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March 30, 2010

**VIA ELECTRONIC FILING**

The Honorable Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Re: ISO New England Inc.; Docket No. ER10-787-000  
Motion for Leave to Answer and Answer of the New England Power Pool  
Participants Committee

Dear Secretary Bose:

Attached for filing in the above-captioned proceeding is the Motion for Leave to Answer and Answer of the New England Power Pool Participants Committee ("NEPOOL").

A copy of the foregoing has been served on all parties included on the official service list for this proceeding maintained by the Secretary. Please contact me if you have any questions or need any further information regarding this filing.

Respectfully submitted,

Michelle C. Gardner  
Counsel to the NEPOOL Participants Committee

cc: Official Service List

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England Inc.

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Docket No. ER10-787-000

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF  
THE NEW ENGLAND POWER POOL PARTICIPANTS COMMITTEE**  
(March 30, 2010)

Pursuant to Rules 212 and 213 of the Commission’s Rules of Practice and Procedure,<sup>1</sup> the New England Power Pool (“NEPOOL”) Participants Committee<sup>2</sup> hereby submits this Motion for Leave to Answer and Answer to several pleadings filed in this proceeding challenging aspects of the Market Rule revisions to the Forward Capacity Market (“FCM”) (the “Rule Changes”). Those Rule Changes were jointly filed on February 22, 2010 by ISO New England Inc. (“ISO-NE”) and NEPOOL (the “February 22 Filing”). Among the forty-one comments, protests, and interventions filed in this proceeding, NEPOOL focuses in this Answer solely on the pleadings of the Boston Gen Companies, the Electric Power Supply Association (“EPSA”), GDF Suez Energy Marketing NA, Inc. (“GDF Suez”), the New England Power Generators Association (“NEPGA”), NextEra Energy Resources, LLC (“NextEra”), and NRG and the PSEG Companies (“NRG and PSEG”).<sup>3</sup>

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<sup>1</sup> 18 C.F.R. §§ 385.212 and 385.213 (2010).

<sup>2</sup> Capitalized terms used but not defined in this Answer are intended to have the meanings given to such terms in the Second Restated New England Power Pool Agreement (the “Second Restated NEPOOL Agreement”), the Participants Agreement, the ISO New England Inc. Transmission, Markets and Services Tariff (the “ISO-NE Tariff”).

<sup>3</sup> For purposes of this filing, the Boston Gen Companies are Boston Generating, LLC (“Boston Gen”), Mystic I, LLC (“Mystic I”), Mystic Development, LLC (“Mystic Development”), and Fore River Development, LLC; the PSEG companies are PSEG Energy Resources & Trade LLC (“PSEG ER&T”) and PSEG Power Connecticut LLC; NRG is comprised of NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC.

NEPOOL files its Answer to urge the Commission to accept the Rule Changes, which are widely understood to improve the current Market Rules, and to permit the region to continue its work on further refinements to FCM. Most supporters and critics of the Rule Changes alike agree that they improve the design of the FCM. The current FCM has resulted in assurance of sufficient capacity resources, including new demand resources, to satisfy the region's capacity requirements for the next three Capacity Commitment Periods. The Rule Changes improve upon that just and reasonable and Commission-accepted market design.<sup>4</sup>

While there may well be additional refinements or improvements to the FCM Market Rules that could also be found just and reasonable, the ISO-NE, state regulators, and NEPOOL all support the Rule Changes at this time. The February 22 Filing fully demonstrates that the Rule Changes satisfy the requirements of the Federal Power Act and, accordingly, should be accepted by the Commission. Moreover, the region is committed to continue working to identify additional acceptable refinements, which commitment includes reviewing the initial analysis recently submitted in this proceeding by the External Market Monitor on certain Rule Changes, an analysis that was not available to stakeholders during its votes on those Rule Changes in February. In addition, some of the pleadings filed in this proceeding, particularly those filed by generating resource owners, include substantial additional information by other experts in this industry that may also contribute to successful resolution of these matters.

Under these circumstances, the Commission should: (1) permit the Rule Changes to become effective when and as requested; (2) provide any guidance it concludes may be appropriate for consideration in future regional deliberations, so long as the Commission is not

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<sup>4</sup> See *Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g*, 117 FERC ¶ 61,133 (2006); *ISO New England Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007).

directing a particular substantive outcome at this time; and, (3) permit the ISO-NE, state regulators, and all affected regional stakeholders the opportunity to continue working through further refinements and improvements in the FCM design for the region.

## **I. MOTION FOR LEAVE TO ANSWER**

While several of the Pleadings are self-described as a “protests,” they contain statements that seek affirmative changes to the FCM Rules, to which NEPOOL is entitled to respond.<sup>5</sup> To the extent the Commission considers any of the Pleadings to be protests, however, answers are not permitted except for good cause shown.<sup>6</sup> Under these circumstances, NEPOOL moves for leave to answer the Pleadings to the extent necessary for the Commission to consider its Answer. Pursuant to Rule 213(a)(2) of the Commission’s Rules, the Commission may accept the filing of an answer to a protest for good cause shown when it leads to a more accurate and complete record, helps the Commission understand the issues, clarifies matters in dispute or errors, responds to new issues raised, or provides information that will assist the Commission in its decision-making process.<sup>7</sup> NEPOOL respectfully submits that its Answer in response to the

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<sup>5</sup> See, e.g., *Iroquois Gas Transmission Sys., L.P.*, 61 FERC ¶ 61,341 at 62,341 n.9 (1992) (party is entitled to respond to affirmative request in a pleading regardless of how that pleading is captioned); *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 53 FERC ¶ 61,026, 61,101 (1990) (answer accepted to the extent it responded to a party’s requests for affirmative relief).

<sup>6</sup> See, e.g., Rule 213(a)(2), 18 C.F.R. § 385.213(a) (2010) (“An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, *unless otherwise ordered by the decisional authority*”). (Emphasis added.)

<sup>7</sup> The Commission permits replies that would otherwise be prohibited where the reply would assure a complete record in the proceeding; See, e.g., *Las Vegas Cogeneration Limited Partnership*, 117 FERC ¶ 61,309 at P 20 (2006); *S. Natural Gas Co.*, 121 FERC ¶ 61,118, at P 5 (2007); or assists the Commission in its decision-making process; see *Virginia Electric and Power Company*, 124 FERC ¶ 61,207 at P 22 (2008); *Pepco Holdings, Inc.* 125 FERC ¶ 61,130 at P 24 (2008); *Potomac-Appalachian Transmission Highline, LLC*, 122 FERC ¶ 61,188 at P 23 (2008); *Southern California Edison Co.*, 122 FERC ¶ 61,187 at P 19 (2008); *New York Independent System Operator, Inc.*, 121 FERC ¶ 61,112 at P 4 (2007); *PJM Interconnection, L.L.C.*, 116 FERC ¶ 61,179 at P 19 (2006); provide information helpful to the disposition of an issue; see *CNG Transmission Corp.*, 89 FERC ¶ 61,100 at 61,287 n.11 (1999); or permit the issues to be narrowed or clarified; *PJM Interconnection LLC*, 84 FERC ¶ 61,224 at 62,078

Pleadings will assure a more complete record and will otherwise assist the Commission in reviewing the issues sought to be raised in this proceeding. Accordingly, NEPOOL submits that good cause exists for the Commission to grant this motion for leave to file this Answer.

## **II. BACKGROUND**

The Rule Changes improve the design of several elements of the FCM, and provide additional detail and refinement to a number of related areas. The Rule Changes expand the circumstances under which the Alternative Price Rule (“APR”) is applied for purposes of setting prices in the Forward Capacity Auction (“FCA”). As described further below, the revised APR now reflects two distinct circumstances that were not incorporated in the original rule under which prices will be administratively adjusted, either because the auction clearing prices do not fairly reflect the cost of new capacity due to out-of-market (“OOM”) capacity from previous FCAs or because resources that seek to exit the market by de-listing are not permitted to do so for reliability reasons. The Rule Changes also: (1) expand the circumstances where the Internal Market Monitor must specifically review offers from new resources that are below 0.75 times CONE; (2) extend the capacity floor price for an additional three auctions; (3) provide additional compensation for resources that have been denied for reliability reasons a request to prorate their resources; (4) decouple the FCA starting price from the calculated Cost of New Entry (“CONE”); (5) provide for CONE to be adjusted going forward; (6) clarify language regarding ISO-NE requests for energy from resources not subject to a Capacity Supply Obligation; (7) revise the zonal requirements for local resources; and (8) revise the modeling of Capacity Zones. The Rule Changes are described and explained fully in the February 22 Filing.

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(1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335 at 61,323 n.1 (1998).

As described previously, the Rule Changes are the product of a very extensive stakeholder process that culminated in NEPOOL Participants Committee Votes of approximately 70% in favor. That process began in response to stakeholder concerns that the FCM design required further development<sup>8</sup> and in response to the initial report submitted by the Internal Market Monitor in June of 2009 (the “INTMMU Report”).<sup>9</sup> The INTMMU Report, which was required under Market Rule 1, made the following recommendations:

- the APR triggering conditions should be modified to account for multi-year effects of OOM resources;<sup>10</sup>
- the auction starting price should be decoupled from the CONE and set at a level high enough to ensure that both generation and demand will enter and create a competitive auction;<sup>11</sup>
- Permanent De-List Bids should be allowed to affect the creation and pricing of zones in the FCA to improve zonal price formation;<sup>12</sup> and
- not all types of bids in the FCM should be allowed to be an input into the modeling of Capacity Zones.<sup>13</sup>

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<sup>8</sup> NEPOOL and ISO-NE jointly submitted on December 1, 2008 a filing entitled Various Revisions to FCM Rules Related to Bilateral Contracts and Reconfiguration Auctions in Docket No. ER09-356-000 (“FCM Phase II Filing”). In that filing, ISO-NE and NEPOOL identified certain issues raised by stakeholders with the FCM design that required further development. In response to these additional concerns related to FCM, ISO-NE and NEPOOL proposed a stakeholder process, beginning in the first quarter of 2009, that culminated in the February 22 Filing. *See ISO New England Inc. and New England Power Pool Participants*, 126 FERC ¶ 61,115 (2009) (accepting the tariff changes in the FCM Phase II Filing).

<sup>9</sup> Internal Market Monitoring Unit Review of the Forward Capacity Market Auction Results and Design Elements, ISO New England Inc. Market Monitoring Unit (June 5, 2009), available at <http://www.iso-ne.com/regulatory/ferc/filings/2009/jun/index.html>.

<sup>10</sup> *See id.* at 6.

<sup>11</sup> *See id.* at 53.

As detailed in the February 22 Filing, the Forward Capacity Market Working Group (“FCM Working Group”), which was open to all interested stakeholders, assumed the task of examining all unresolved FCM issues and determining which issues could be resolved in time for a February 2010 filing. The FCM Working Group collected the issues identified in the FCM Phase II Filing, other issues of concern to Participants, rule changes required by the ISO-NE Tariff, and the conclusions reached by the Internal Market Monitor. With the appreciated assistance of Ms. Cynthia Marlette, former General Counsel of the Commission, the Working Group decided collectively what could be done in the near term and other issues were to be addressed subsequently.

Over the course of many meetings that included broad stakeholder participation with representation by more than 45 companies and all six New England state regulatory agencies,<sup>14</sup> the FCM Working Group explored the current APR and the impact of OOM capacity on the FCA. It also discussed Capacity Zones and the calculation of zonal requirements, Transmission Security Analysis, reliability reviews, the impacts of de-list bids of all types, CONE, participation of Demand Resources in the FCM, and comparability issues between resource types. With the benefit of thorough discussion among all interested constituents, the Working Group produced a design basis document that formed the basis for development of Market Rule changes.

The design basis document resulting from the efforts of the FCM Working Group was supported by state regulators from all six New England states and was presented to NEPOOL

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<sup>12</sup> *See id.* at 5.

<sup>13</sup> *See id.* at 42.

<sup>14</sup> Details of the FCM Working Group meetings are available at: [http://nepool.com/committees/comm\\_wkgrps/othr/fcmwg/mtrls/index.html](http://nepool.com/committees/comm_wkgrps/othr/fcmwg/mtrls/index.html).

and supported by a 69.09% Vote of the NEPOOL Participants Committee, with opposition principally from those with existing supply-side capacity resources in the region. ISO-NE had reservations with how the state regulators and certain Market Participants proposed to address a limited number of specific issues, which were largely ancillary to the main agreements reached by the region, and did not support the design basis document. Continuing with efforts to resolve their differences at the business table rather than through litigation, the region continued to work to address concerns with the design basis document and, in the end, settled on a single set of modifications – the instant Rule Changes.

At its February 5, 2010 meeting the NEPOOL Participants Committee considered the Rule Changes. After debating, voting and not approving numerous proposed amendments, the Participants Committee voted in support of the Rule Changes in two separate votes. Specifically, the Rule Changes in Section 13 were supported by a 70.1% Vote after the failure of six proposed amendments. The Rule Changes in Section 12 achieved a 71.69% Vote after the failure of two proposed amendments. A full report of the actions taken by this Committee was submitted by NEPOOL in this proceeding on March 1, 2010.

As with the vote on the design basis document, Participants that currently own and operate supply-side resources voted overwhelmingly in opposition to the Rule Changes while at the same time acknowledging that they were improvements to the current rules. Notably, some of the changes they sought were included in the Rule Changes before they were presented to the Participants Committee for vote, including the extension of the price floor and the proposal to increase compensation for resources denied the ability to prorate their MWs for reliability reasons. Those changes were not enough for these market participants to support the Rule Changes and they proposed other desired amendments. None of their additional proposed

amendments at that time achieved the level of support necessary for incorporation into the Rule Changes. Those amendments were opposed by the ISO-NE and state regulators, and did not receive sufficient support by NEPOOL to be included among the NEPOOL-supported rule changes. Ultimately, those who supported the Rule Changes were members representing transmission owners, load serving entities, publicly-owned entities, alternative resources, end users, and suppliers whose current position has them relying on the wholesale power market to satisfy their contractual supply obligations. In addition, the regulators from all six New England states supported the Rule Changes. There was opposition from the entire Generation Sector and within the Supplier Sector.

In response to the February 22 Filing, in their pleadings some NEPOOL members that own generating assets in New England challenge not only the Rule Changes but, in some cases, the existing FCM rules. NEPGA protested several aspects of the Rule Changes, particularly focused on the effects of OOM supply on capacity prices and the modeling of capacity zones. NEPGA proposed a different APR mechanism than the one included in the Rule Changes and requested that the Commission order such mechanism to be in place prior to the next FCA. The APR mechanism NEPGA advances borrows heavily from the mitigation measures in place in PJM and NYISO. NEPGA also filed a complaint against ISO-NE pursuant to Section 206 of the Federal Power Act on March 23, 2010 that essentially repeats all the arguments in its pleading in this proceeding (the “NEPGA Complaint”).<sup>15</sup>

In addition to the pleadings filed by NEPGA, several other generators also filed challenges to the Rule Changes and the existing FCM rules. The Boston Gen Companies

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<sup>15</sup> *Complaint Requesting Fast Track Processing By New England Power Generators Association*, filed in Docket No. EL10-50-000 (March 23, 2010).

challenge the fact that the Rule Changes do not take into account the multi-year effects of OOM capacity that has already been entered into the first three FCAs and raise questions about the Internal Market Monitor's treatment of the costs associated with Demand Resources that are used in determining whether such resources are OOM. The Boston Gen Companies also request further clarification from the Commission relating to the Rule Changes regarding compensation for resources not allowed to prorate. GDF Suez requests that the Commission order modifications to one aspect of the Rule Changes dealing with the calculation of the Maximum Capacity Limit so that the calculation is unchanged from how it is currently calculated. GDF Suez also appears to challenge the existing FCM rules regarding the ability of resources to self-supply, even though nothing about the Rule Changes impacts those provisions. NextEra requests further changes to the Rule Changes addressing ISO-NE requests for energy from resources without a Capacity Supply Obligation. PSEG and NRG file additional challenges to the Rule Changes, primarily complaining that the resulting Market Rules do not adequately provide for locationally differentiated capacity prices. In addition to the preceding pleadings, there were other comments filed, many of which either echo some of the comments described above or state support for the Rule Changes.

### **III. ANSWER**

#### **A. The Rule Changes as filed should be Accepted by the Commission as Just and Reasonable Improvements to the FCM**

The Rule Changes represent improvements to the current just and reasonable FCM design. Importantly, those improvements reflect careful consideration and detailed discussions among the many and varied interest in New England. For the benefit of suppliers, the Rule Changes, among other things, continue a capacity floor price that was to expire with the fourth

FCA this August. The Rule Changes also increase materially the circumstances where capacity prices are administratively buoyed by the APR rule because of any price-depressive effects of OOM resources and continued operation for reliability reasons of resources seeking to de-list. The Rule Changes also ensure that MWs that are not able to prorate for reliability reasons are paid at the same prices as other MWs, notwithstanding the Commission's recent conclusion that such a change is not necessary for the current Market Rules to be just and reasonable.<sup>16</sup> The Rule Changes address these and other concerns that had been raised previously by Market Participants and as part of the INTMMU Report.

While the Rule Change provide these improvements for the benefit of supply resources, they unquestionably do not address all concerns that have been raised with the FCM design. Nor do the Rule Changes reflect every request by either the providers or purchasers of capacity. Thus, not surprisingly, some Participants that want still more changes to the current Market Rules did not support the Rule Changes and have sought here to challenge aspects of the Rule Changes they would like to see modified. Some also challenge unchanged aspects of the existing FCM rules that they do not like.

Gratifyingly, many of the arguments and proposals those Participants have presented in their pleadings were already presented to and considered fully by the region. Their proposed alternatives or alterations were not supported at that time based on the information presented then.

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<sup>16</sup> See *ISO New England Inc.*, 130 FERC ¶ 61,235 at PP 40-41 (2010).

1. This is not the proceeding to weigh the Rule Changes against alternative or additional changes.

NEPOOL Participants appreciate that the FCM is a complex market that will continue to evolve as circumstances change, particularly as the region gains more experience with the start of its first Capacity Commitment Period. Even though the FCM Market Rules already have been found to be just and reasonable and have been in effect for three FCAs, the Rule Changes refine those Rules further to address some but not all of the design issues that have been concerning to Participants in the region, as well as by the Internal Market Monitor. Those changes have now been specifically reviewed and commented on by the External Market Monitor in this proceeding. The Rule Changes address concerns that the current APR mechanism was insufficient and needed to be expanded to take into account the effects of OOM capacity cleared in prior auctions as well as capacity associated with de-list bids rejected for reliability reasons. The Rule Changes also address concerns that the current FCM rules do not take into account transmission security criteria when reviewing de-list bids for the FCA and do not properly model Capacity Zones to allow for more locational pricing. In addition, the Rule Changes address concerns that CONE has grown stale and may no longer reflect the cost of new resources entering the capacity market.

The Rule Changes are clearly a work-in-progress and the region will continue with new information and additional time to further refine the market, but those Changes unquestionably improve and refine the existing FCM design in the direction sought by suppliers and should be approved now by the Commission. Those who oppose the Rule Changes have proposed further refinements in New England that, in some cases, the Commission has already found in other

capacity markets to be just and reasonable,<sup>17</sup> but that is not the legal standard the Commission must apply in considering the Rule Changes. This is *not* a jump ball filing where NEPOOL supports one set of rule changes and the ISO-NE supports another, thereby freeing the Commission to choose between two equally just and reasonable options.<sup>18</sup> Instead, the Commission's inquiry is limited here to whether what has been filed is just and reasonable.<sup>19</sup>

Further, this proceeding is *not* a complaint proceeding under Section 206 of the Federal Power Act. ISO-NE and NEPOOL have filed Rule Changes that improve on the current just and reasonable FCM design. The Commission has already considered many challenges to that design and has concluded on multiple occasions that it is just and reasonable.<sup>20</sup> This proceeding is not an appropriate proceeding to attack current FCM rules.<sup>21</sup> Indeed, NEPGA recognizes that at least some of its concerns are beyond the scope of this Section 205 proceeding and has, accordingly, filed a complaint in FERC Docket No. EL10-50-000 to pursue in a legally proper

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<sup>17</sup> See *PJM Interconnection L.L.C.*, 117 FERC ¶ 61,331 (2006) (approving, with certain conditions, the RPM settlement that included the "Minimum Offer Price Rule"); see also *PJM Interconnection L.L.C.*, 122 FERC ¶ 61,264 at P 11 (2008); *New York Ind. Sys. Operator*, 122 FERC ¶ 61,211 at PP 109-12 (2008) (accepting the "In-City ICAP Offer Floor Rule").

<sup>18</sup> See § 11.1.5 of the Participants Agreement; *ISO New England Inc. and New England Power Pool Participants*, 130 FERC ¶ 61,105 at P 51 (2010) (accepting the ISO-NE's proposed values for the Installed Capacity Requirement and related values and tariff revisions relating to the calculation of tie benefits).

<sup>19</sup> *Cities of Bethany, Bushnell et al. v. FERC*, 727 F. 2d 1131, 1136 (D.C. Cir.), cert. denied, 469 U.S. 917 (1984) ("*Cities of Bethany*"); see also *ISO New England Inc.*, 114 FERC ¶ 61,315 at P 33 and n.35 (2005), citing *Pub. Serv. Co. of New Mexico v. FERC*, 832 F. 2d 1201, 1211 (10th Cir. 1987) and *Cities of Bethany* at 1136.

<sup>20</sup> See *Devon Power LLC*, 115 FERC ¶ 61,340, at P 63 and 64, order on reh'g, 117 FERC ¶ 61,133 (2006); *ISO New England, Inc.*, 119 FERC ¶ 61,045 at P 214 (2007); *ISO New England Inc. and New England Power Pool Participants Committee*, 126 FERC ¶ 61,115 (2009); and *ISO New England Inc. and New England Power Pool Participants Committee*, 128 FERC ¶ 61,023 (2009).

<sup>21</sup> See *ISO New England Inc.*, 112 FERC ¶ 61,060 at PP 13-14 (2006) (indicating that a Section 205 proceeding is not the appropriate proceeding to challenge unchanged aspects of the filed rate); *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 61,292 at P 63 (2006); *Louisiana*

way its challenges to current provisions of the FCM rules. NEPOOL will respond to that complaint in that proceeding. Neither NEPGA's submission of its Complaint in this proceeding nor the other pleadings challenging current provisions of the FCM rules transform this proceeding into a complaint proceeding. Nor do they alter in any way the only issue before the Commission here in *this* proceeding, which is whether the Rule Changes as filed are just and reasonable.

2. The Rule Changes include just and reasonable improvements to APR and related mechanisms to address OOM

The Rule Changes revise the existing APR mechanism to account for OOM capacity and capacity associated with resources that are needed for reliability and are unable to exit the market in a manner that is just and reasonable. Specifically, the Rule Changes make two adjustments to the current rule, which is identified in the Rule Changes as "APR-1," and provide for two additional pricing mechanisms, identified as "APR-2" and "APR-3." In APR-1, the Rule Changes provide that Permanent De-List Bids and Non-Price Retirement Requests that are rejected for reliability reasons will be included in the calculation of OOM capacity for the purposes of determining whether the APR will be triggered. APR-2 provides an alternative price mechanism where new capacity would have been required but for the OOM capacity cleared in previous FCAs affecting the current FCA. For purposes of the next FCA in August, the Rule Changes provide that the OOM capacity from the past three auctions shall be considered zero and place a cap on the number of years that OOM capacity can impact future auctions. APR-3 provides an alternative price mechanism in those circumstances where the rejection of de-list bids for reliability reasons affects the current FCA.

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*Power & Light Company*, 50 FERC ¶ 61,040, at 61,062-63 (1990); *Entergy Services, Inc.*, 52 FERC ¶

NEPGA generally argues that these changes do not go far enough and that the impact of previously committed OOM capacity on the market has depressed and will continue to depress capacity prices below competitive levels contrary to the public interest and its members.<sup>22</sup> Several Participants that own generating assets echoed these concerns.<sup>23</sup> The Boston Gen Companies also challenge the fact that the OOM capacity from the past three auctions shall be considered zero, arguing that such capacity resulted from past exercises of monopsony power and market manipulation and that it will take the region until at least 2023 to absorb it.<sup>24</sup> NEPGA proposes as an alternative a proposal that would essentially require the Internal Market Monitor to input a competitive offer bid for each determined OOM resource into the FCA and allow all OOM resources to clear in the auction and receive the auction clearing price.<sup>25</sup>

While NEPGA's suggestion might well be found just and reasonable, it had not been directly raised within the NEPOOL stakeholder process and as such, it is not supported by NEPOOL, who instead supported Rule Changes that address the concerns raised by the Internal Market Monitor in its Report, which related to the impacts that large quantities of OOM capacity in one year could have on auction prices for following years. While not required to be just and reasonable, the Rule Changes also account for de-list bids that are rejected for reliability reasons in response to an issue that many Participants with generating units have been asking the ISO-

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61,317, at 62,270 (1990); *Yankee Atomic Electric Company*, 60 FERC ¶ 61,316, at 62,096-97 (1992).

<sup>22</sup> See NEPGA at 4.

<sup>23</sup> See Boston Gen Companies at 13; GDF Suez at 5; and NRG and PSEG at 27.

<sup>24</sup> See Boston Gen Companies at 12-13.

<sup>25</sup> See NEPGA at 40-41.

NE to consider since the initial set of FCM rules was filed with the Commission.<sup>26</sup> The Rule Changes place an initial restriction on the amount of OOM capacity from the first three FCAs, as well as a cap on the number of years, i.e., six years such that it will apply in no more than seven FCAs, in order to ensure that the APR mechanism going forward is triggered when appropriate. These Rule Changes should be considered in light of the uncontested conclusion by the Internal Market Monitor in the INTMMU Report that, for the first two auctions, it was an excess of supply and not the amounts associated with OOM capacity, that resulted in the auctions clearing at the price floor.<sup>27</sup>

While those opposing the Rule Changes may see these modifications as improvements to the status quo, they suggest wrongly that no consideration was given to the very substantial amount of OOM that cleared in the first two auctions. While there was and is no agreement among Participants that the first two auctions resulted in excessive OOM, and many members advocated strenuously to allow capacity clearing prices during this time of surplus capacity to drop to market levels approaching zero, the Rule Changes instead include an extension to the capacity floor price of 0.6 times CONE for three additional FCAs. One key rationale expressed for this extension was to address the OOM capacity that cleared in the first three FCAs. Such OOM capacity, as mentioned previously, will not be included in the revised APR mechanisms. As stated in the February 22 Filing, an extension of the price floor is a reasonable compromise that balances an appropriate desire to address the effects of what those opposing the Rule Changes claim is OOM, while recognizing that the past auctions reflect the proper application of

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<sup>26</sup> See., e.g., *ISO New England, Inc.*, 119 FERC ¶ 61,045 at PP 99-143 (2007); *ISO New England Inc. and New England Power Pool Participants Committee*, 126 FERC ¶ 61,115 at P 47 (2009); *ISO New England Inc.*, 130 FERC ¶ 61,145 at P 30 (2010).

the FCM rules in effect at that time.<sup>28</sup> The extension of the FCM floor prices was also supported by Participants on the basis that it would prevent undue disruption of the market, to protect the emerging demand response industry, and to reduce the likelihood of reliance on Reliability Agreements for resources whose de-list bids are rejected for reliability reasons.

3. The Rule Changes include just and reasonable means to address other concerns with FCM rules.

The Rule Changes also address a particular concern for generating resource owners regarding compensation for resources denied the ability to prorate their megawatts due to reliability reasons. The Rule Changes provide that, in these circumstances, resources shall be allowed to receive compensation based on the Capacity Clearing Price, with such additional costs allocated to Network Load in the affected Reliability Region. This change was *not* required to make the current FCM Rules just and reasonable, and indeed the Commission determined only five days ago that the current means of addressing prorated capacity is just and reasonable.<sup>29</sup> Nonetheless, the Rule Changes eliminate contentions raised in other Commission proceedings by some of those Participants with generating assets (who continue to challenge the Rule Changes) that they are treated unfairly and in an inconsistent manner with the resources that are denied the ability to de-list their megawatts for reliability reasons in the FCA.<sup>30</sup>

Similarly, the Rule Changes also address concerns raised by the Internal Market Monitor in its Report that the starting price for the FCA should be divorced from the other uses of CONE.

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<sup>27</sup> INTMMU Report at 2 (“Both auctions would have cleared at the floor price with excess capacity without any participation by OOM capacity.”).

<sup>28</sup> See February 22 Filing at 21.

<sup>29</sup> See *ISO New England Inc.*, 130 FERC ¶ 61,235 at P 40 (2010).

<sup>30</sup> See, e.g., *ISO New England Inc.*, 130 FERC ¶ 61,145 at P 30 (2010); *ISO New England Inc. and New England Power Pool*, 125 FERC ¶ 61,102 at PP 22-30 (2008).

While the Commission has already concluded that starting the FCA based on CONE is just and reasonable, the Rule Changes provide that, starting with the seventh FCA (Capacity Commitment Period beginning on June 1, 2016), the starting price shall be a fixed amount of \$15/kW-month, which will be adjusted annually. As mentioned previously, until that FCA, the Rule Changes provide for the price floor of 0.6 times CONE. The February 22 Filing also explained that given the current excess supply of capacity in New England and the continued participation of new resources at the current auction starting price of 2.0 times CONE, the ISO-NE believes that implementation after the sixth FCA would not affect the auction results for the next three auctions. The Rule Changes also provide for additional CONE adjustments in order to prevent CONE from becoming stale.

In addition to the above, and in further response to concerns raised in part by those who seek additional or alternative changes in this proceeding, the Rule Changes include several modifications to improve and harmonize resource adequacy and transmission security requirements. The Rule Changes now provide that both of these requirements are to be developed for each import-constrained zone, which changes appear to be generally acceptable to those generating resource owners that continue to seek more. NEPGA and other generating resources, specifically PSEG and NRG, want to force on ISO-NE and the region changes that require that all zones be modeled in all cases and that all delist bids be used in determining whether to create additional zones.<sup>31</sup> They also raise concerns with the FCM Pivotal Supplier test included in the Rule Changes that will be used to determine whether a resource making a delist bid has market power, stating that since all delist bids should be considered in determining

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<sup>31</sup> See NEPGA at 10, 11; NRG and PSEG at 11,26; and EPSA at 4, 19-22.

zones, the Pivotal Supplier test is irrelevant, but to the extent it is retained, it should be changed as it improperly omits consideration of all newly qualified resources in an auction.<sup>32</sup>

While the suggestions offered by NEPGA, PSEG and NRG may or may not be found just and reasonable, they had been raised and rejected within the NEPOOL stakeholder process and are not supported at this time by the ISO-NE, state regulators, and NEPOOL. The Rule Changes provide important improvements to the FCM design in order to enhance the opportunities for price separation for import-constrained zones that have insufficient capacity. Under the Rule Changes, the ISO-NE will determine the Local Sourcing Requirement as the amount of capacity needed to satisfy “the higher of” either the Local Resource Adequacy Requirement or the Transmission Security Analysis. The Rule Changes also depart from the original, just and reasonable FCM design to expand the types of delist bids that can affect the creation and pricing of zones in the FCM. Specifically, the Rule Changes allow Non-Price Retirement Requests, Permanent De-List Bids, Static De-List Bids from non-FCM Pivotal Suppliers, Export Bids from non-FCM Pivotal Suppliers, and Administrative Export De-List Bids from non-FCM Pivotal Suppliers to be used in the modeling of an import-constrained capacity zone. These changes are fully responsive to and, in some cases, actually go even further than the recommendations by the Internal Market Monitor, who had recommended that only Permanent De-List Bids be allowed to affect such creation and pricing.<sup>33</sup>

While the current FCM rules in this regard are just and reasonable and the Rule Changes improve on those rules, NEPOOL acknowledges that further changes may also be worthy of consideration. For example, the External Market Monitor stated that these Rule Changes

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<sup>32</sup> See NEPGA at 11.

<sup>33</sup> See INTMMU Report at 5.

improve the consistency of market and reliability requirements and should be accepted at this time, but recommends further review in order to ensure that market requirements reflect reliability requirements to the maximum extent feasible. The External Market Monitor noted some instances where a Capacity Zone may not form even when there is a local need, although he did not go as far as some pleadings in this proceeding and recommend outright that the region must model all zones at all times.

Like the External Market Monitor, NEPOOL urges the Commission to accept these Rule Changes in this proceeding as a just and reasonable improvement on the original FCM design, while still allowing the region to continue to work through these important issues in light of the new and additional observations and inputs in this proceeding. As explained in Section A.1 above, the issue before the Commission in this proceeding is whether the Rule Changes as filed are just and reasonable. The issue is not whether further suggested changes would also fall within the zone of reasonableness. The February 22 Filing demonstrates that the Rule Changes are just and reasonable and should be approved as filed.

**B. Future Improvements to the FCM Should be Vetted Through the NEPOOL Stakeholder Process**

The Rule Changes represent the culmination of extensive work by the ISO-NE and New England regulators and stakeholders. Further changes may well be identified as the region considers new facts and arguments raised in this proceeding and collectively gains more experience with the operation of this market, particularly as it enters the first Capacity Commitment Period on June 1, 2010. Any Participant has the right and the ability to offer up additional Market Rule changes at any time in order to address such emerging and identified

issues. Such identified changes, like the Rule Changes, are best worked through the stakeholder process.

Neither NEPOOL nor the ISO-NE stated anywhere in the February 22 Filing that additional FCM design changes are unlikely or that the design cannot be changed. The FCM design has continued to evolve since the first set of implementing Market Rules was filed in 2007, and there is no basis to suggest or conclude that the region will stop working to improve upon that design. To the contrary, the ISO-NE has committed to retain an economic consultant to assist it and stakeholders in considering how to improve the FCM and, among other issues, consider further refining the definition of OOM resources, when the APR should be triggered, and how the price should be set under the APR. Further, ISO-NE stated its intent within 18 months of the February 22 Filing to making a filing with the Commission, either proposing rules that have developed as a result of this process or reporting on the status.

While those who now oppose the Rule Changes are pleased to accept advancements they gained through the stakeholder process, they now seek further changes and object to the ISO-NE's proposed process for achieving such changes. Several parties, including the Boston Gen Companies, EPSA, NEGPA, NextEra, and others in this proceeding, suggest that another round of stakeholder deliberations would be duplicative and futile.<sup>34</sup> This opinion effectively implies that the new information provided by them, the External Market Monitor, and others in this proceeding since the conclusion of the stakeholder process on February 5, 2010 will be irrelevant or unpersuasive to any supporters of the Rule Changes. It further implies incorrectly that the agreement to focus initially on those changes that could be implemented in time for a February 2010 filing (a date which generators had in fact negotiated with ISO-NE in Docket No. ER09-

356-000), was to the exclusion of efforts to continue to address additional concerns following the February filing.

Generating resource owners also suggest that stakeholders should not be given the chance to further consider these matters because, in this instance, they have little reason to believe or hope that additional stakeholder deliberations of the same issues would reach any different result.<sup>35</sup> This precise argument has already been made and rejected by the Commission in another context and should be similarly rejected here.<sup>36</sup>

Notwithstanding the improvements to the FCM rules achieved, generating resource owners also state that the “one-sided solution” before the Commission should enjoy very little deference.<sup>37</sup> The fact that certain Participants did not achieve all they wished hardly makes the Rule Changes one-sided, and the deference NEPOOL seeks is only deference to the rule of law, which is that the Commission must approve the Rule Changes if it concludes that they are just and reasonable. It is entirely appropriate for the Commission to consider the balance achieved in the deliberate and detailed stakeholder process as one important factor in concluding, as it should, that the Rule Changes are, in fact, just and reasonable.

Several Participants, including NEPGA members, also argue that the ISO-NE’s 18-month proposed process is unreasonably long.<sup>38</sup> NextEra objects to the language in the Rule Changes regarding ISO-NE requests for energy from resources without a capacity supply obligation and

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<sup>34</sup> See Boston Gen Companies at 10; EPSA at 3; NEPGA at 36; NextEra at 3; and Dynegy at 15.

<sup>35</sup> See Boston Gen Companies at 11; EPSA at 11; NEPGA at 38; and NextEra at 6.

<sup>36</sup> See *Braintree Elec. Light. Dept., et al. v. ISO New England Inc.*, 128 FERC ¶ (61,008) at P 55 (2009).

<sup>37</sup> See NextEra at 3; NRG and PSEG at 32; EPSA at 8; and GDF Suez at 5.

<sup>38</sup> See NEPGA at 36-37.

uses that particular example to illustrate why the ISO-NE has failed to justify their proposal to hold an additional 18-month stakeholder process. NEPOOL objects to any assertions that imply, directly or indirectly, that there is no reason to continue the collaborative stakeholder process, although notes that it does not have a position on how long it will take to explore in appropriate detail the impact of further rule changes on the FCM design. NEPOOL notes in this regard that the ISO-NE has publicly indicated to stakeholders its intention to attempt to complete this process even sooner than the 18 month window, perhaps within this year.

NEPOOL is dedicated, however, to work through any proposals as quickly as feasible. Balancing the understandable desire for speed, however, is the desire to ensure that all details are reviewed and that all impacts are understood by all stakeholders, particularly given the complexities of the FCM. Efforts to short-circuit the necessary time to educate and persuade ISO-NE and stakeholders that changes are appropriate may produce a different result than desired, particularly if affected entities feel they are once again working against the clock and can only focus on a limited set of issues. NEPOOL urges that the process be collaborative and permitted to run its course. NEPOOL would welcome participation by knowledgeable FERC Staff to the extent that can be accomplished consistent with the FERC's obligations to consider any resulting proposal, and would not object to periodic reports that allow FERC to ensure diligence is being exercised and progress is being made.

Importantly, as noted previously in this filing, further stakeholder process will have the benefit of the additional facts and opinions presented in this proceeding, additional qualification and auction results, and final 2009 Market Assessments to be published this spring or early summer by both the Internal and External Market Monitors. Those additional facts and reports have contained, and future reports undoubtedly will contain, additional opinions, comments,

perspectives, and further questions that will certainly guide the ISO-NE as well as Market Participants and state regulators in seeking further enhancements to improve the FCM. It is simply incorrect to assume that the region will be starting and ending at the same place it did previously.

Several Participants also seek to minimize NEPOOL's support for the Rule Changes through criticism of the NEPOOL voting structure. EPSA, in particular, a non-Participant, states that, while it supports well-structured stakeholder processes, the stakeholder process and its voting structure produced a skewed outcome here because there was not a consensus from the "sellers." Specifically, it states that there was no support from the Generation Sector and most of the Supplier Sector. Thus, it concludes that this stakeholder process did not achieve an acceptable outcome. NextEra goes on to further state that the Generation Sector was "shut out" out of that process and that the Rule Changes are indicative of a stakeholder process that was "controlled by one side."<sup>39</sup>

Given the advances achieved, some of which were designed to benefit "sellers" in the region, to FCM rules that are already just and reasonable, the suggestion that they were shut out of the process is simply wrong and lacks both support and credibility. As already noted, the Rule Changes address several concerns that members in the Generation and Supplier Sectors have been raising in the region for the past few years. Several aspects of the Rule Changes, if not all the Rule Changes, provide material benefits to suppliers in this market, including in particular and by way of example the extension of the 0.6 times CONE price floor, that continues revenue streams to those Participants for an additional three years. Such benefits were hard fought in the

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<sup>39</sup> NextEra at 2-3.

stakeholder process and represent to some Participants a very material and substantial concession that they, nonetheless, were willing to support among the package of Rule Changes.

It is telling that the Rule Changes are not wholly rejected by the “sellers,” as evidenced by statements in their own pleadings that certain aspects are acceptable to them. These facts stand in stark contrast to NextEra’s assertion that it was “shut out” of the process. It is simply wrong to suggest that an entire sector has been shut out because it failed to get all that it desired out of the stakeholder negotiation process. Such an argument is no more valid than an opposing argument that suppliers collectively were entirely unwilling to compromise their interests. In point of fact, the stakeholder process reflected an extraordinarily diligent attempt among many differing, competing, and in certain instances irreconcilable interests to find common ground and achieve agreement where possible. NEPOOL rejects the suggestion that the governance structure is flawed because suppliers collectively were not joined in their efforts to achieve further changes to FCM that they desired.

The voting structure that is now being challenged is the product of the Commission’s insistence that no business interest in New England have a controlling voting weight and its rejection of arguments that are now being made implicitly that NEPOOL votes should be more reflective of economic interest in the market.<sup>40</sup> NEPOOL has been down the road of governance debates numerous times and notes that business interests can be parsed countless ways and adjusted over time and across issues. Stated directly, this is the wrong proceeding, time and place to collaterally attack the governance process achieved in New England after more than a decade of negotiation and litigation, and that attack should be summarily rejected.

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<sup>40</sup> See *New England Power Pool*, 86 FERC ¶ 61,262 (1999).

There is a broad and firm commitment among NEPOOL members, the ISO-NE, and state regulators to work independently and diligently with all interests, including generators and other suppliers, to ensure a successful stakeholder process going forward. While a successful substantive **outcome** from the many different perspectives cannot be assured, a successful **process** that allows all interested entities a fair opportunity to participate actively and productively within that process and with a willingness and legitimate desire to seek common ground, can help to address divergent and conflicting concerns. NEPOOL urges the Commission to reject clearly and definitively any suggestion that the stakeholder process is flawed and/or should be bypassed in addressing further changes to the FCM design and urges further that the Commission insist that all future refinements and improvements be vetted first through the NEPOOL stakeholder process.

**IV. RELIEF REQUESTED**

For the reasons stated herein, NEPOOL respectfully requests that the Commission accept this answer and approve the Rule Changes as filed without modification or condition.

Respectfully submitted,  
NEPOOL Participants Committee

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Its Attorneys

Dated: March 30, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that on March 30, 2010, I caused a copy of the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in the captioned proceedings.

Dated at Hartford, CT, this thirtieth day of March 2010.

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