UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Corporation and Calpine Corporation	)	
v.	)	Docket No. EL15-23-000
ISO New England Inc.	)	

MOTION TO INTERVENE AND PROTEST OF THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rules 211, 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. §§ 385.211, 385.212, and 385.214 (2014), and the Commission's December 1, 2014 Notice of Complaint, the New England States Committee on Electricity ("NESCOE") hereby files this Motion to Intervene and Protest in response to the Complaint Seeking Fast Track Processing filed in the above-captioned docket by Exelon Corporation ("Exelon") and Calpine Corporation ("Calpine") (together, the "Complainants") against ISO New England Inc. ("ISO-NE") on November 26, 2014 (the "Complaint").

I. EXECUTIVE SUMMARY

The Commission should reject Complainants' last minute attempt to invalidate one aspect of ISO-NE's market rules, which is an integral part of a package of interrelated reforms to ISO-NE's Forward Capacity Market ("FCM")[1] that stakeholders considered holistically and the Commission approved earlier this year.[2] Six months later, and just two months before the Ninth

[1] Capitalized terms not defined in this pleading are intended to have the meaning given to such terms in the ISO-NE Transmission, Markets and Services Tariff (the "Tariff").

[2] *ISO New England Inc. and New England Power Pool Participants Committee*, Order Accepting Tariff Revisions, 147 FERC ¶ 61,173 (2014) ("2014 Demand Curve Changes Order").

Forward Capacity Auction ("FCA 9") is scheduled to run, Complainants now ask that the Commission selectively revise ISO-NE's new entry pricing rule in a manner that would unreasonably increase costs to consumers in New England and undermine the stakeholder process. Complainants' grievance about ISO-NE's new entry pricing rule is not new. In its May 2014 order, the Commission explicitly rejected these very same arguments raised by Exelon and others, including the New England Power Generators Association ("NEPGA"),[3] and this issue is the subject of pending rehearing requests submitted by Exelon[4] and others.[5]

The requested fast track processing is ostensibly premised on the need for expedited Commission action before FCA 9, but the alleged urgency is one of Complainants' own making. Apparently Complainants have been unhappy with this aspect of ISO-NE's rules for some time, yet waited to file their Complaint until "time was short" before the FCA 9.

The Commission should reject the Complaint. Complainants have not demonstrated that the existing rule is unjust, unreasonable or unduly discriminatory. The Commission very recently made explicit findings to the contrary, concluding that the new entry pricing rule – and its two-year extension – was an integral part of the reforms to ISO-NE's capacity markets. In the 2014 Demand Curve Changes Order, the Commission considered – and rejected – arguments about the "price suppressing" and unduly discriminatory effect of the rule. Nor have

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3 Both Calpine and Exelon are among NEPGA's 2014 member companies.

4 *ISO New England Inc. and New England Power Pool Participants Committee,* Limited Request for Rehearing of Exelon Corporation and Entergy Nuclear Power Marketing, LLC, Docket No. ER14-1639-001 (June 30, 2014) ("Exelon Rehearing Request").

5 *See, e.g.*, *ISO New England Inc. and New England Power Pool Participants Committee,* Request for Rehearing of the New England Power Generators Association, Inc., Docket No. ER14-1639-001 (June 30, 2014) ("NEPGA Rehearing Request").

Complainants demonstrated that their alternatives, including one previously presented to the Commission involving a shadow price bidding scheme,[6] are just and reasonable.

In the event the Commission does not reject the Complaint outright, given the complexity of these issues and the consumer cost implications, the Commission should set the Complaint for hearing under Track II time standards and establish settlement procedures.

II. SERVICE AND COMMUNICATIONS

Pursuant to Rule 203, 18 C.F.R. § 385.203 (2014), the persons to whom correspondence, pleadings, and other papers in regard to this proceeding should be addressed and whose names are to be placed on the Commission's official service list are designated as follows:

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III. BACKGROUND

The Complaint requests that the Commission find that provisions of the ISO-NE Tariff that permit new entrants to "lock in" the clearing price from its first FCA are unjust, unreasonable and unduly discriminatory.[7] Complainants ask that the Commission issue an order

[6] *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, Complaint of the New England Power Generators Association, Inc. and Request for Fast Track Processing, Docket No. EL14-7-000 (Oct. 31, 2013), at 39 ("2013 NEPGA Complaint").

[7] Complaint at 1.

on a (very) fast-track basis by January 23, 2015, so that the measures they claim are needed to address this purported problem can be put into effect prior to FCA 9, scheduled to begin on February 2, 2015.[8] Such a fast-track process effectively eliminates the opportunity for sufficient time for state, stakeholder, grid operator and Commission review of this proposed rule change.

The rule at issue in the Complaint is part of ISO-NE's Market Rule 1, which provides Project Sponsors the option to lock in Capacity Supply Obligations and Capacity Clearing Prices for up to seven years.[9] The Complaint contends that one element of this rule, which ensures that new entrants' capacity is obligated in the FCAs for subsequent Capacity Commitment Periods of the lock-in period, will "significantly suppress […] FCM clearing prices to the detriment of both existing resources and new entrants, including the same new entrants that the rule is meant to benefit."[10] The Complaint asks that the Commission adopt a remedy that "addresses the impact of the zero-price offer requirement on other suppliers and the market" and that the Commission apply that remedy "prospectively for the balance of any lock-in periods from prior FCAs."[11] Complainants' preferred remedy is that the Commission model an approach taken in PJM Interconnection, L.L.C. ("PJM"), and require that a new entrant electing to lock in its price must offer its capacity in subsequent FCAs during the locked-in period at a price equal or less than the

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8 *Id.* at 3.

9 ISO-NE Tariff Section III.1.1.2.2.4 ("In the New Capacity Qualification Package, the Project Sponsor must specify whether, if its New Capacity Offer clears in the Forward Capacity Auction, the associated Capacity Supply Obligation and Capacity Clearing Price (indexed for inflation) shall continue to apply after the Capacity Commitment Period associated with the Forward Capacity Auction in which the offer clears, for up to six additional and consecutive Capacity Commitment Periods, in whole Capacity Commitment Period increments only…").

10 Complaint at 2.

11 *Id.* at 21-22.

price at which the seller offered the resource in its first FCA, or 0.90 times Net Cost of New Entry ("CONE") from FCA 9.[12]

This is not the first time the Commission has heard and rejected this objection to ISO-NE's new entry pricing rule. On October 31, 2013, NEPGA filed a complaint against ISO-NE alleging that certain provisions of ISO-NE's Tariff governing the FCM were unjust, unreasonable and unduly discriminatory.[13] Among other things, NEPGA argued that ISO-NE's Capacity Carry Forward Rule created price discrimination between new and existing resources and resulted in artificially low prices being paid to existing resources that were far below what new entrants received. In comments supporting the 2013 NEPGA Complaint, Exelon argued that the Capacity Carry Forward Rule "fails to mitigate price suppression arising from the requirement that a new entrant must offer its capacity into the FCA at a $0 or 'price-taker' bid in years two through five of its five-year New Entry Pricing Rule guarantee."[14] The Commission rejected this aspect of the 2013 NEPGA Complaint.[15] NEPGA sought rehearing of the NEPGA Complaint Order, urging the Commission, among other things, to "require ISO-NE to eliminate the zero-bid requirement and implement the bidding protocols requested by NEPGA in its Complaint."[16]

As previously committed and in response to the Commission's directive in the NEPGA Complaint Order that ISO-NE accelerate its implementation of a sloped demand curve in

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12 *Id.* at 22-23

13 *See* note 6, *supra*.

14 *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, Comments of Exelon Corporation in Support, Docket No. EL14-7-000 (Nov. 27, 2013), at 5.

15 *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, Order on Complaint, 146 FERC ¶ 61,039 at PP 56-60 (2014) ("NEPGA Complaint Order").

16 *New England Power Generators Ass'n, Inc. v. ISO New England Inc.*, Request for Rehearing and Clarification of the New England Power Generators Association, Docket Nos. EL14-7-000 and ER14-463-000 (Feb. 24, 2014), at 4. An order on rehearing remains pending.

advance of FCA 9, on April 1, 2014, ISO-NE and the New England Power Pool ("NEPOOL") Participants Committee filed revisions to the ISO-NE Tariff pursuant to Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d. These tariff revisions established a system-wide sloped demand curve and adopted several related changes to the FCM, including an extension from five to seven years of the period during which a Market Participant may elect to lock in the capacity price for a new resource.[17] Exelon protested "[t]he addition of two years to the locked-in period in which new resources must effectively bid zero into the auction [which] would significantly exacerbate this price distortion."[18]

Once again, the Commission considered and explicitly rejected this argument, finding that "[a]lthough a lock-in extension may result in lower market clearing prices, we emphasize that other demand curve parameters ... help to assure that the demand curve construct overall will support adequate new and existing resources to achieve the stated reliability objective."[19] In its 2014 Demand Curve Changes Order, issued on May 30, 2014, the Commission approved the demand curve changes including the lock-in extension, without directing changes to the zero bid aspect of the new entry pricing rule.

IV. MOTION TO INTERVENE

NESCOE is the Regional State Committee for New England. It is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont and is funded through a regional tariff that ISO-NE

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[17] *ISO New England and New England Power Pool*, Demand Curve Changes Filing (Docket No. ER14-1639-000) (Apr. 1, 2014) ("Demand Curve Changes Filing"), at 10.

[18] *ISO New England and New England Power Pool*, Joint Comments in Support and Limited Protest of Entergy Nuclear Power Marketing, LLC and Exelon Corporation, Docket No. ER14-1639-000 (Apr. 22, 2014) ("Exelon Limited Protest"), at 19; *see also ISO New England and New England Power Pool*, Motion To Intervene and Protest of the New England Power Generators Association, Inc. and Electric Power Supply Association, Docket No. ER14-1639 (Apr. 22, 2014) at 24-26 (the new entry lock-in extension will exacerbate "price suppression" caused by new entry pricing).

[19] 2014 Demand Curve Changes Order at P 56.

administers.[20] NESCOE's mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest reasonable cost over the long-term, consistent with maintaining reliable service and environmental quality.

The Complaint is related to the FCM, New England's resource adequacy market. The Complaint, if granted, would affect the prices that capacity resources are paid and the costs ultimately charged to electric consumers. The Complaint has system reliability, consumer cost and environmental implications. NESCOE has a direct, immediate, and substantial interest in this proceeding, which will not be adequately represented by any other party. In addition, NESCOE's participation in this proceeding as the representative of the New England Governors will serve the public interest. NESCOE respectfully requests leave to intervene in this matter.

V. PROTEST

The Commission should dismiss the Complaint on both procedural and substantive grounds. As a threshold matter, the Complaint is a collateral attack on a recent Commission order accepting a modification to the very same rule Complainants now challenge. That modification to the new entry pricing rule was part of an integrated package of reforms undertaken in connection with implementation of a demand curve in the FCM. The Commission should not countenance Complainants' attempt to cherry pick one component of the package approved just six months ago, the effect of which will be to drive up costs to consumers with no appreciable improvement in resource adequacy or economic efficiency.

In addition, Complainants have failed to meet the requirements of FPA Section 206, 16 U.S.C. § 824e. In bringing this Complaint, Complainants bear the burden under FPA Section 206 of demonstrating that the existing rate, rule, or practice is "unjust and unreasonable, unduly

[20] *ISO New England Inc.*, 121 FERC ¶ 61,105 (2007).

discriminatory or preferential."[21] Even if they make this demonstration, if they are to succeed in obtaining the remedies they propose, then Complainants must demonstrate that their proposal is a just and reasonable alternative.[22] As set forth below, Complainants have not met the requirements under FPA Section 206. Complainants have not demonstrated that this aspect of ISO-NE's new entry pricing rule is not operating as intended or is unjust and unreasonable and unduly discriminatory. Complainants have also not demonstrated that any of their proposed alternative remedies are just and reasonable.

A. The Complaint Amounts to a Collateral Attack on the Commission's 2014 Demand Curve Changes Order, Which Approved Extension of the "Zero Price Offer Requirement" as Part of a Package of Reforms.

The Commission, over Exelon's and others' objections, accepted the very provision now challenged by the Complaint. It is incumbent on Complainants to demonstrate that there has been a significant change in circumstances that warrants the Commission revisiting its 2014 Demand Curve Changes Order and finding that the rule it approved just six months ago is no longer just and reasonable. Complainants have made no such demonstration here; rather, they resurrect arguments made in the demand curve changes proceeding that the Commission already rejected. Complainants attempt to repackage their argument, saying that they:

> are not challenging the New Entry Pricing Rule itself or suggesting that the Commission revisit its recent conclusion that extending the lock-in period 'is an appropriate way to provide investor assurance' and thereby to encourage new entry. Rather, Complainants are asking that the Commission address the impact

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[21] 16 U.S.C. § 824e(a).

[22] *See, e.g., Municipal Electric Utilities Ass'n of NY v. Niagara Mohawk Power Corp. d/b/a National Grid et al.*, 148 FERC ¶ 61,175, at P 35 (2014) (pointing out that complainant "in its answer acknowledges its burden as the complainant to make a demonstration both that the existing rates are unjust and unreasonable and its proposed replacement rate is just and reasonable") (*reh'g pending on other grounds*); *Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 10 (D.C. Cir. 2002). Alternatively, if the Commission finds the existing tariff unjust and unreasonable, and does not adopt one of the Complainants' alternatives, it shoulders the burden of determining a just and reasonable alternative. *FirstEnergy Service Co. v. FERC*, 758 F.3d 346 (D.C. Cir. 2014).

> of the lock-in when coupled with the zero-price offer requirement on other suppliers, consistent with the approach taken in PJM.[23]

However, the "zero-price offer requirement" – an aspect of the rule that was expressly preserved with the Demand Curve Changes filing – was an integral part of the revisions that the Commission approved in the 2014 Demand Curve Changes Order. The two-year extension of the lock-in period was an extension of the ISO-NE rule that allows "a new resource clearing the FCA [to] elect to receive, or 'lock-in,' the capacity clearing price for that year's FCA for up to four additional capacity commitment periods, regardless of the actual auction clearing price."[24] Perhaps to obscure the Complaint's collateral attack on the Commission's recent order, Complainants attempt to frame the issue differently. In fact, the issue is no different than the one raised in the 2014 demand curve changes proceeding, and the Commission has already ruled that ISO-NE's new entry pricing rule is just and reasonable and not unduly discriminatory.

The new entry pricing rule does not stand alone and cannot be viewed in isolation. It is an integral part of the package of reforms recently considered by states and stakeholders and approved by the Commission. The Complaint's attempt to cherry pick from the package of modifications to ISO-NE's FCM recently approved by the Commission should be rejected, as that package of reforms was carefully put together to balance the interests of the states, market participants, and other stakeholders. As NESCOE emphasized in its comments on the proposed tariff revisions, while it did not necessarily support every element of the sloped demand curve, it represented a balanced and comprehensive package, because "these capacity market reforms work together to align the incentives for resource adequacy, financial stability, consumer cost

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23 Complaint at 10 (citation omitted).

24 2014 Demand Curve Changes Order at P 42.

impacts, market power mitigation, and state statutory requirements."[25] The Commission recognized that the majority of commenters supported the proposed demand curve changes (including the price lock-in extension) as a whole.[26]

The Commission explained that the demand curve changes were inextricably linked with the price lock-in extension:

> As part of the Demand Curve Changes, the Filing Parties propose to extend the price lock-in period to seven years, in order to set the demand curve price cap at a lower level (1.6 times net CONE), while still inducing investment. ISO-NE states that a study by The Brattle Group regarding the effects of extending the price lock-in period shows that, in order to support sufficient entry to meet the 1-in-10 LOLE without extending the lock-in period, developers required a price cap of $23.00/kW-month (roughly 2.0 times net CONE) instead of $17.73/kW-month (1.6 times net CONE). ISO-NE also states that the five-year lock-in period coupled with the higher price cap of $23.00/kW-month would mean a steeper curve and, thus, greater price volatility.[27]

Specifically, ISO-NE and NEPOOL, as the filing parties, proposed to extend the price lock-in period to seven years in order to set the demand curve price at a lower level. The Commission found that:

> The price lock-in period is directly correlated with the sloped demand curve parameters. That is, in order for a sloped demand curve to achieve a 1-in-10 LOLE standard, a longer price lock-in period allows the price cap to be set at a lower level (i.e., 1.6 x net CONE). If ISO-NE were to maintain the current five-year lock-in, a higher price cap would be needed to achieve the same degree of reliability.[28]

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25 *ISO New England Inc. and New England Power Pool Participants Committee*, Motion To Intervene and Comments of the New England States Committee on Electricity, Docket No. ER14-1649-000 (Apr. 22, 2014), at 6-7.

26 2014 Demand Curve Changes Order at P 18.

27 *Id*. at P 42.

28 *Id*. at P 55.

The Commission further found that the lock-in period "seeks to achieve a reasonable balance between incenting new entry and protecting consumers from very high prices[.]"[29] The Commission determined that the changes constituted an "appropriate way to provide investor assurance, given that the sloped demand curve represents a significant change in the FCM design."[30] Additionally, the Commission rejected arguments that ISO-NE did not show that extending the lock-in period would bring long-term benefits that would offset disadvantages to "existing economic capacity resources," noting that the lock-in extension addresses issues "unique to the New England region, such as the real risk of lack of investment when new capacity is needed and a high reliance on merchant entry."[31] The Commission also rejected arguments that the extension is an inefficient mechanism to increase investor confidence in the FCA.[32]

Despite attempts to recast its arguments from the demand curve proceeding, the Complaint is a clear collateral attack on the 2014 Demand Curve Changes Order. It should be rejected outright as such.

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[29] *Id.* at P 56.

[30] *Id.*

[31] *Id*. at P 58.

[32] *Id*.

B. Complainants Have Not Met Their Burden of Demonstrating That the Current Rules Are Unjust and Unreasonable.

1. As the Commission Recently Held, the PJM Orders Upon Which Complainants Rely Are Not Applicable in the Context of ISO-NE's Different Market Rules.

The Complaint relies heavily on two orders in which the Commission rejected what the Complainants characterize as a similar rule in PJM.[33] This reliance is misplaced because the Commission disposed of this very argument in its 2014 Demand Curve Changes Order.

The Complainants recycle the same argument from – and the same precedent cited in – the 2013 NEPGA Complaint. In that proceeding, NEPGA argued that the ISO-NE approach to mitigating "price suppression" in the wake of a new entry pricing election by a new resource is akin to allowing this new resource to bid $0 into subsequent year auctions. NEPGA argued that because the Commission rejected a zero pricing rule in the PJM Orders, it must do so in ISO-NE as well.[34] The Commission rejected the argument, pointing out that "there are substantial differences between the PJM and ISO-NE tariffs that render their treatment of carry-forward capacity dissimilar. Most importantly, unlike ISO-NE, PJM uses a sloped demand curve in its forward capacity market, which eliminates the need for PJM to uneconomically pro-ration capacity."[35]

Complainants latch onto this statement, arguing that because ISO-NE has now adopted a sloped demand curve, the salient distinction between PJM and ISO-NE no longer exists.[36] The Complaint asserts that "[t]he Commission has already found, in analogous circumstances, that treating price-locked resources as price takers is unjust, unreasonable and unduly

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[33] *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 (2009), *on reh'g*, 128 FERC ¶ 61,157 (2009) (collectively, "PJM Orders"). *See* Complaint at 2, 7-8, citing to the PJM Orders.

[34] NEPGA Complaint at 24, 31.

[35] NEPGA Complaint Order at P 58.

[36] Complaint at 2.

discriminatory." [37] Complainants thus claim – once again – that the PJM Orders must apply and that the Commission must therefore find the zero pricing rule to be unjust, unreasonable and unduly discriminatory. This argument is entirely without merit.

The Complaint conspicuously fails to acknowledge that the Commission's more recent 2014 Demand Curve Changes Order – issued four months after the NEPGA Complaint Order – explicitly rejected reliance on the PJM Orders as applicable to ISO-NE's new entry pricing rule. Earlier this year, Exelon, as part of its opposition to ISO-NE's proposal to extend the lock-in period from five to seven years, made this same argument, urging the Commission to reject the proposed extension of the lock-in period as unjust and unreasonable in part because of the PJM Orders.[38] And, the Commission again explicitly rejected the argument that the PJM Orders compel rejection of the zero pricing rule for new capacity resources in ISO-NE. The Commission explained that the proposal to extend the lock-in period by two years:

> is distinguishable from the PJM proposal that the Commission rejected. In that case, the Commission found that the proposed extension went beyond the intent of the original price lock-in provision, which was aimed at addressing the issue of lumpy investment in a small zone. The Commission also rejected PJM's proposal because it found that "no party has made the case that extending the [lock-in] term to five or seven years strikes a superior balance to the existing provisions." Here, we find that the extension, as part of the package of Demand Curve Changes, is a reasonable means to address the New England region's current capacity shortage and investor perceptions regarding risk.[39]

The Commission also held that the lock-in extension "addresses specific issues unique to the New England region, such as the real risk of lack of investment when new capacity is needed and

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37 *Id.* at 15.

38 Exelon Limited Protest at 19. In its request for rehearing, Exelon cited to the Commission's failure to rely on the PJM Orders (Exelon Rehearing Request at 13-14), indicating that Exelon is well aware that the Commission disagrees that the PJM Orders require a finding that the ISO-NE rule is unlawful.

39 2014 Demand Curve Changes Order at P 57.

a high reliance on merchant entry," in addition to being "closely linked to the design of the sloped demand curve and the parameters chosen" for the FCM.[40]

In addition to the Commission's clear statement in the 2014 Demand Curve Changes Order, NESCOE presented evidence in Docket No. EL14-7-000 as to the differences between ISO-NE's new entry pricing rule and PJM's New Entry Pricing Adjustment ("NEPA") rule,[41] which demonstrate why PJM's NEPA rule would be inappropriate in New England. Significant differences between the PJM NEPA rule and ISO-NE's FCM include: (1) the PJM NEPA rule was designed to apply in very limited circumstances, *i.e.*, when a large new resource in a small zone would have a very large price impact on the zone by moving the clearing price from at least 1.125 times Net CONE (the price if less capacity clears than is required to satisfy the reliability requirement) to a low price of no greater than 0.4 times Net CONE; (2) the PJM NEPA rule allows the option for only two additional years of multi-year pricing; and (3) the PJM NEPA resource's capacity in the two subsequent years of the multi-year pricing period is first offered at the lower of the NEPA resource's original offer price or 0.9 times the applicable Net CONE in the original auction in which the NEPA resource cleared, and if this offer fails to clear the auction, it then is resubmitted at a price sufficiently low to clear the auction.[42] As Mr. Wilson testified, the PJM NEPA is highly restricted, extremely difficult to trigger and use, has only been used once, and is limited to a three-year period.[43] The one time the NEPA rule was used in PJM, the zonal clearing price in the subsequent year was less than 50% of the applicable Net CONE.[44]

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40 *Id*. at P 58.

41 *New England Power Generators Ass'n, Inc. v. ISO New England Inc.,* Testimony of James F. Wilson in Support of the Protest of the New England States Committee on Electricity, Docket No. EL14-7-000 (Nov. 27, 2013) ("Wilson Testimony"), at 32-35.

42 *Id.* at 33.

43 *Id.;* s*ee also id.* at 12.

44 *Id.* at 34.

The PJM rule does not stand for the broad proposition reflected in Complainants' proposed modification that existing resources should receive prices at the level required for new entry over the full seven-year election period. There is absolutely no evidence in the record that would suggest the PJM rule would be appropriate in New England, and Complainants' proposed remedy is without any support.

3. Complainants' Arguments That the Zero-Price Requirement Will Harm New England's Markets Are Unfounded.

The Complaint argues that "[t]he price suppression that results from the zero-price offer requirement undermines the intent and design of the FCM and, indeed, of the New Entry Pricing Rule itself[,]" by, among other things, "encouraging premature exit of existing resources."[45] Under the current FCM rules, new resources are offered in subsequent years as price takers (*i.e.*, at zero). This ensures that such resources do in fact clear and receive Capacity Supply Obligations. Such resources could also be offered at their net going-forward cost, which could be lower than, and have no impact on, the clearing prices. The resulting FCA clearing prices reflect the reality of supply and demand, post-entry, and if the new resource is relatively large compared to the demand in the zone, prices could be lower. However, price reduction as a result of the efficient operation of the market is not price suppression.

Complainants argue that this situation can lead to premature retirements but this argument is misguided. The entry of new and more efficient capacity, and the changes in the supply/demand dynamics that it causes, may well result in some existing resources clearing and some choosing to retire. But, such retirements would not in any sense be premature; they would be the natural product of the entry of more competitive alternatives.

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[45] Complaint at 12.

Complainants state that they do not seek elimination of the new entry pricing rule, only changes to the post-entry pricing provisions.[46] To the extent there is a rule that encourages entry by offering new entrants a price lock, the timing of any resulting retirements is appropriate, not premature. Moreover, despite the Complainants' claim about a nexus between the price lock and early retirement of generating units,[47] the expected participation of resources in FCA 9 evidences no such connection. Of the four generating resources that submitted a Non-Price Retirement Request ("NPRR") for FCA 9,[48] the only resource significant in size, Mt. Tom, had apparently not been operating regularly[49] and never took on a Capacity Supply Obligation in the eighth FCA.[50] While the Complaint speculates about the effect of the rule on retirement decisions, the tangible actions of generators in the very next auction, where the challenged rule will be in place, provides a true indicator of the market response. Almost 30,000 MW of Existing Generating Capacity Resources are set to participate in the auction,[51] and the only meaningfully-sized generating unit submitting an NPRR had already begun winding down operations.

Contrary to Complainants' arguments, the new entry pricing rule is needed "to ensure that the overall market design, including the use of a curve that incorporates a price cap and slope that are designed to mitigate market power, provides sufficient certainty to attract new

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46 *Id.* at 10.

47 *See* Complaint at Att. A, Direct Testimony of Michael M. Schnitzer, at 7-10.

48 *See* ISO-NE, Status of Non-Price Retirement Requests (update Nov. 21, 2014), available at http://www.iso-ne.com/static-assets/documents/2014/09/npr_tracking_external.pdf.

49 *See, e.g., Mt. Tom coal plant to close in fall*, Erin Ailworth, The Boston Globe, Jun. 3, 2014 (According to a spokesperson for Mt. Tom: "It's a difficult market for an old plant and a coal plant like Mt. Tom to compete in . . . It has been operating pretty sporadically.").

50 *See generally* ISO-NE, Forward Capacity Auction Results Filing, Docket No. ER14-1409-000 (Feb. 28, 2014), available at http://www.iso-ne.com/static-assets/documents/regulatory/ferc/filings/2014/feb/er14_1409_000_fca8_results_filing_2_28_2014.pdf.

51 *See* ISO New England Inc., Informational Filing for Qualification in the Forward Capacity Market, Docket No. ER15-328-000 (filed Nov. 4, 2014) at 4, available at http://www.iso-ne.com/static-assets/documents/2014/11/er15-___-000_11-3_14_fca_9_info_filing_public_version.pdf.

investment when needed."[52] Complainants ignore the very real benefits that the rule and the package of modifications to ISO-NE's FCM will provide, including providing a firm basis for confidence in the capacity markets in New England.

C. Complainants' Proposed Alternative Remedies Are Not Just and Reasonable.

Complainants urge the Commission, in the first instance, to require ISO-NE to adopt the approach used in PJM because it is the "simplest remedy" and because the Commission has already deemed it just and reasonable and not unduly discriminatory in the context of the PJM market and all of its parameters.[53] Specifically, the Complaint asks that ISO-NE's rules be modified so that a new resource choosing to lock in its price be required to offer capacity into each subsequent FCA during the lock-in period at "a price 'equal to the lesser of: A) the price in such seller's [offer] for the [FCA] in which such resource qualified [for the lock-in]; or B) 0.90 times the Net CONE applicable in the first [FCA] in which . . . [it] cleared . . . .'"[54]

This shadow price approach Complainants cherry-picked from PJM would be inappropriate in ISO-NE's market, especially considering the lack of eligibility restrictions comparable to those in PJM's market rules. The mere fact that the mitigation approaches approved by the Commission for the PJM and ISO-NE markets differ does not mean that ISO-NE's approach is unlawful.[55] Both approaches mitigate the potential for price suppression in the context of their differing capacity auction structures.

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[52] Demand Curve Changes Filing at 11.

[53] Complaint at 22-23.

[54] *Id.* at 23, citing PJM Tariff, Attachment DD, Section 5.14(c)(4).

[55] The Commission has consistently recognized and approved the differences in RTO market structures and rules. *See, e.g., Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 9 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 (2009), *order denying reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) ("Significant differences exist between regions, including differences in industry structure, mix of ownership, sources of electric generation, population densities, and weather patterns. . . . We recognize and respect these differences across various regions.").

As the Commission noted in the NEPGA Complaint Order, PJM's NEPA rule is very different from ISO-NE's new entry pricing rule, and is in place for a very different, and much more limited, purpose. PJM's NEPA rule is to address concerns about *extreme* post-entry price impacts due to large, "lumpy" investments in small zones. PJM's NEPA rule is very restricted in its use. In particular, for it to be triggered, a new resource must drop the price in a zone from above 112.5% of Net CONE to 40% of Net CONE or lower. This can only occur with a large resource in a small zone. In eleven RPM delivery years, the PJM NEPA had only been triggered once.[56] Once triggered, a NEPA resource is allowed the price lock for just two additional years, and the capacity is offered at the lower of its offer price in the first auction in which it participated, or 90% of Net CONE; however, if the resource does not clear at this price, the auction is cleared by re-offering the resource at whatever lower offer price is needed so that it does clear.

The appearance of similarity between NEPGA's proposal for new resource pricing in subsequent years and PJM's NEPA rule does not make it appropriate for the FCM. Moreover, PJM stakeholders never agreed to the current NEPA rule, and in particular the current post-entry pricing provisions; it was changed by the Commission in 2009.

Complainants' proposed alternatives would essentially economically withhold the new resource in order to impose a price floor for some period of time, which would provide an incentive for resources that are actually no longer needed to nevertheless defer retirement and continue to accept Capacity Supply Obligations. Clearing prices would be higher than can be justified by supply and demand (given the new entry), and the cleared quantity would also be excess, once the new resource's capacity is added back. The Complaint is silent as to whether

[56] Wilson Testimony at 33.

the full excess quantity would receive Capacity Supply Obligations, or whether some pro-rata approach would be applied. The Complainants' proposal would prop-up prices, distort the market, and very likely increase the cost to consumers.

Finally, Complainants' request that the Commission apply any remedy in this proceeding "prospectively for the balance of any lock-in periods from prior FCAs"[57] should be rejected out of hand. The argument that this would present no retroactive ratemaking concerns fails to acknowledge that resettling the market would upend the settled expectations of capacity purchasers and others with commitments to serve in the states' competitive retail markets.

D. Fast-Track Processing Should be Denied and, to the Extent the Commission Does Not Dismiss the Complaint Outright, the Commission Should Set the Complaint for Hearing and Settlement Procedures.

In the event the Commission does not dismiss the Complaint outright, the Commission should reject Complainants' request to direct changes to ISO-NE's new entry pricing rule in advance of FCA 9. The fast-track process the Complaint requests does not allow sufficient time for review and analysis of the rule change presented in this proceeding. As explained above, the new entry pricing rule – including the zero price offer feature that is central to the Complaint– does not operate on a stand-alone basis and cannot be viewed in isolation. Extending the lock-in period, which inextricably involved extending the zero price offer component for an additional two years, was integral to the parameters of the sloped demand curve proposed by ISO-NE and NEPOOL, supported by the states, and integral to the Commission's approval of ISO-NE's package of demand curve modifications.[58] If the Commission grants the Complaint and finds the zero price rule unjust and unreasonable, the entire package of reforms to the FCM will need to be

[57] Complaint at 22.

[58] 2014 Demand Curve Changes Order at P 58.

reevaluated to ensure that the market is functioning as intended and not creating unjust and unreasonable rates for New England consumers.

Additionally, the purported need for an order in less than 60 days is an artifice of Complainants' own making. Following the Commission's acceptance of the extension of the lock-in period, a number of entities, including Exelon, sought rehearing of this ruling on June 30, 2014.[59] Exelon and NEPGA subsequently presented, at the July 8, 2014 Markets Committee meeting, proposed market rule revisions to the zero price offer component of the new entry pricing rule.[60] This presentation followed an earlier presentation by Charles River Associates prepared for NextEra Energy that raised the same concerns related to the longer lock-in period during the original demand curve stakeholder discussions.[61]

At the July 8, 2014 meeting, the Markets Committee voted on and failed to adopt the following motion, with a vote of 48.5% in favor:

> RESOLVED, that the Markets Committee recommends that the Participants Committee support the revisions to Market Rule 1 to implement a shadow de-list bid mechanism for Existing Capacity Resources that accepted a multi-year capacity clearing price within the FCM as proposed by Exelon and as circulated for this meeting with those further changes recommended by this Committee and supported by Exelon and such further non-substantive changes as the Chair and Vice-Chair approve.[62]

Exelon's proposed changes were presented to the NEPOOL Participants Committee in August 2014. Neither Exelon nor any supporter of the proposal sought a vote by the Participants

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59 Exelon Rehearing Request, *supra* note 4; *see also* NEPGA Rehearing Request, supra note 5.

60 *See New Entry Pricing*, NEPOOL Markets Committee, July 8-10, 2014, Bruce Anderson, New England Power Generators Association, Inc., available at http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2014/jul89102014/a05_nepga_presentation_07_08_14.pptx.

61 *See Capacity Demand Curve in ISO-NE, CRA Presentation #2: Comments on the March 12 ISO Proposal and Related Topics*, NEPOOL Markets Committee, March 12, 2014, Charles River Associates, at Slide 12, available at http://www.iso-ne.com/committees/markets/markets-committee.

62 *See Actions of the Markets Committee*, July 8, 2014 Memorandum, available at http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrkts_comm/mrkts/actions/2014/mc_actions_14070810.doc.

Committee after discussion made clear that a vote would reflect the same lack of support that occurred at the Markets Committee.[63]

Complainants thus had knowledge in:

- March 2014, that at least one generator was displeased with ISO-NE's proposed reforms to the new entry price rule;
- May 2014, that the Commission approved the rule revisions;
- July 2014, that the Markets Committee did not support Exelon's proposed changes to the rule; and
- August 2014, that the proposal had concluded through the stakeholder process and ISO-NE would not adopt and propose the changes.

Yet, Complainants waited *four months* to file a complaint that now claims rises to an urgent need for the Commission to modify one element of an interrelated package before the end of January 2015 so that Complainants' desired market rule changes can be implemented before FCA 9. This strategy of creating an artificial need for urgent action should not be countenanced by the Commission. Such last minute "urgent" litigation on select elements of an overall approach to market rules undermines the state and stakeholder deliberative process. If tolerated, it will dissuade states and stakeholders from seeking to find balance in connection with elements of reform packages and instead encourage strategizing with an eye toward single-issue litigation.

In addition to the substantial and unexpected cost impact on consumers, sudden rule changes without stakeholder consensus can have a destabilizing effect on market rules and can create a view among market participants that capacity prices are "unpredictable and not to be relied on."[64] The granting of the Complainants' requested relief after such a brief process, and so quickly on the heels of the Commission's 2014 Demand Curve Changes Order, would create regulatory uncertainty that will affect the FCM as well as shake trust in the stakeholder process.

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[63] *Minutes of the August 1, 2014 Participants Committee Meeting*, at 3313, available at http://www.nepool.com/uploads/Minutes_NPC_2014_0801.pdf.

[64] Wilson Testimony at 42.

It would additionally set a precedent that stakeholders can cherry pick and eliminate unwanted provisions from complicated, intertwined agreements shortly after approval by stakeholders and the Commission. This type of process, if allowed, will undermine confidence in the wholesale markets and stakeholder process.

The Commission should reject the Complaint outright, including its request for fast-track processing. Alternatively, if the Commission does not dismiss the Complaint, it should set the matter for hearing and settlement procedures, using a Track II schedule.

VI. CONCLUSION

For the reasons stated herein, NESCOE respectfully requests that the Commission (i) grant its Motion to Intervene, (ii) deny the Complaint, (iii) to the extent the Commission does not reject the Complaint outright, set the Complaint for hearing using a Track II procedural schedule and establish settlement procedures, and (iv) take other necessary and appropriate actions consistent with the foregoing protest.

Respectfully submitted,

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Date: December 16, 2014

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 16th day of December, 2014.

Respectfully submitted,

/s/ Phyllis G. Kimmel

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