

122 FERC ¶ 61,016  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

ISO New England Inc.

Docket No. ER08-199-000

ORDER ACCEPTING PROPOSED REVISIONS TO FORWARD CAPACITY  
MARKET RULES

(Issued January 8, 2008)

1. On November 9, 2007, ISO New England Inc. (ISO-NE) filed various proposed revisions to its Forward Capacity Market (FCM) rules, which had been conditionally accepted by the Commission on April 16, 2007.<sup>1</sup> For the majority of the proposed revisions to the FCM rules, ISO-NE requests an effective date of January 9, 2008. However, for proposed changes to sections III.13.1.1.1.6 and III.13.1.4.1 (regarding the treatment of deactivated and retired resources), ISO-NE requests an effective date of December 17, 2007. As discussed below, we will accept the proposed revisions to the FCM rules.

**I. Background and Summary of Filing**

2. As a means of ensuring reliability, for many years ISO-NE has imposed an installed capacity (ICAP) requirement on load-serving entities, requiring them to procure specified amounts of ICAP based on their peak loads plus a reserve margin.<sup>2</sup> Beginning in 1998, ISO-NE began operating a bid-based market for ICAP.<sup>3</sup> In 2000, as the region began to develop wholesale power markets and with parties charging market-based rates, the Commission began to identify flaws in the ICAP market, and it allowed ISO-NE to replace the ICAP auction mechanism with an administratively-determined ICAP

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<sup>1</sup> *ISO New England Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007).

<sup>2</sup> Before the establishment of ISO-NE, the New England Power Pool (NEPOOL) similarly imposed an ICAP requirement.

<sup>3</sup> *See New England Power Pool*, 83 FERC ¶ 61,045, at 61,263 (1998).

deficiency charge. The Commission agreed with ISO-NE that the auction “can produce inflated prices unrelated to the actual harm caused by ICAP deficiencies.”<sup>4</sup> In 2002, the Commission addressed further deficiencies in New England’s ICAP market, this time noting the lack of a locational element, and stating that it “believes that location is an important aspect of ensuring optimal investment in resources.”<sup>5</sup> As part of this overall process, certain generators sought cost-of-service Reliability-Must-Run (RMR) contracts. In a series of orders the Commission rejected the majority of the RMR agreements out of concern about the effect widespread use of such contracts could have on the competitive market.<sup>6</sup> The Commission directed ISO-NE “to file no later than March 1, 2004 for implementation no later than June 1, 2004, a mechanism that implements location or deliverability requirements in the ICAP or resource adequacy market ... so that capacity within [congested areas] may be appropriately compensated for reliability.”<sup>7</sup> On March 1, 2004, ISO-NE submitted a filing seeking to implement a locational ICAP market in New England by June 1, 2004.

3. After a hearing before an administrative law judge and extensive further proceedings, the parties arrived at a settlement with regard to that filing (FCM Settlement Agreement), which the Commission substantially approved in the FCM Order and FCM Rehearing Order.<sup>8</sup>

4. On February 15, 2007, ISO-NE filed the market rule revisions required by the Settlement Agreement. The proposed rules, conditionally accepted on April 16, 2007,<sup>9</sup> provided that ISO-NE will conduct an annual auction to procure capacity (*i.e.*, the Forward Capacity Auction or FCA).

5. On November 9, 2007, ISO-NE filed the proposed revisions to the FCM rules that are at issue here. ISO-NE proposes various substantive changes, as well as revisions

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<sup>4</sup> *ISO New England, Inc.*, 91 FERC ¶ 61,311, at 62,081 (2000).

<sup>5</sup> *New England Power Pool*, 100 FERC ¶ 61,287, at 62,278 (2002).

<sup>6</sup> *Devon Power LLC*, 102 FERC ¶ 61,314 and 103 FERC ¶ 61,082, *order on reh’g*, 104 FERC ¶ 61,123 (2003); *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,185, *order on reh’g*, 105 FERC ¶ 61,324 (2003).

<sup>7</sup> *Devon Power*, 103 FERC ¶ 61,082 at P 37 (citation omitted).

<sup>8</sup> *See Devon Power LLC*, 111 FERC ¶ 63,063 (2005) (Initial Decision); *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (FCM Order), *order on reh’g*, 117 FERC ¶ 61,133 (2006) (FCM Rehearing Order).

<sup>9</sup> *See supra* note 1.

intended to clarify the FCM rules, provide internal cross-references, and correct typographical errors.

6. Specifically, ISO-NE proposes revisions to provide additional details about how deactivated and retired resources are treated in the FCM. In new section III.13.1.1.1.6(a), the proposed revisions establish that any resource that is not retired 45 days prior to the Forward Capacity Auction or deactivated by the Existing Capacity Qualification Deadline will be included in the Forward Capacity Auction;<sup>10</sup> retirements and deactivations after these respective dates or deadlines will not remove the resource from the Forward Capacity Auction. ISO-NE states that deactivations or retirements within 45 days of the Forward Capacity Auction introduce unnecessary risk into the Forward Capacity Auction, which relies on a variety of fixed information. ISO-NE points out that this provision will only apply for the first Forward Capacity Auction and that ISO-NE and its stakeholders will coordinate to address the treatment of retired and deactivated resources in future Forward Capacity Auctions.

7. ISO-NE also proposes to change the FCM rules to address certain pre-existing long-term import contracts to deliver capacity to New England; these grandfathered import contracts were in place prior to the development of the FCM. Specifically, ISO-NE's proposed section III.13.2.7.3(c) would revise the FCM rules to provide that, when the Capacity Clearing Price floor is reached while there is more import capacity still in the Forward Capacity Auction than can be accommodated over the relevant interface, the grandfathered import contracts will clear before existing import resources without grandfathered import contracts as well as new import capacity resources. Those contracts will clear in full (provided they can all be accommodated in full over the interface) and the remaining import capacity that is not subject to grandfathered import contracts will be prorated.<sup>11</sup>

## **II. Notice of Filing and Responsive Pleadings**

8. Notice of ISO-NE's filing was published in the *Federal Register*, 72 Fed. Reg. 65,718 (2007), with interventions and protests due on or before November 30, 2007. Timely motions to intervene were filed by Northeast Utilities Service Company on behalf of its associated operating companies; ANP Funding LLC and IPA Mill, LLC; NRG Companies; and Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.

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<sup>10</sup> Existing Capacity Qualification Deadline is a deadline, specified in section III.13.1.10 of Market Rule 1, for submission of certain qualification materials for the Forward Capacity Auction, as discussed in section III.13.1 of Market Rule 1.

<sup>11</sup> Filing at 8.

9. The Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company (collectively, CMEEC/MMWEC) and Exelon New Boston LLC (Exelon) filed timely motions to intervene and comments in support. PSEG Power LLC and PSEG Energy Resources & Trade LLC (collectively, PSEG Companies) also filed a timely motion to intervene and comments. Milford Power Company, LLC (Milford) filed a motion to intervene out-of-time.

10. On December 17, 2007, ISO-NE, CMEEC/MMWEC, and NEPOOL filed motions for leave to answer and answers.

11. In its comments, Exelon supports the changes to section III.13.1.1.1.6. Exelon emphasizes that the proposed revisions to section III.13.1.1.1.6(a) are consistent with its right to retire Exelon's Unit 1 and remove it from the 2008 FCA. Exelon also supports ISO-NE's request for a December 17, 2007 effective date for revised sections III.13.1.1.1.6 and III.13.1.4.1.

12. In their comments, PSEG Companies state that they do not oppose the adoption of section III.13.1.1.1.6(a) for use in the first FCA. However, PSEG Companies wish to make clear that the adoption of this rule for future auctions would be inappropriate. PSEG Companies contend that the application of the proposed section III.13.1.1.1.6(a) for subsequent FCAs would result in unfair penalties for generator owners retiring a unit.

13. On November 30, 2007, Brookfield Energy Marketing Inc. (Brookfield) filed a motion to intervene and protest. Brookfield protests proposed section III.13.1.3.3(c) of Market Rule 1.<sup>12</sup> Brookfield states that, in new section III.13.1.3.3(c), ISO-NE proposes to establish a list of pre-FCM import contracts that will receive "grandfathered" treatment at an interface. Brookfield notes that, under ISO-NE's proposal, the grandfathered import contracts will clear in their entirety, while all non-grandfathered imports will be prorated down to meet the interface's transfer limit if the Capacity Clearing Price floor is reached while there is more import capacity still in an FCA than can be accommodated over the relevant interface.<sup>13</sup> Brookfield claims that this proposed treatment of

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<sup>12</sup> Brookfield Protest 3-4 (quoting ISO New England Inc., FERC Electric Tariff No. 3, 2nd Rev. Sheet No. 7311E).

<sup>13</sup> In the case of the Hydro Québec (HQ) Interconnection, the transfer limit is calculated net of HQ Interconnection Capability Credits (*i.e.*, HQICC). Section III.12.9.2 of the ISO-NE tariff states that "[ISO-NE] shall calculate the MW value of the tie benefits over the HQ Interconnection and determine the HQ Interconnection Capability Credits using a deterministic methodology that uses forecasted load and capacity for the Quebec Control Area and the HQ Interconnection transfer limit as determined by [ISO-NE]." The total transfer limit of the HQ Interconnection, minus the HQ Interconnection Capability Credits, results in the remaining transfer limit (or "excess") available to all other import capacity resources.

grandfathered contracts vis-à-vis non-grandfathered contracts and new import capacity resources is unduly discriminatory.

14. Brookfield contends that proposed section III.13.2.7.3(c) would result in the rationing of the remaining import capability (after grandfathered imports are considered) between new import capacity resources and existing import capacity resources:

Where the Capacity Clearing Price reaches 0.6 times [the Cost of New Entry or CONE], if the amount of capacity offered from New Import Capacity Resources and Existing Import Capacity Resources over an interface between an external Control Area and the New England Control Area is greater than that interface's approved capacity transfer limit (net of tie benefits, or net of HQICC in the case of the HQ Interconnection):

(i) the full amount of capacity offered at that price from Existing Import Capacity Resources associated with contracts listed in Section III.13.1.3.3(c) shall clear; and

(ii) the capacity offered at that price from New Import Capacity Resources and Existing Import Capacity Resources other than Existing Import Capacity Resources associated with the contracts listed in Section III.13.1.3.3(c) will be prorated such that the interface's approved capacity transfer limit (net of tie benefits, or net of HQICC in the case of the HQ Interconnection) is not exceeded.

(iii) Capacity remaining after the treatment described in Section III.13.2.7.3(c)(i) and III.13.2.7.3(c)(ii) shall be subject to the proration described in Section III.13.2.7.3(b).<sup>[14]</sup>

15. Brookfield claims that ISO-NE's proposed rule change also masks the price signals that are supposed to indicate to developers when and where to build; therefore, an important underlying principle of the FCM Settlement Agreement—that the marketplace will determine where and when to construct new resources—will be defeated.

16. Brookfield additionally contends that ISO-NE's proposed rule change contradicts the spirit of the FCM Settlement Agreement. Brookfield states that section III.G.4 of the FCM Settlement Agreement, which describes the rationing rule, specifically states that

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<sup>14</sup> *Id.* at 4-5 (quoting ISO New England Inc., FERC Electric Tariff No. 3, 2nd Rev. Sheet No. 7314Q.01).

payments shall be “prorated based on the total number of bid [megawatts or MWs] of listed units.” Brookfield claims that ISO-NE’s proposed section III.13.2.7.3(c) does not comply with this provision.

17. Further, Brookfield points out that under the terms of the FCM Settlement Agreement ISO-NE is allowed to file modifications to the FCM rules only where it can demonstrate that failure to implement the proposed change would have a negative effect on (1) system reliability or security or (2) the competitiveness or efficiency of the forward capacity or forward reserve markets. Brookfield asserts that ISO-NE has failed to adequately demonstrate that proposed section III.13.2.7.3(c) is needed for reliability or to ensure the competitiveness or efficiency of the FCM.

18. In its answer, ISO-NE responds to the issues raised by Brookfield and PSEG Companies. With respect to Brookfield’s contention that the rule changes mask price signals, ISO-NE maintains that the proposed revisions “are needed to clarify and resolve the treatment of external interfaces in the FCA for those limited instances where there is oversupply and the [Capacity Clearing Price] collar mechanism is implemented.”<sup>15</sup> ISO-NE argues that section III.13.2.7.3(b) prorates the price of all offers but the FCM rules do not provide enough specificity about how to treat any remaining oversupply of capacity when the Capacity Clearing Price floor is reached nor specificity about the appropriate process for allocating finite transfer capability over a physically constrained external interface.<sup>16</sup>

19. ISO-NE contends that its proposed revisions do not create undue discrimination; the proposed changes are needed to ensure that pre-existing contracts are not abrogated. Proposed section III.13.2.7.3(c) “simply helps to ensure that the quantity of pre-existing capacity contracts is not reduced by other resources when there is oversupply that cannot be accommodated by the interface transfer limit.”<sup>17</sup> According to ISO-NE, “[a]t bottom, Brookfield, an existing resource without a pre-existing contract to supply capacity, erroneously seeks to be treated identically to existing resources that have pre-existing contracts. It is not unduly discriminatory for the FCM rules to extend different treatment to resources that are not similarly situated.”<sup>18</sup>

20. ISO-NE avers that the FCM Settlement Agreement’s requirements for such revisions are not applicable to the proposed revisions at issue here. ISO-NE cites to

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<sup>15</sup> ISO-NE Answer at 6.

<sup>16</sup> *Id.* at 5-6.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.* at 8.

section 4.A of the FCM Settlement Agreement, which provides that “the ISO shall retain its authority under section 205 of the Federal Power Act (FPA) to file modifications of the Market Rules that address the terms of the Settlement Agreement.” ISO-NE explains that its proposed rule changes address a matter that “the terms of the Settlement Agreement” do not address at all; the FCM Settlement is silent on this issue. ISO-NE contends, however, that even if the terms of the FCM Settlement Agreement could be deemed to address the issue of allocating physical oversupply of capacity when the Capacity Clearing Price floor is reached, ISO-NE’s “modification to the existing FCM rules is indeed needed to help prevent a negative impact on the efficiency of the FCM market, and on system reliability.”<sup>19</sup> According to ISO-NE, without section III.13.7.(c), ISO-NE runs the risk of being unable to rationally close the FCA in instances where excess supply exists on an interface and the Capacity Clearing Price floor applies.

21. With respect to PSEG Companies’ comments, ISO-NE reiterates that its proposed revisions concerning the deactivation or retirement of resources will apply only to the first FCA and that ISO-NE will work with stakeholders on this issue for future FCAs.

### **III. Discussion**

#### **A. Procedural Matters**

22. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We grant the unopposed motion to intervene out-of-time filed by Milford given its interest, the early stage of this proceeding, and the absence of undue prejudice or delay.

23. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept the answers of ISO-NE, CMEEC/MMWEC, and NEPOOL because they have provided information that assisted us in our decision-making process.

#### **B. Substantive Matters**

24. The Commission accepts ISO-NE’s proposed revisions to the FCM rules, as discussed below.

25. The FCM Settlement Agreement is silent with respect to the issue of allocating physical oversupply of capacity when the Capacity Clearing Price collar is reached. ISO-NE’s proposed section III.13.2.7.3(c) addresses this issue by assigning preference to the existing, grandfathered contracts listed in section III.13.1.3.3(c). The proposed new

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<sup>19</sup> *Id.* at 10.

section provides that the full amount of capacity offered from Existing Import Capacity Resources associated with contracts listed in section III.13.1.3.3(c) will clear.

26. The Commission's long-standing policy,<sup>20</sup> consistent with a substantial body of judicial precedent, has been to protect the stability of long-term contracts. Contracts, especially long-term contracts like the ones at issue here, provide certainty and stability in energy markets. Hence it is not unreasonable for ISO-NE to accord different treatment to pre-existing grandfathered contracts.<sup>21</sup>

27. The Commission does not find persuasive Brookfield's argument that the proposed revisions would have the effect of masking the price signals that indicate to developers when and where to build. To the contrary, we agree with ISO-NE that new section III.13.2.7.3(c) improves the price signal by revealing the extent to which the interface is already physically subscribed by pre-existing contracts; only the remaining capacity on the interface will thus be allocated among other resources.

28. We are also not persuaded that ISO-NE's proposed new section contradicts the spirit of the FCM Settlement Agreement, as Brookfield contends. Section III.G.4 of the FCM Settlement Agreement states:

For the lesser of five FCAs or three Successful FCAs: (a) if the Capacity Clearing Price is above 1.4 times CONE, Existing Capacity shall be paid 1.4 times CONE, and New Capacity shall be paid the Capacity Clearing Price; and (b) the Capacity Clearing Price shall not fall below 0.6 times CONE. At 0.6 times CONE, any excess supply shall be prorated to procure no more than ICR, as follows: the total payment to all listed Resources shall be equal to 0.6 times CONE times ICR. Payments to listed individual Resources shall be prorated based on the total number of bid MWs of listed units.

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<sup>20</sup>See, e.g., *Californians for Renewable Energy, Inc. v. Cal. Pub. Utils. Comm'n*, 120 FERC ¶ 61,272, at P 43 (2007).

<sup>21</sup>We note that, since the terms of the FCM Settlement Agreement do not specifically address allocating a physical oversupply of capacity when the Capacity Clearing Price floor is reached, ISO-NE's proposed revisions addressing the grandfathered contracts do not oblige ISO-NE to meet the additional requirements identified by Brookfield for the proposed revisions. See FCM Settlement Agreement § 4.A; see also FCM Order, 115 FERC ¶ 61,340 at P 35. In any event, ISO-NE has adequately demonstrated that, without the proposed changes, there would be a negative effect on system reliability or security, or the competitiveness or efficiency of the FCM or forward reserve market.

Suppliers wishing instead to prorate their bid MWs of participation in the capacity market can do so by partially delisting one or more Resources in their portfolio (or an equivalent mechanism to be developed in the Market Rules) after the need for proration is identified.

This section does not specifically consider the question posed by ISO-NE, namely, how to treat any remaining oversupply of capacity when the Capacity Clearing Price floor is reached or the appropriate process for allocating finite transfer capability over a physically constrained external interface. Put simply, this section does not address the treatment to be given to grandfathered capacity resources compared to non-grandfathered capacity resources. ISO-NE's new section addresses—and fills—this gap by proposing specific treatment of such grandfathered contracts.

29. We also disagree with Brookfield's contention that ISO-NE's proposed new section III.13.2.7.3(c) is unduly discriminatory merely because the grandfathered contracts would be treated differently than the non-grandfathered. What is prohibited by the Federal Power Act is undue discrimination, not all differences in treatment no matter the justification.<sup>22</sup> ISO-NE here proposes specific treatment for the grandfathered contracts with respect to allocating physical oversupply of capacity when the Capacity Clearing Price floor is reached.<sup>23</sup> The Commission encourages long-term contracting and is loathe to undercut such contracts, which benefit the market by providing certainty and stability. Alternatively, rejecting such proposed treatment likely would chill long-term contracting. Furthermore, while Brookfield was not a party to the FCM Settlement Agreement, Brookfield is free to participate in future stakeholder processes.

30. With regard to proposed section III.13.1.1.1.6, we accept ISO-NE's proposed revisions concerning how deactivated and retired resources are treated in the first Forward Capacity Auction. Importantly, and as ISO-NE acknowledges, the provisions of this section will apply only for the first Forward Capacity Auction; ISO-NE states that it will work with stakeholders to address the treatment of retired and deactivated resources in future Forward Capacity Auctions.

31. With respect to the proposed December 17, 2007 effective date for the revisions to sections III.13.1.1.1.6 and III.13.1.4.1, we grant ISO-NE's requested effective date. As ISO-NE explains, the forty-five-day deadline for a resource to retire or be deactivated in advance of the first Forward Capacity Auction to avoid participating in the Forward

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<sup>22</sup> 16 U.S.C. § 824d (2000).

<sup>23</sup> Elsewhere these grandfathered long-term contracts are treated uniquely by ISO-NE. *See, e.g.*, Market Rule 1 § III.8.8.6; ISO-NE Open Access Transmission Tariff § 2, Attachment G-3; ISO-NE Manual M-20 (ICAP) §§ 1.5, 3.10.4, and Attachment A.

Capacity Auction is December 21, 2007. Granting a December 17, 2007 effective date thus will enhance market certainty in advance of the first Forward Capacity Auction by ensuring that resources that retire or which are deactivated 45 days in advance of the first Forward Capacity Auction will not be eligible to participate in the Forward Capacity Auction. Otherwise, we will make the revisions effective January 9, 2008, as requested.

The Commission orders:

(A) ISO-NE's proposed revisions to the FCM rules are hereby accepted, effective December 17, 2007, or January 9, 2008, as requested, as discussed in the body of this order.

(B) ISO-NE's proposed revisions to sections III.13.1.1.1.6 and III.13.1.4.1 are hereby accepted, effective December 17, 2007, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.