued by the Commission on April 23, 2010,<sup>26</sup> if some of the capacity procured by ISO-NE in an FCA is OOM, the APR rule could (under some circumstances in which there is an excess of capacity in the market) come into effect and significantly raise prices for all customers. Additionally, the APR's carry-forward provision will carry forward OOM into future FCAs until it is offset by load growth and retirements. Joint Challengers argue that, given this potential negative effect of OOM determinations,<sup>27</sup> it is critical that such determinations be correct. Joint Challengers believe that, with additional information and analysis, the IMM will agree that these Demand Resources should not have been determined to be OOM, and state that they are attaching additional evidence on this question to their protest. They further note that, since existing resources exceed the amount of capacity that ISO-NE will purchase in the fifth FCA, the APR will not trigger in that FCA; thus, Joint Challengers argue, the final resolution of these resources' market status may be delayed until after the fifth FCA, although any OOM determinations should be made under the rules applicable to the fifth FCA.<sup>28</sup> Joint Challengers also state that the process of gathering information prior to the

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<sup>26</sup> *ISO New England Inc.*, 131 FERC ¶ 61,065 (2010).

<sup>27</sup> Joint Challengers argue that even the changes caused by a small number of OOM resources could have a large effect on the FCM, stating that "[a]n upward adjustment to the FCA capacity clearing price of only \$1/kW-month would result in significant additional charges to load equal to \$384 Million/year," based on a requirement to procure 32,000 MW of capacity. Joint Challengers Protest at 16.

<sup>28</sup> Joint Challengers further request that the Commission direct ISO-NE to make corrections for the purpose of determining the applicability of the proposed carry-forward rules to the resources in question in future FCAs, so that, if the IMM ultimately agrees that these resources are not OOM, they will not be included as carry-forward OOM for the purpose of future FCAs. *Id.* at 18.

qualification of resources should be more transparent, and the IMM should more clearly detail its information and format needs in a Market Manual.<sup>29</sup>

14. Joint Challengers request that the Commission direct ISO-NE to (1) reconsider, after receipt of any additional clarifications and/or corrections, the challenged OOM determinations, and (2) make improvements to the information gathering process employed during the resource qualification process, and to make those improvements in advance of the August 15, 2011, deadline for the sixth FCA qualification packages.

## 2. NECPUC

15. NECPUC states that the IMM has found that state-sponsored energy efficiency programs offering approximately 151 new MWs of capacity are OOM, and that the IMM has stated that its analysis involves a determination of whether the programs' benefits exceeded their costs. NECPUC believes that the appropriate way to determine whether a resource is OOM or In-Market is to determine whether it is cost-effective,<sup>30</sup> and that, while New England state regulatory commissions have found these programs cost-effective, the IMM has nevertheless determined that some state-approved energy efficiency programs are In-Market, while other, "virtually identical" state-approved programs are OOM.<sup>31</sup> NECPUC states that, while there are some differences in the criteria used by ISO-NE and the states to determine cost-effectiveness, the inconsistencies in the IMM's determinations show that state-sponsored energy efficiency

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<sup>29</sup> Joint Challengers assert that ISO-NE should share with resource sponsors the item specifics and explanations in its determinations so that they can understand the IMM's cost-benefit calculations, or else give Demand Resource sponsors the template for the IMM's computations that would allow them to see the results before a submission. Joint Challengers also request that, if the OOM provisions of ISO-NE's July 1, 2010 proposal for FCM modifications in Docket No. ER10-787-000 are approved, ISO-NE should be required to provide the details of the benchmark resource calculations by technology that identifies program costs and benefits for non-generation technologies. *Id.* at 19.

<sup>30</sup> NECPUC's Protest at 2 (citing ISO New England Inc. Market Monitoring Unit, *Internal Market Monitoring Unit Review of the Forward Capacity Market Auction Results and Design Elements*, June 5, 2009, at 31 (IMM FCM Review), submitted in Docket ER09-1282-000, available at [http://www.iso-ne.com/regulatory/ferc/filings/2009/jun/er09-1282-000\\_06-05-09\\_market\\_monitor\\_report\\_for\\_fcm.pdf](http://www.iso-ne.com/regulatory/ferc/filings/2009/jun/er09-1282-000_06-05-09_market_monitor_report_for_fcm.pdf)).

<sup>31</sup> NECPUC Protest at 2.

resources classified as OOM have been misclassified. Similarly to Joint Challengers, NECPUC points out that because of the operation of the APR rule, erroneously determining resources to be OOM could potentially cost ratepayers hundreds of millions of dollars, both in the fifth FCA and in future FCAs.<sup>32</sup>

16. NECPUC sets forth the particulars of the state-sponsored energy efficiency programs in the New England states, and notes that each such program is tested for cost-effectiveness.<sup>33</sup> NECPUC points to the IMM's statement that "the appropriate way to determine whether a resource is in market or out of market is to determine whether it is cost effective," even if they are subsidized by states, and that "demand resources should be treated as in market when they are cost effective."<sup>34</sup> NECPUC notes that the state-sponsored energy efficiency resources offered into the FCM are subject to two separate cost-effectiveness evaluations: the first by state commissions and the second by the IMM. NECPUC acknowledges that there are some differences in the criteria used by ISO-NE and the states to determine cost-effectiveness,<sup>35</sup> but argues that the differences in the two agencies' methodologies do not explain the IMM's inconsistent classifications of almost identical programs administered by different utilities in the same state that were

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<sup>32</sup> NECPUC estimates that a \$1/kW-month increase in the clearing price for a 34,000 MW system – which it notes is just under the ICR of 34,154 MWs that will be used in the fifth FCA – would translate into additional costs to ratepayers of more than \$400 million. NECPUC Protest at 8.

<sup>33</sup> NECPUC states that Connecticut requires its electric distribution companies to implement conservation and load management programs which the CT DPUC tests for cost-effectiveness; Maine requires its energy efficiency program administrator to develop and implement conservation programs that are cost-effective; Massachusetts requires its electric distribution utilities and municipal aggregators to procure all cost-effective energy efficiency; electric utilities in New Hampshire have established energy efficiency programs that are reviewed annually by the NHPUC and tested for cost-effectiveness; Rhode Island electric distribution companies are required to file plans for energy efficiency and conservation procurement that are approved by the Rhode Island Public Utilities Commission; and Vermont requires its energy efficiency utility and the Burlington Electric Department to procure cost-effective energy efficiency, which procurement is reviewed by the Vermont Department of Public Service. *Id.* at 9-13.

<sup>34</sup> *Id.* at 13 (citing IMM FCM Review at n. 4).

<sup>35</sup> NECPUC gives the example of the Mass DPU, which considers savings from avoided transmission and distribution as well as demand reduction induced price effects. NECPUC Protest at 14.

all approved as cost-effective by state commissions. NECPUC asserts that "the benefits considered by state commissions that the [IMM] does not consider in its cost-effectiveness analysis are small enough that such differences cannot be material," given that state commissions have been finding benefit-cost ratios of some energy efficiency programs as high as three to one. NECPUC argues that therefore "[t]he only plausible explanation for the [IMM] to classify these programs as OOM . . . is a misunderstanding, miscommunication, or inadvertent error in the data submitted,"<sup>36</sup> demonstrating a failure of the qualification process. NECPUC states that it would be unjust and unreasonable to pass on to consumers (through the operation of the APR rule) costs that result from erroneous OOM determinations.

17. NECPUC further argues that, while market participants have a responsibility to provide accurate data to allow the IMM to make determinations, it is ISO-NE, as the market administrator, that has a heightened responsibility to detail clearly the criteria that it uses to make such determinations and to ensure that participants understand any clarifying questions. Therefore, NECPUC requests that the Commission suspend issuance of any ruling or order related to the In-Market/OOM designation of energy efficiency resources, and that the Commission require a *de novo* review and opportunity to cure any misclassification of resources. It states that such review and opportunity to cure should (1) commence immediately and at minimum no later than 30 days prior to the commencement of the fifth FCA, which is June 6, 2011; (2) require ISO-NE to review its In-Market/OOM determinations of new, state-sponsored energy efficient resources for the fifth FCA with affected market participants and state entities; (3) provide an opportunity to correct any misclassification of such resources and ensure any misclassification does not contribute to the running tally of carried-forward OOM capacity; and (4) take place under FERC's general supervision. NECPUC states that this review would provide a forum to correct errors, clarify and explain the data submitted, and analyze whether data deemed questionable by the IMM affected the OOM determination (e.g., whether, for example, a resource would have been In-Market had a higher discount rate been used).<sup>37</sup>

18. NECPUC further believes that ISO-NE should take steps to eliminate future problems with the qualification process and provides two possible solutions. First, to

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<sup>36</sup> *Id.* at 15.

<sup>37</sup> NECPUC notes that the administrators of energy efficiency programs have "informally reported continued challenges they have experienced in trying to understand how the [IMM] analyzed data . . . . In one example, a participant was told that their actual discount rate was unreasonably low, without further explanation of what constitutes a reasonable discount rate." NECPUC Protest at 21.

help resolve miscommunications or misunderstandings during the qualification process and to avoid unnecessary litigation before the Commission, NECPUC asserts that ISO-NE should provide an opportunity during the qualification process for participants offering new resources to challenge OOM classifications and cure any misclassification before the qualification process concludes and an informational filing is made with the Commission. Second, NECPUC asserts that ISO-NE should provide a greater level of guidance to market participants seeking to qualify new resources, particularly new state-sponsored energy efficiency, to address any misunderstandings about the criteria the IMM applies in making an In-Market/OOM determination.

19. NECPUC agrees with Joint Challengers that it is unlikely that the APR will trigger for the fifth FCA, and therefore does not oppose the running of the auction subject to a *de novo* review and Commission hearing concerning the carrying forward of new state-sponsored energy efficiency resources designated as OOM. In that event, NECPUC asks, pursuant to section III.13.8.2(c) of the Tariff, that the Commission suspend certification of the auction results pending the outcome of such review and hearing.

### **3. Other Commenters**

20. New England Advocates support Joint Challengers' protest, asking that, if Joint Challengers' claims were true, the Commission direct ISO-NE (1) to identify and exchange the information necessary for the IMM to make a proper determination prior to the fifth FCA, and require the IMM to reissue determinations based on the identified data; and (2) to improve its information collection and review process for new demand resources that offer prices below 0.75 times CONE.

21. CT DPUC states that it joins and supports NECPUC's protest. UI, like Joint Challengers and NECPUC, expresses concerns that erroneous OOM determinations have long lasting and undesirable effects on the FCM and may unnecessarily increase the burden borne by ratepayers.

22. NEPGA states that the competitiveness of capacity market bids cannot be justified by the capacity price reduction savings achieved by clearing new capacity resources below their long run average cost. Further, NEPGA states that OOM determinations and APR price adjustments are expressly intended to discourage all entities, including entities charged with implementing state efficiency programs, from offering new capacity resources into an FCA at prices below their actual long run average costs. NEPGA states that it is improper to include the market distortion benefits of such capacity clearing price suppression as a reason to avoid an OOM determination – rather, NEPGA states, where such benefits are used to justify new capacity resource investments (including energy efficiency resources), an OOM determination is exactly what should happen in the FCM.

23. NEPGA states that the economic construct of the FCM rests on the presumption that prices should be established by the costs of investment choices as they can be

supported by market compensation, without relying on a state subsidy or the capacity cost savings derived from the associated non-competitive price suppression. Further, NEPGA argues, the FCM's protections against monopsony power would be rendered useless if the Commission were to permit market participants to use capacity clearing price suppression benefits to offset new capacity costs that could not otherwise be justified at the new resource's capacity price, plus other competitive values.<sup>38</sup>

#### **4. ISO-NE's and NEPOOL's Answers**

24. ISO-NE, in response to the protests of NECPUC and Joint Challengers, states that the IMM's determination of certain resources to be OOM capacity was made in accordance with ISO-NE's Commission-approved Tariff. ISO-NE notes that there are differences between the criteria utilized by the states and the IMM in determining a resource's cost-effectiveness, which may result in certain resources being deemed cost-effective by a state commission and not by the IMM. In addition, ISO-NE states that being deemed a cost-effective resource by the state is not sufficient evidence for the IMM to conclude that state-sponsored energy efficiency programs should be In-Market.

25. ISO-NE states that the Tariff requires the IMM's determinations to be based solely on the documentation submitted by the project sponsors,<sup>39</sup> and that a determination by a state commission as to the cost-effectiveness of the project does not change this obligation. ISO-NE argues that if the IMM cannot determine if a bid is consistent with the project's cost net of expected net revenues, the resource will be classified as OOM. ISO-NE states that the IMM based its determinations here on the documentation submitted by the project sponsors. In response to NECPUC's suggestion that the energy efficiency programs at issue here were deemed to be OOM because of a fundamental flaw in the qualification process (and that some projects were found to be In-Market where other identical projects were found to be OOM), ISO-NE reiterates that the ultimate responsibility for submitting sufficient documentation to the IMM lies with each project sponsor, and that the IMM bases its determination on that documentation.

26. ISO-NE agrees with Joint Challengers that "some required data have been reported in error and some not explicit[ly] enough to allow the IMM to make an unqualified determination"<sup>40</sup> and agrees that the submittal of correct or additional data could result in a different finding as to whether certain resources are OOM. ISO-NE notes that, under

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<sup>38</sup> NEPGA Comments at 5.

<sup>39</sup> See Tariff, section III.13.1.4.2.4(b).

<sup>40</sup> ISO-NE Answer at 9 (citing Joint Challengers protest at 6).

the Tariff, the IMM may seek clarification or address questions or concerns arising from the materials submitted by project sponsors after the New Capacity Qualification Deadline and before the issuance of QDNs.<sup>41</sup> For the fifth FCA, the IMM utilized this provision to consult with numerous project sponsors, including several of the Joint Challengers; these consultations, however, must be completed early enough to permit the timely issuance of a QDN to each project. It further states that under the Tariff, a new Demand Resource may not submit supporting documentation after the Qualification Deadline, which for the fifth FCA was October 15, 2010.<sup>42</sup> ISO-NE posits that NECPUC and Joint Challengers appear to be seeking a waiver of the qualification deadline for resources to submit additional information.

27. ISO-NE states that, because it has determined that the designation of OOM will not impact the fifth FCA, it takes no position on whether the Commission should grant waiver of the deadline. ISO-NE states that if the Commission determines Joint Challengers are requesting a waiver and grants that waiver, the IMM can review the additional documentation. ISO-NE states, however, that although it does not oppose the waiver request, it asks that any order granting such a waiver explicitly provide that it is limited to the specific and unique facts presented here and does not constitute established precedent that would allow Market Participants to avoid these or other terms and conditions set forth in the Tariff.<sup>43</sup> ISO-NE notes that it is approaching the fifth FCA, and Market Participants should have sufficient knowledge and experience to follow the letter of the Tariff and ISO procedures, presumably since the learning curve is leveling out.<sup>44</sup> Nevertheless, ISO-NE states that it and the IMM are willing to address the concerns raised by NECPUC in the stakeholder process (namely the need for additional guidance on the qualification of offers below 0.75 times CONE) and are committed to working with owners of New Demand Resources and other stakeholders to clarify the process.

28. NEPOOL, in its answer, states that it takes no position on any of the challenges raised to ISO-NE's administration of the Market Rules and Manuals pertaining to the FCM, but wishes to reinforce the importance of the Commission limiting its consideration of issues in proceedings such as this involving whether ISO-NE has properly and consistently applied the FCM Rules in its qualification of resources for an

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<sup>41</sup> Tariff at section III.13.1.1.2.7.

<sup>42</sup> Tariff at section III.13.1.4.2.4.

<sup>43</sup> ISO-NE Answer at 10.

<sup>44</sup> *Id.*

FCM auction. NEPOOL states that this proceeding is not the appropriate vehicle to address concerns with the currently effective Market Rules, and that, if such concerns exist, any changes to the FCM Rules to address such concerns should be done prospectively and be worked out in the NEPOOL stakeholder process, rather than in response to this type of proceeding.

## 5. Commission Determination

29. Contrary to Joint Challengers' and NECPUC's representations, we find that the IMM's actions and determinations with respect to the energy efficiency Demand Resources at issue here were consistent with the applicable Tariff provisions. As ISO-NE points out in its answer, under section III.13.1.4.2.4(b) of its Tariff, the IMM must review each offer from new Demand Resources below 0.75 times CONE to determine whether the offer is consistent with the long-run average costs of that resource, net of expected net revenues for its Demand Reduction Value other than capacity revenues. A resource that wishes to be found In-Market must submit information to the IMM to support that assertion, and the IMM must evaluate the resource's market status based solely on that information. On the basis of the evidence presented here, we find that the IMM acted in accordance with Tariff requirements in making its OOM determinations.

30. The representations made by Joint Challengers, however, and the findings that they cite from the QDNs issued to their resources (as set forth in P 12, *supra*) suggest that the qualification process, as applied to Joint Challengers in this case, might have resulted in incorrect designations as to the market status of certain resources. It appears that there was inaccurate, misunderstood, or insufficient communication between the IMM and certain resources, which may have affected the nature of the information provided by the resources to the IMM. While we find, as noted above, that the IMM followed applicable Tariff procedures, we are concerned that incorrect information provided by some Joint Challengers and information deemed insufficient by the IMM may have led the IMM to make erroneous OOM determinations.

31. Incorrect OOM determinations could potentially have a significant impact on the market price of capacity in future years. As several parties have acknowledged, the current APR rules will not be triggered in the fifth FCA, and by order issued April 13, 2011,<sup>45</sup> the Commission directed significant changes to ISO-NE's method of mitigating buyer-side market power that will render moot the current APR rules. However, because there is as yet no certainty as to when that revised mitigation method will be put into place, it is possible that in the sixth FCA, the existing APR rules could operate to cause carried-forward OOM capacity to have a significant impact on the clearing price of

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<sup>45</sup> *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011) (the Paper Hearing Order).

capacity. For this reason, it is crucial that the IMM's OOM determinations actually reflect whether the offers submitted by the resources at issue are consistent with their long-run average costs, net of expected net revenues for Demand Reduction Values other than FCM revenues.

32. Therefore, noting ISO-NE's statement that the IMM can reevaluate the OOM determinations for the eleven resources discussed by the protesters here,<sup>46</sup> we will grant a one-time waiver of the deadline in order to enable resource sponsors to provide qualification information to the IMM, so as to permit the IMM to re-evaluate the market status of the resources listed in Attachment A of NECPUC's protest. Joint Challengers state in their protest that they have already provided information regarding the nine resources that are discussed in their protest.<sup>47</sup> We therefore find that, within 5 business days of the date of this order, (1) the nine resources discussed by Joint Challengers may submit the information contained in Attachments A through C of Joint Challengers' protest to the IMM, and (2) the additional two resources in NECPUC's Attachment A<sup>48</sup> may submit the information to the IMM that they believe supports their claim that they are In-Market. If the IMM believes that further information or clarification is necessary to make a determination, it may seek that additional information.

33. We stress that this is a one-time waiver, and that as a general matter, resource sponsors will be required to complete their information exchange with the IMM by the deadline provided by the regulations. Waiving the Tariff deadline in this case, however, is consistent with Commission precedent. As the Commission has previously found, a waiver of a tariff provision may be granted in rare circumstances where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) it would address a concrete problem; and (4) it would not have undesirable consequences, such as harming third parties.<sup>49</sup> We find that these requirements are satisfied here, because the

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<sup>46</sup> NECPUC lists eleven resources at Attachment A to its protest. The nine specific resources discussed in the Joint Challengers' protest are among those eleven resources.

<sup>47</sup> See Attachments A through C to Joint Challengers' protest.

<sup>48</sup> Resource No. 12757, NHEC Energy Efficiency Programs, and Resource No. 12822, Burlington Electric Department – On-Peak Efficiency.

<sup>49</sup> *ISO New England Inc.*, 134 FERC ¶ 61,182, at P 8 n. 2 (2011) (citing *ISO New England Inc.*, 127 FERC ¶ 61,242 at P 13 (2009), *ISO New England Inc.*, 122 FERC ¶ 61,297 (2008)); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *University of New Hampshire*, 121 FERC ¶ 61,185 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

Joint Challengers have submitted information demonstrating that they made a good faith effort to comply with the data requirements; the waiver applies only to a single discrete set of resources and only for the FCA results at issue here; and granting the waiver will help ensure that resources are properly designated as In-Market or OOM, thus enabling the APR rules to function as intended.<sup>50</sup>

34. Given the representations by all parties that the question of whether these resources are or are not OOM will not trigger the APR for the fifth FCA, regardless of the resolution of this matter, we will require the IMM to review the additional information provided by resources pursuant to this order and make a determination as to each of the resources in Attachment A of NECPUC's protest, and we will require ISO-NE to make an informational filing with the Commission with the determinations resulting from the additional review on or before July 15, 2011, as ISO-NE has stated in its answer that it is willing to do. With regard to NECPUC's and the Joint Challengers' longer-term concerns regarding the qualification process generally, we further note that, in the Paper Hearing Order, *supra*, we are requiring ISO-NE and its stakeholders to consider multiple matters relating to the FCM. ISO-NE has stated that it and the IMM are willing to work with stakeholders "to identify possible improvements to the qualification process for New Demand Resources offering below 0.75 times CONE."<sup>51</sup> We therefore expect that the parties will have the opportunity to address this issue in the stakeholder process.

35. Finally, we note that while we are granting a waiver for the purpose of allowing Joint Challengers to submit additional or corrected data bearing upon classification of certain New Demand Resources, we are not making a finding as to what the final determination should be. If, after the IMM issues new QDNs, parties wish to challenge those determinations pursuant to section III.13.8.1(b) of the Tariff, they must file such challenges within 15 days of the IMM's issuance of new QDNs.<sup>52</sup>

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<sup>50</sup> As noted in P 13, above, under some circumstances in which there is an excess of capacity in the market, if some of the capacity procured by ISO-NE in an FCA is OOM, the APR rule could come into effect; *see also* ISO-NE Answer at 4-5.

<sup>51</sup> ISO-NE answer at 11.

<sup>52</sup> We also note, in response to NECPUC's request that the Commission suspend certification of the auction results pending the outcome of further review of the IMM's determinations, that such suspension will not be necessary, in light of the representations by all parties (including ISO-NE) that the APR rule will not be triggered in the fifth FCA.

## **B. Salem Harbor Units**

### **1. Dominion Protest**

36. Dominion submitted comments relating to the IMM's rejection of the Permanent De-List Bids submitted by Salem Harbor as inconsistent with the respective Units' net risk adjusted going forward and opportunity costs (Going Forward Costs). Dominion states that, while its Permanent De-List Bids have been superseded by Dominion's later decision to submit Non-Price Retirement Requests for each of the four Salem Harbor Units, it seeks to inform the Commission of the practical impact of the IMM's decision. Dominion states that the IMM unreasonably supplanted Dominion's reasonable business judgment that Salem Harbor would incur significant capital costs associated with environmental compliance if required to take on a capacity obligation or serve a reliability need in the fifth FCA,<sup>53</sup> with the IMM's own judgment that such an outcome was uncertain. Dominion seeks to preserve its rights going forward and notes its objection to the IMM's decision to "systematically exclude from its calculation of the Going Forward Costs of the [Salem Harbor] Units the capital costs associated with environmental compliance."<sup>54</sup>

37. Dominion also states that, while the Commission previously found that a resource that submits a Non-Price Retirement Request may make a later filing under section 205 to recover the costs of capital expenditures if ISO-NE seeks to retain it for reliability,<sup>55</sup> the resource would have to decide whether to accept ISO-NE's offer before such a section 205 filing could be resolved. Thus, Dominion states, many resources have the choice between committing to serve a reliability need in the future, without any certainty

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<sup>53</sup> Dominion states that, in submitting its Permanent De-List Bids for the Fifth FCA, it evaluated the likely capital costs associated with environmental compliance three years in advance of the relevant Capacity Commitment Period, and identified three expected U.S. Environmental Protection Agency regulations that would require Dominion to make significant capital expenditures. According to Dominion, the IMM's assumption that these costs are uncertain (and thus, they should not be considered part of Dominion's Going-Forward Costs) made Dominion's Permanent De-List Bid untenable, because it leaves no mechanism for the Salem Harbor units to recover these costs if they do occur, and if the Salem Harbor units are required for reliability. Dominion comments at 5-6.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> Dominion Comments at 8 (citing *ISO New England Inc.*, 125 FERC ¶ 61,102, at P 13 n. 9 (2008)).

that they will recover the costs of serving that need, or exiting the capacity market. Dominion requests that the Commission clarify that the IMM has overstepped its mitigation authority bounds in this instance, so as to provide resources with some measure of certainty going forward.<sup>56</sup>

## 2. NEPGA's Comments

38. NEPGA states that it supports Dominion's arguments, and that the compensation mechanisms for existing units whose de-list bids or retirement requests are rejected for reliability reasons are flawed. NEPGA asserts that development of de-list bid prices using Going Forward Costs leaves out real cash costs that are appropriate to use as a basis for pricing the capacity product (e.g., debt, taxes, insurance). Additionally, NEPGA states that the timeframes for electing compensation treatment for rejected de-list or Non-Price Retirement Request bids are inadequate for the unit owner to achieve the certainty of a FERC order that the cost of service compensation will adequately cover the cost of meeting the reliability obligations of supplying capacity, including appropriate recovery of capital costs associated with environmental controls that are necessary to continue operating the unit.

39. NEPGA states that, in the case of a Permanent De-list Bid rejected for reliability, the resource owner must elect to be paid either the de-list bid price or pursuant to a cost of service agreement within six months of ISO-NE's filing of the results of the relevant FCA. NEPGA states that resource owners cannot operate within this tight time frame. Similarly, NEPGA states, in the case of a Non-Price Retirement Request rejected for reliability, the resource owner must elect to be paid either (1) the FCA clearing price, or (2) pursuant to a cost of service agreement within six months of ISO-NE's reliability determination, which is no later than 30 days prior to the FCA, or can simply elect to retire the unit, notwithstanding the reliability need. NEPGA states that this schedule will almost certainly lead resource owners to choose retirement, notwithstanding the reliability need, since recovery of their costs will be uncertain. NEPGA asserts that the management judgment of resource owners cannot be subject to over-ride by a market monitor, and that markets must be governed by the actions of willing buyers and willing sellers, so that resource owners that anticipate, with good cause, incremental capital and/or operating costs in order to continue operating their facility, must be able to incorporate such costs into their development of prices at which they would be willing to sell that capacity service. Otherwise, NEPGA states, the FCM cannot yield either fair compensation or market signals which can succeed in drawing new private investment.<sup>57</sup>

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<sup>56</sup> Dominion Comments at 8.

<sup>57</sup> NEPGA Protest at 3-4.

### 3. ISO-NE's Answer

40. ISO-NE argues that the protest of Dominion is outside the scope of this proceeding and should be dismissed. Further, ISO-NE states that Dominion is seeking an advisory ruling on a matter not at issue in the proceeding.<sup>58</sup> ISO-NE states that the Commission has already rejected similar arguments regarding future environmental upgrade costs and previous claims that the IMM has improperly substituted its own business judgment for Dominion's judgment.<sup>59</sup>

41. ISO-NE states that Dominion's other comments which concern the timing of certain requirements, and the Commission's prior determination not to permit resources whose Permanent De-List Bids are rejected for reliability to submit a section 205 filing to recover capital costs necessary to meet reliability needs, is a collateral attack on Commission rulings approving these provisions and should therefore be dismissed. ISO-NE states that Dominion's concerns would be more properly addressed in a section 206 proceeding.

### 4. Commission Determination

42. We find that the issues raised by Dominion concerning de-list bids related to the Salem Harbor Units are beyond the scope of this proceeding and constitute a collateral attack on previous Commission rulings. As Dominion acknowledges, the Commission has already ruled on this question:

A resource that submits a non-price retirement request that remains available for reliability and must make a capital expenditure to remain available because it is needed for reliability can make a separate filing under section 205 to

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<sup>58</sup> ISO-NE Answer at 12 (citing *Californians for Renewable Energy, Inc. v. Pacific Gas and Electric Company et al.*, 134 FERC ¶ 61,207, at P 11 (2011) (internal footnotes omitted) ("CARE has not requested that we clarify any determination rendered in the ... Order. Essentially, CARE is requesting an advisory opinion, and requesting an opinion on a record that is lacking in the elements we would need to know to address matters arising under the FPA and PURPA. ... As a general proposition, the Commission does not render advisory opinions, and certainly cannot render its views on questions and on a record that are ill-defined.")).

<sup>59</sup> ISO-NE Answer at 12 (citing *ISO New England Inc.*, 132 FERC ¶ 61,044, at P 25 (2010); *ISO New England Inc.*, 130 FERC ¶ 61,108, at P 29 (2010); and *ISO New England Inc.*, 128 FERC ¶ 61,266, at P 44, 47 (2009)).

recover those costs. This capital expenditure filing may be made in advance of the resource's filing to receive cost-of-service treatment. This option is not available for resources whose permanent de-list bids are rejected because those resources can continue to operate in the energy markets and external capacity markets to recover such costs.<sup>60</sup>

43. Further, as Dominion states, a resource that chooses to submit a Non-Price Retirement Request (which, therefore, may not be compelled to remain in the capacity market) may nevertheless choose, if needed for reliability, to stay in the capacity market and provide capacity under an out-of-market arrangement with ISO-NE.<sup>61</sup> While a resource may, as Dominion states, need to incur some risk as part of this decision-making process, this is consistent with the philosophy behind the FCM, under which each resource must decide its own business strategy. In a previous case involving the participation of the Salem Harbor units in the FCM, the Commission stated:

Prior to the third Forward Capacity Auction, Dominion was able to choose whether to submit into that auction either static de-list bids, permanent de-list bids, or Non-Price Retirement Requests. By submitting static de-list bids for its units, Dominion was able to keep open the door to participation in future Forward Capacity Auctions, where prices could exceed those de-list bids. By contrast, submitting a permanent de-list bid or a Non-Price Retirement Request would have required the Salem Harbor units to permanently leave ISO-NE's capacity market . . . or to permanently leave ISO-NE's capacity, energy and ancillary services markets . . . once the resource was no longer needed for reliability. . . . Dominion made this choice even though, as Dominion was aware, it could potentially be required to accept a capacity price that would not, in Dominion's view, enable it to fully recover its costs.<sup>62</sup>

44. We agree with ISO-NE that, if Dominion has concerns regarding the compensation available to resources submitting Permanent De-List Bids when they

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<sup>60</sup> *ISO New England Inc.*, 125 FERC ¶ 61,102 at P 13 n. 9.

<sup>61</sup> *Id.*, P 13.

<sup>62</sup> *ISO New England Inc.*, 132 FERC ¶ 61,044 at P 29.

provide reliability services, and wishes to bring about the changes in the structure of the FCM that addressing those concerns would require, those issues would be more properly addressed in a separate section 206 proceeding.

The Commission orders:

(A) Within 5 business days of the date of this order, the sponsors of those resources listed in Attachment A of NECPUC's protest who wish to avail themselves of this opportunity may submit additional information to the IMM to support their assertions that their resources are In Market.

(B) The IMM must review the additional information provided by resources pursuant to this order and make a determination as to each of the resources, and ISO-NE must make an informational filing with the Commission with the determinations resulting from the additional review by July 15, 2011.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.