

136 FERC ¶ 61,191  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc. and New England Power Pool          Docket No. ER11-3953-000

ORDER ON COMPLIANCE FILING

(Issued September 15, 2011)

1. On June 30, 2011, ISO New England Inc. (ISO-NE), joined by the New England Power Pool (NEPOOL) Participants Committee, submitted revisions to the ISO-NE Tariff in compliance with Order Nos. 741 and 741-A.<sup>1</sup> The revisions include changes to the ISO-NE Financial Assurance Policy (Financial Assurance Policy), the ISO-NE Information Policy (Information Policy), and Section I.2.2 of the ISO-NE Tariff. ISO-NE requests an effective date of October 1, 2011. For the reasons discussed below, the Commission will conditionally accept ISO-NE's submittal, subject to a compliance filing to be made within 90 days of the date of this order, effective October 1, 2011.

**I. Background**

2. In Order No. 741, the Commission adopted reforms to strengthen the credit policies used in organized wholesale electric power markets. Citing its statutory responsibility to ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential,<sup>2</sup> the Commission directed regional transmission organizations (RTO) and independent system operators (ISO) to revise their tariffs to reflect the following reforms: implementation of shortened settlement timeframes, restrictions on the use of unsecured credit, elimination of unsecured credit in all financial transmission rights (FTR) or equivalent markets, clarification of legal status to continue the netting and set-off of transactions in the event of bankruptcy, establishment of minimum criteria for market participation, clarification regarding the organized markets' administrators' ability to

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<sup>1</sup> *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *order denying reh'g*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

<sup>2</sup> 16 U.S.C. §§ 824d, 824e (2006).

invoke “material adverse change” clauses to demand additional collateral from market participants, and adoption of a two-day grace period for “curing” collateral calls.

3. The Commission applied these reforms to all RTO and ISO markets, explaining that the activity of market participants is not confined to any one region or market. The Commission stated that the credit practices in all RTOs and ISOs are only as strong as the weakest credit practice because a default in one market could have ripple effects in another market. In order to implement these reforms, the Commission directed each RTO and ISO to submit tariff changes by June 30, 2011, with an effective date of October 1, 2011. In Order No. 741-A, the Commission extended the deadline for complying with the requirement regarding the ability to offset market obligations to September 30, 2011, with the relevant tariff revisions to take effect January 1, 2012.<sup>3</sup> Accordingly, the Commission will not address compliance with that requirement in this order.

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

4. Notice of the ISO-NE’s June 30, 2011 filing was published in the *Federal Register*, 76 Fed. Reg. 41,774 (2011), with interventions and protests due on or before July 21, 2011. NEPOOL Industrial Customer Coalition; H.Q. Energy Services (U.S.) Inc.; J.P. Morgan Ventures Energy Corporation; Electric Power Supply Association (EPSA); GenOn Energy Management, GenOn Canal, LLC, and GenOn Kendall, LLC (collectively GenOn Parties); Calpine Corporation; Consolidated Edison Energy, Inc.; Consolidated Edison Solutions, Inc.; BP Energy Company; Shell Energy North America (US), L.P.; Exelon Corporation; Vitol Inc.; Constellation Energy Commodities Group, Inc.; Constellation NewEnergy, Inc.; Brookfield Energy Marketing LP; and Northeast Utilities Service Company filed timely motions to intervene. Morgan Stanley Capital Group Inc.; Macquarie Energy LLC; and DB Energy Trading LLC (collectively, Indicated Participants); and DC Energy, LLC (DC Energy) filed timely motions to intervene with comments. EPSA filed untimely comments.

5. On August 5, 2011, the NEPOOL Participants Committee submitted an answer to the Indicated Participants’ comments. On August 22, 2011, the Indicated Participants filed an answer to the NEPOOL Participants Committee’s answer.

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<sup>3</sup> Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 25.

### **III. Discussion**

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

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely-filed, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. The Commission will accept the NEPOOL Participants Committee's and the Indicated Participants' answers, because the answers have provided information that assisted us in our decision-making process.

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

##### **1. Shortening the Settlement Cycle**

8. Order No. 741 directed each RTO and ISO to submit a compliance filing that includes tariff revisions to establish shorter billing and settlement periods that are, at most, weekly.<sup>4</sup>

##### **a. Filing**

9. ISO-NE states that it currently complies with this requirement. In fact, ISO-NE states that it has gone further than this requirement by adopting twice-weekly billing.<sup>5</sup> Further, except in the case of special billing, all charges due must be paid to and received by ISO-NE no later than the second Business Day after the invoice on which the charges appeared was issued, provided that ISO-NE sends the invoice to the covered entities by 11:00 a.m. eastern time on the invoice date. Therefore, ISO-NE has not proposed any revisions to this requirement.<sup>6</sup>

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<sup>4</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 32.

<sup>5</sup> ISO-NE Filing at 10 (citing *ISO New England Inc. and New England Power Pool*, 132 FERC ¶ 61,046, at P 17-27 (2010) (July 15 Order)).

<sup>6</sup> *Id.*

**b. Commission Determination**

10. The Commission finds that ISO-NE is currently compliant with this requirement.

**2. Use of Unsecured Credit**

11. Order No. 741, as revised by Order No. 741-A, required each RTO and ISO to revise its tariff provisions to establish a limit on unsecured credit of no more than \$50 million per market participant, including the corporate family to which a market participant belongs.<sup>7</sup>

12. The Commission emphasized that the \$50 million limit on unsecured credit is a ceiling, and that an organized wholesale electric market may establish a lower ceiling, either for individual market participants or, for example, based on the relative market size, the price of energy, the number of megawatt hours, and the size and number of members. The Commission also directed that RTOs and ISOs not take parent guarantees into account when establishing the appropriate level of unsecured credit for a market participant.<sup>8</sup>

**a. Filing**

13. ISO-NE states that it is already partially compliant with this requirement. Specifically, ISO-NE states that, under the current Financial Assurance Policy, the maximum market credit limit for rated non-municipal market participants and rated non-market participant transmission customers is \$50 million. In addition, ISO-NE points out that the maximum market credit limit for unrated non-municipal market participants and qualifying municipal market participants, and the maximum transmission credit limit for unrated non-municipal market participants, qualifying municipal market participants and unrated non-market participant transmission customers, is \$25 million in each case.<sup>9</sup>

14. However, ISO-NE states that the remaining credit limits that it extends are above the \$50 million limit. Therefore, ISO-NE proposes to lower the transmission credit limits

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<sup>7</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 49, *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 9. In Order No. 741-A, the Commission stated that “a corporate family may choose to have a single member company participate in an RTO/ISO’s market, or instead opt to have more than one do so, [but] in either case, the single entity or multiple entities together will have a cap of no more than \$50 million.” Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 9 & n.15.

<sup>8</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 55-56.

<sup>9</sup> ISO-NE Filing at 11.

for rated non-municipal market participants and rated non-market participant transmission customers from \$75 million to \$50 million. In addition, ISO-NE proposes to lower the total credit limits for rated non-municipal market participants and non-market participant transmission customers from \$75 million to \$50 million.<sup>10</sup>

15. In addition, ISO-NE proposes to add language to several sections of the Financial Assurance Policy to provide that: “[t]he sum of the Market Credit Limits and Transmission Credit Limits of entities that are Affiliates shall not exceed \$50 million.”<sup>11</sup>

16. ISO-NE also proposes to modify Sections II.G and V.B.3 of the Financial Assurance Policy to clarify the timing and process associated with the allocation of unsecured credit. Specifically, ISO-NE proposes to add language to provide that no later than five Business Days after any affiliate change, each rated non-municipal market participant and each non-market participant transmission customer that has a market credit limit and a transmission credit limit must determine the amounts to be allocated to its market credit limit and its transmission credit limit. In addition, ISO-NE proposes to clarify that, when a rated non-municipal market participant or a non-market participant transmission customer does not provide such determination, then ISO-NE will use a default allocation of \$25 million each to the market credit limit and transmission credit limit, and these values will also be used in allocating the \$50 million credit limit among affiliates. ISO-NE states that, if the sum of the amounts for affiliates is greater than \$50 million, then it will reduce the amounts such that the sum is no greater than \$50 million.

17. Finally, ISO-NE proposes to include a minor change to replace the term “business days” with the proper defined term “Business Days.”<sup>12</sup>

18. No protests were filed on this proposal.

**b. Commission Determination**

19. The Commission finds that ISO-NE’s proposed revisions comply with the directives in Order Nos. 741 and 741-A. Therefore, the Commission accepts ISO-NE’s compliance filing with regard to the use of unsecured credit, to become effective October 1, 2011.

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

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

<sup>12</sup> *Id.* at 12.

**3. Elimination of Unsecured Credit for Financial Transmission Rights Markets**

20. Order No. 741 directed each RTO and ISO to submit a compliance filing that includes tariff revisions to eliminate the use of unsecured credit in its FTR, or FTR-equivalent, markets.<sup>13</sup>

**a. Filing**

21. ISO-NE states that it is currently compliant with this requirement. Specifically, ISO-NE states that, under the Financial Assurance Policy, unsecured credit is not extended to meet FTR-related financial assurance requirements.<sup>14</sup> Therefore, ISO-NE states that it has not included any revisions with regard to this requirement.

**b. Commission Determination**

22. The Commission finds that ISO-NE is currently compliant with this requirement.

**4. Minimum Criteria for Market Participation**

23. In Order No. 741, the Commission directed each RTO and ISO to revise its tariff to establish minimum criteria for market participation.<sup>15</sup> The Commission further directed each RTO and ISO to develop these criteria through its stakeholder processes.<sup>16</sup> While Order No. 741 did not provide specific criteria, the Commission offered examples of acceptable criteria, and stated that it would evaluate each RTO and ISO proposal to ensure that it is just and reasonable and not unduly discriminatory. For example, the Commission explained that minimum criteria for market participation could include the market participant having the capability to engage in risk management or hedging or to out-source this capability with periodic compliance verification. The Commission stated that the minimum criteria for market participation would make sure that each market participant has adequate risk management capabilities and adequate capital to engage in trading with minimal risk, and related costs, to the market as a whole.<sup>17</sup> Moreover, the Commission stated that any minimum participation criteria apply to all market

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<sup>13</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 75.

<sup>14</sup> ISO-NE Filing at 12 (citing July 15 Order, 132 FERC ¶ 61,046 at P 64).

<sup>15</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

<sup>16</sup> *Id.* P 132.

<sup>17</sup> *Id.* P 131.

participants rather than only certain participants.<sup>18</sup> The Commission later clarified in Order No. 741-A that some criteria may be tiered or calibrated based on, for example, the size of a market participant's positions.<sup>19</sup>

**a. Filing**

24. ISO-NE proposes to revise the "Overview" section of the Financial Assurance Policy to provide that one of the purposes of that policy is to establish minimum criteria for participation in the New England markets. In addition, ISO-NE proposes to clarify that the purpose of the policy is to suspend a market participant or non-market participant transmission customer when there is a failure "to comply with the terms of the Financial Assurance Policy," which will include failure to comply with the minimum criteria for market participation.<sup>20</sup> ISO-NE proposes to add a new Section II.A in the Financial Assurance Policy to establish minimum criteria for participation in the New England markets. ISO-NE states that the criteria, which will apply to all applicants and customers, include four requirements: (1) information disclosure; (2) risk management; (3) communications; and (4) capitalization.<sup>21</sup>

25. With respect to the first criterion, information disclosure, ISO-NE states that the information disclosure requirement will allow ISO-NE to take action if it finds that, based on the information disclosed by an applicant or customer, the commencement or continued participation of that applicant or customer in the New England markets may present an unreasonable risk to those markets or its market participants. ISO-NE states that the information disclosure requirement will include the submission of information and the review of information.<sup>22</sup>

26. With regard to the submission of information, ISO-NE proposes to require each customer and applicant to submit several pieces of information by April 30 of each year. This information includes, but is not limited to, the following: (1) a list of Principals; (2) a list of any material criminal or civil litigation involving the customer or applicant or

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<sup>18</sup> *Id.* P 133. While there needs to be minimum criteria for all market participants, as we explained in Order No. 741-A, not all market participants need necessarily be held to the same minimum criteria. Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 33 & n.43.

<sup>19</sup> Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 at P 33 and n.43.

<sup>20</sup> ISO-NE Filing at 13 & n.72.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 13-14.

any of the Principals of the customer or applicant arising out of participation in any U.S. wholesale or retail energy market in the past five years; and (3) a written summary of any bankruptcy, dissolution, merger or acquisition of the customer or applicant in the preceding five years.<sup>23</sup>

27. ISO-NE proposes that an applicant that fails to provide the information required will be prohibited from participating in the New England Markets until the deficiency is rectified. Specifically, if a customer fails to provide the required information by the close of business each April 30, then ISO-NE will issue a notice to the customer on the next Business Day and, if the customer does not provide the information to ISO-NE within two Business Days after the issuance of the notice, then the customer will be suspended until the deficiency is rectified.

28. With regard to the review of information, ISO-NE states that it will not only review the information disclosed by the customer or applicant, but it will also review whether the customer or applicant or any of their principals are included on any relevant list maintained by the U.S. Office of Foreign Asset Control (OFAC).<sup>24</sup> ISO-NE states that, based on these reviews, if it determines that the commencement or continued participation of the customer or applicant in the New England markets may present an unreasonable risk to those markets or its market participants, then ISO-NE's chief financial officer must promptly forward those concerns to the participant committee or its delegate, along with any background materials deemed by ISO-NE to be necessary for the participants committee or its delegate to develop an informed opinion with respect to the identified concerns, including any measures that ISO-NE may recommend imposing as a condition to the commencement or continued participation in the markets by the customer or applicant or ISO-NE's recommendation to prohibit or terminate participation by the customer or applicant in the New England markets.<sup>25</sup>

29. ISO-NE further states that, if it decides to impose measures other than prohibition or termination of participation in the New England markets, then ISO-NE will be required to make an informational filing with the Commission as soon as practicable after taking such action. However, ISO-NE states that, if it chooses to prohibit or terminate

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<sup>23</sup> *Id.* at 14-15.

<sup>24</sup> ISO-NE states in its filing that the OFAC administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. Sanctions imposed by the OFAC include the blocking of assets and trade restrictions to accomplish foreign policy and national security goals. *Id.* n.79.

<sup>25</sup> *Id.*



participation in the New England markets, then ISO-NE must file for Commission approval of such action, and the prohibition or termination will become effective only upon final Commission ruling.<sup>26</sup>

30. Finally, ISO-NE states that the proposed changes include language providing that the information disclosed will be treated as confidential information. However, ISO-NE clarifies that ISO-NE, the participants committee, or any governance participant may disclose confidential information as required or permitted to satisfy the minimum criteria for market participation.<sup>27</sup>

31. ISO-NE states that the second criterion, the risk management requirement, is intended to ensure that customers and applicants have adequate risk management capabilities to engage in trading with minimal risk, and related costs, to the market as a whole. Therefore, ISO-NE proposes to require each applicant or customer to submit, by April 30 of each year, a certificate stating that the customer or applicant: (1) has either established or contracted for risk management procedures that are applicable to participation in the New England markets; and (2) has established or contracted for appropriate training of relevant personnel that is applicable to its participation in the New England markets.<sup>28</sup>

32. Specifically, ISO-NE proposes to add an “Officer Certification Form” to the Financial Assurance Policy which must be signed by a senior officer of the customer or applicant and must be notarized. As stated in that form, the customer or applicant will certify that it has established or contracted for written policies, procedures, and controls applicable to participation in the New England markets, approved by the customer’s or applicant’s governing body, which provide an appropriate, comprehensive risk management framework that clearly identifies and documents the range of risks to which the customer or applicant is exposed. In addition, the form states that the customer or applicant will also certify that it has established or contracted for appropriate training of relevant personnel that is applicable to its participation in the New England markets. ISO-NE states that an applicant that fails to provide this certificate will be prohibited from participating in the New England markets until the deficiency is rectified, similar to the information disclosure requirement discussed above.<sup>29</sup>

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<sup>26</sup> *Id.* at 16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 16-17.

<sup>29</sup> *Id.* at 17.

33. ISO-NE states that the third criterion, the communications requirement, will ensure that customers and applicants have the ability to respond to ISO-NE's direction. Therefore, ISO-NE proposes to require each customer and applicant to certify, as part of the "Officer Certification Form" discussed above, that they have either established or contracted to establish procedures to effectively communicate with and respond to ISO-NE with respect to matters relating to the Financial Assurance Policy and the billing policy.<sup>30</sup> Similar to the information disclosure requirement and the risk management requirement discussed above, an applicant that fails to provide this certificate will be prohibited from participating in the New England markets until the deficiency is rectified.<sup>31</sup>

34. ISO-NE states that the fourth criterion, the capitalization requirement, will help protect the New England markets from the risks posed by under-capitalized customers or applicants. ISO-NE proposes to require a customer or applicant to either (1) have a Governing Rating<sup>32</sup> that is an investment grade rating of BBB-/Baa3 or higher; (2) maintain a minimum tangible net worth of one million dollars; or (3) maintain a minimum of ten million dollars in total assets. ISO-NE states that the consequences for failing to meet these requirements are different for the FTR market and for markets other than the FTR market.<sup>33</sup>

35. For the FTR market, ISO-NE proposes that if a customer or applicant fails to meet the capitalization requirements, then it will be suspended from entering into any future transactions of a duration greater than one month in the FTR system. In addition, the customer or applicant must provide additional financial assurance equal to 15 percent of the customer's or applicant's FTR financial assurance requirements. ISO-NE clarified that such additional financial assurance will not be counted toward satisfaction of the customer or applicant's total financial assurance requirements.<sup>34</sup>

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<sup>30</sup> *Id.* at 17-18 & n.85.

<sup>31</sup> *Id.*

<sup>32</sup> ISO-NE defines "Governing Rating" as: "for a Market Participant that is Rated, the lowest corporate rating from any Rating Agency for that Market Participant, or, if the Market Participant has no corporate rating, then the lowest rating from any Rating Agency for that Market Participant's senior unsecured debt." ISO-NE Filing at 18 & n.90.

<sup>33</sup> *Id.* at 18-19.

<sup>34</sup> *Id.* at 19.

36. For markets other than the FTR market, ISO-NE states that the capitalization requirement will not apply to a customer or applicant with a total financial assurance requirement of lower than \$100,000. Where a customer or applicant with a total financial assurance requirement of \$100,000 or greater fails to meet the capitalization requirements, the customer or applicant will be required to provide specified additional amounts of financial assurance, which will not be counted toward satisfaction of a customer's or applicant's financial assurance requirements. For example, if a customer or applicant has a total financial assurance requirement from \$100,000 to \$249,999.99 or \$250,000 to 499,999.99 then its respective additional financial assurance requirement would be \$25,000.00 or \$50,000.00.<sup>35</sup>

37. ISO-NE states that if a non-FTR applicant fails to provide the full amount of additional financial assurance required, then the applicant will be prohibited from participating in the New England markets until the deficiency is rectified.

38. ISO-NE states that the tariff changes also include several other modifications to the Financial Assurance Policy that are related to the capitalization requirements for customers and applicants. First, the tariff changes add provisions describing when additional financial assurance related to the capitalization requirements will be factored into a customer's or applicant's financial assurance requirements. Second, the tariff changes modify the definition of tangible net worth to expand the list of items that are deducted from an entity's assets to determine the tangible net worth such as: assets that ISO-NE reasonably believes to be restricted or potentially unavailable to settle a claim in the event of default (e.g., regulatory assets, restricted assets, and affiliated assets) net of any matching liabilities, to the extent that the result of that netting is a positive value; derivative assets, net of any matching liabilities, to the extent that the result of that netting is a positive value; preferred stock; and non-controlling interest. Additionally, references in the tangible net worth provisions to "generally accepted accounting principles in the United States" are being expanded to also refer to "international accounting standards." Third, the tariff changes modify the requirements related to provision of financial statements, which ISO-NE uses to calculate a customer's or applicant's tangible net worth. Specifically, the tariff changes provide that if a customer cannot provide audited statements then alternate documentation may be specified and accepted by ISO-NE.<sup>36</sup>

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<sup>35</sup> *Id.* at 19-20.

<sup>36</sup> *Id.* at 20-21.

**b. Protests and Comments**

39. Indicated Participants state that the RTOs and ISOs have proposed revisions to their Commission-jurisdictional tariffs to enable them to obtain an exemption from regulation of RTO and ISO products and services by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act.<sup>37</sup> However, Indicated Participants assert that they are not privy to the discussion between the RTOs and ISOs and the CFTC, and are not certain what changes are necessary to obtain an exemption. Given that RTOs and ISOs have not proposed uniform changes to their tariffs, Indicated Participants argue that individual RTOs and ISOs may fall short of, or exceed, whatever requirements are being set forth by the CFTC as creating a necessary basis for exemption, particularly the proposed certification statements. Thus, Indicated Participants request that the Commission solicit input from the CFTC explaining what that agency requires and require the RTOs and ISOs to tailor their revisions to satisfy only those requirements.

40. EPSA urges the Commission to require that processes across RTOs and ISOs be sufficiently uniform to ensure compliance and clarity. In that vein, EPSA suggests that the Commission hold a compliance workshop so that RTOs, ISOs, and industry can discuss both the necessary differences in compliance across the regions as well as areas that can be standardized. Indicated Participants similarly ask the Commission to direct the RTOs/ISOs to coordinate their certification statements and verification processes both in terms of substance and dates for submission.

41. For instance, EPSA argues that the Commission should direct RTOs and ISOs to amend their proposed certification forms to allow a corporate parent to make the certification on behalf of the market participant. Similarly, Indicated Participants argue that RTOs and ISOs should uniformly be required to accept both domestic and foreign guarantees from creditworthy guarantors for satisfaction of minimum capitalization, and that flexibility should be allowed with respect to the form of guarantee (e.g., choice of governing law, termination and assignment, waiver of surety defense). In addition, the Indicated Participants support a net worth requirement, consistent with the definition of Eligible Contract Participant as administered by the CFTC, instead of the tangible net worth requirement proposed by RTOs and ISOs. Indicated Participants argue that no demonstrable benefit arises from using a standard more burdensome than the CFTC's Eligible Contract Participant definition. Indicated Participants state that ISO-NE's proposed tariff revisions restrict a market participant from entering FTR transactions of duration greater than one month even if the participant has otherwise met its financial assurance requirements and posts additional collateral equal to 15 percent of its FTR

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<sup>37</sup> Indicated Participants Protest at 8; *see* 7 U.S.C. § 1 (2006).

financial assurance requirements. The Indicated Participants believe that this is an “unduly discriminatory restriction with no demonstrable benefit.”<sup>38</sup>

42. EPSA states that it is unclear what is meant by the term “governing body” in ISO-NE’s annual certification form. EPSA states that one possibility is the entity’s Board of Directors, but that the “governing body” could be a committee or function within the organization which acts under delegated authority from the Board of Directors. Therefore, EPSA requests that the Commission direct ISO-NE to clarify what is meant by the phrase “governing body.”<sup>39</sup>

43. Finally, the Indicated Participants support the creation of an exemption from the minimum capitalization requirements (and from certain risk management and training requirements) for entities that are already subject to other stringent capitalization requirements (e.g., Federal Reserve (or similar foreign regulator) following Basel III Standards for banks and/or the exchange capitalization requirements of the ICE, the CME Group, and the Green Exchange).

44. The NEPOOL Participants Committee submitted an answer in response to comments regarding the ability of Market Participants to enter into certain FTR transactions if they fail to satisfy certain minimum criteria, the use of domestic and foreign guarantees to satisfy minimum capitalization requirements, and the use of tangible net worth as a measurement of minimum capitalization. The NEPOOL Participants Committee states that preventing those without adequate capitalization from participating in longer term FTR transactions is a reasonable response to the unpredictability of the FTR market. The NEPOOL Participants Committee also states that the Commission agreed with the elimination of the use of the parent guarantee in a past proposal from ISO-NE.<sup>40</sup> The NEPOOL Participants Committee argues that nothing about the credit reform orders would require a reversal of those approved provisions. The NEPOOL Participants Committee also states that tangible net worth is the appropriate means of determining the capitalization of a market participant for purposes of judging its suitability to transact in the wholesale power markets.

45. The Indicated Participants reply that the NEPOOL Participants Committee conflates financial assurance requirements with capitalization requirements when ISO-NE explicitly addresses those requirements as separate and distinct. The Indicated

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<sup>38</sup> Indicated Participants Protest at 16.

<sup>39</sup> EPSA Protest at 6.

<sup>40</sup> NEPOOL Participants Committee Comments at 5 (citing July 15 Order, 132 FERC ¶ 61,046 at P 80).

Participants state that the prior proposal from ISO-NE to eliminate the use of the parent guarantee did not contemplate, and the Commission therefore did not consider, whether corporate guarantees could be used to satisfy ISO-NE's proposed capitalization requirements. The Indicated Participants urge the Commission to reject the arguments to treat the financial assurance requirements and capitalization requirements as one and the same requirement.

**c. Commission Determination**

46. In Order No. 741, the Commission directed all RTOs and ISOs to adopt minimum participation criteria, but explicitly left it to each RTO and ISO and its stakeholders to develop minimum participation criteria that are applicable to its markets. The Commission thus declines to require RTOs and ISOs to adopt uniform minimum participation criteria, including uniform certification statements, at this time. The Commission will not require ISO-NE to revise its proposal to reflect certain uniform changes proposed by EPSA and Indicated Participants, such as allowing a corporate parent to submit a certification on behalf of a market participant and exempting market participants that are already subject to capitalization requirements required by other regulators or entities. Although we decline to require uniform minimum participation criteria, we recognize that there may be merit in minimizing the differences in requirements for each ISO and RTO, and we are open to subsequent efforts by industry participants and the RTOs and ISOs to come up with uniform criteria. The minimum participation criteria submitted by ISO-NE, as revised as discussed below, are consistent with the Commission's directives, just and reasonable and not unduly discriminatory or preferential and therefore we conditionally accept the proposed changes.

47. The Commission agrees with EPSA that ISO-NE's compliance filing is unclear as to what is meant by the term "governing body" in the proposed certification form. It is not entirely clear if, for example, only the Board of Directors of an entity would qualify, or if a chief operating officer or other official or corporate management body would suffice. Therefore, the Commission directs ISO-NE to submit a compliance filing to clarify what is meant by the term "governing body" within 90 days of the date of issuance of this order.

48. In Order No. 741, the Commission required RTOs and ISOs to develop minimum participation criteria to ensure that markets are protected from risks posed by under-capitalized participants or those who do not have adequate risk management procedures in place.<sup>41</sup> In evaluating whether the proposed tariff revisions comply with Order No. 741, the Commission is concerned with whether the proposed minimum participation criteria accomplish this goal, and are just and reasonable and not unduly discriminatory

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<sup>41</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

or preferential. In so doing, we review the proposal before us, and understand that there may be more than one just and reasonable set of minimum participation criteria.

49. While we expect each RTO and ISO will comply with applicable rules and requirements of all federal agencies, the Commission is presently concerned with compliance with Order No. 741 and with the reasonableness of the proposed changes now before us. Any issues related to a potential CFTC exemption are outside the scope of this proceeding. The Commission, however, remains open to subsequent tariff revisions offered by the RTOs and ISOs in light of future events.

50. The Commission rejects the Indicated Participants' argument that the RTOs and ISOs should be uniformly required to accept domestic and foreign guarantees for satisfaction of minimum capitalization. The Commission has already found the elimination of corporate guarantees to be just and reasonable.<sup>42</sup> Further, the Commission rejects the Indicated Participants' argument that net worth versus tangible net worth should be used when determining capitalization requirements. Tangible net worth is an existing requirement of ISO-NE's credit policy and it is an appropriate measure of what would be available to pay obligations in the event of a default. In addition, the Commission finds that ISO-NE's proposed revisions – restricting a market participant, who fails to meet the capitalization requirement, from entering FTR transactions of duration greater than one month and requiring the participant to post additional collateral equal to 15 percent of its FTR financial assurance requirements – to be a just and reasonable approach because it provides added security without unduly restricting participation in the FTR market.

51. In a response to Indicated Participants' protest of ISO-NE's Order No. 741 compliance filing concerning corporate guarantees for capitalization requirements as part of minimum criteria, NEPOOL indicated that ISO-NE's stakeholder process had already dealt with this issue and had decided that parent guarantees could not be used for "Financial Assurance." Indicated Participants responded that the use of corporate guarantees for meeting capitalization requirements is different than using corporate guarantees for "Financial Assurance." Although using corporate guarantees for meeting capitalization requirements may be just and reasonable, the Commission finds that ISO-NE's approach is just and reasonable in light of the flexibility and discretion given to each RTO and ISO to develop the criteria for meeting capitalization requirements.<sup>43</sup>

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<sup>42</sup> July 15 Order, 132 FERC ¶ 61,046 at P 80.

<sup>43</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,265, at P 21 (2009); *accord Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (under the Federal Power Act, as long as the Commission finds a methodology to be just and reasonable, that methodology "need not be the only reasonable methodology, or even the most

(continued)

52. ISO-NE proposes a certificate, that each customer and applicant will be required to submit by April 30 of each year, stating that the customer or applicant: (i) has either established or contracted for risk management procedures that are applicable to participation in the New England markets; and (ii) has established or contracted for appropriate training of relevant personnel that is applicable to its participation in the New England markets. We find this is insufficient to ensure the protection of the markets from risks posed by under-capitalized participants or those who do not have adequate risk management procedures in place.<sup>44</sup> A market participant officer-certified form that attests to the existence of risk management policies and procedures, as ISO-NE proposes, does not by itself satisfy the above criterion without independent verification that risk management policies and procedures are actually being implemented. We believe that the minimum participation criteria require ISO-NE to engage in periodic compliance verification to minimize risk to the market.<sup>45</sup> We therefore direct ISO-NE to make a compliance filing, within 90 days from the date of this order, to establish such verification as part of its minimum participation criteria.

### 5. Use of “Material Adverse Change”

53. In Order No. 741, the Commission directed each RTO and ISO to submit a compliance filing that includes tariff revisions to establish and clarify when a market administrator may invoke a “material adverse change” clause to compel a market participant to post additional collateral, cease one or more transactions, or take other measures to restore confidence in the market participant’s ability to safely transact.<sup>46</sup> The Commission, however, declined to adopt a *pro forma* list of circumstances that may trigger a “material adverse change” clause. Instead, the Commission directed each RTO and ISO to develop its own tariff provisions identifying circumstances when each market administrator may invoke a “material adverse change” clause in the form of a list that is

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accurate one”); *cf. City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (when determining whether a proposed rate was just and reasonable, the Commission properly did not consider “whether a proposed rate schedule is more or less reasonable than alternative rate designs”).

<sup>44</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 131.

<sup>45</sup> The Commission will not mandate a particular form of periodic verification of attestations concerning minimum risk management policies, practices and procedures. However, such a periodic verification could include periodic review of risk management policies, practices, and procedures, and their implementation, conducted on a random basis or directed to certain market participants based on identified risk.

<sup>46</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 149.



illustrative, rather than exhaustive. Furthermore, the Commission explained that the tools used to determine a “material adverse change” should be sufficiently forward-looking to allow the market administrator to take action prior to any adverse effect on the market.<sup>47</sup>

54. The Commission also directed each RTO and ISO to provide reasonable advance notice to a market participant, when feasible, when the RTO or ISO is compelled to invoke a “material adverse change” clause.<sup>48</sup> The Commission noted that the notification should be in writing, contain the reasoning behind invocation of the “material adverse change” clause, and be signed by a person with authority to represent the respective RTO or ISO in such action.

**a. Filing**

55. ISO-NE states that its currently effective material adverse change provisions largely comply with Order No. 741. However, ISO-NE proposes to add two examples to the provisions: (1) the sanctioning of the market participant or non-market participant transmission customer or any of its principals by the Commission, the Securities and Exchange Commission, the CFTC, any exchange monitored by the National Futures Association, or any entity responsible for regulating activity in energy markets; and (2) a significant change in the market participant’s or non-market participant transmission customer’s market capitalization.<sup>49</sup>

56. ISO-NE further states that, when a sanction or a change in market capitalization results in a material adverse change in the financial status of a market participant or non-market participant transmission customer, that market participant or non-market participant transmission customer will be required to inform ISO-NE in writing within five Business Days of the material adverse change.

57. ISO-NE proposes to revise the Financial Assurance Policy so that, if it determines that there has been a material adverse change, then it may require a different form of financial assurance, an additional amount of financial assurance, or both. In addition, under the proposed changes, ISO-NE states that it will have added flexibility to require that the market participant or non-market participant transmission customer cease one or more transactions in the New England markets or take other measures to restore ISO-NE’s confidence that the entity can safely transact in the New England markets.<sup>50</sup>

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<sup>47</sup> *Id.* P 149-50.

<sup>48</sup> *Id.* P 151.

<sup>49</sup> ISO-NE Filing at 21-22.

<sup>50</sup> *Id.* at 23.

58. ISO-NE explains that the proposed revisions state that any additional amount of financial assurance required as a result of a material adverse change must be sufficient, as reasonably determined by ISO-NE, to cover the market participant's or non-market participant transmission customer's potential settled and unsettled liability or obligations. In addition, the revisions provide that, if the additional amount of financial assurance required is equal to or greater than \$25 million, then ISO-NE's Chief Financial Officer must first consult, to the extent practicable, the ISO-NE's Chief Executive Officer, Chief Operating Officer, and General Counsel.<sup>51</sup>

59. Finally, ISO-NE states that, if it determines that there is a material adverse change in the financial condition of a market participant or non-market participant transmission customer, then it must provide to that market participant or non-market participant transmission customer a signed written notice two Business Days before taking any action, and the notice must explain the reasons for ISO-NE's determination of the material adverse change.<sup>52</sup>

**b. Protests and Comments**

60. Indicated Participants argue that the Commission should direct RTOs and ISOs to modify their proposals to clarify that RTOs and ISOs will consider the totality of circumstances to determine whether a material adverse change has occurred. Indicated Participants also argue that RTOs and ISOs should clarify that they, rather than market participants, will monitor conditions associated with a material adverse change. Indicated Participants argue that the Commission did not require that each market participant itself monitor and report on each such circumstance, and that, during stakeholder conferences, RTOs and ISOs indicated that they would be responsible for monitoring these additional criteria.<sup>53</sup> To the extent that market participants will be responsible for monitoring any additional items, Indicated Participants and EPSA argue that market participants should not be required to purchase additional software review packages, such as Moody's KMV Expected Default Frequency, in order to remain in compliance with RTO/ISO requirements.

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Indicated Participants Comments at 18 (citing Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 148-149).

**c. Commission Determination**

61. We have reviewed the RTO's proposal and its compliance with Order No. 741, and we find it to be just and reasonable as discussed further below.

62. The Commission intended in Order No. 741 to reduce ambiguity as to when a market administrator may request additional collateral due to a material adverse change, by requiring each RTO and ISO to list in its tariff events that could trigger a collateral call. However, the Commission also required that this list be merely illustrative, rather than exhaustive, allowing each RTO and ISO reasonable discretion to independently determine whether a material adverse change that would warrant seeking additional collateral has occurred. In this regard, RTOs and ISOs are responsible for administering and otherwise overseeing their markets, and as such, the Commission expects them to exercise their reasonable discretion in deciding in what circumstances to seek additional collateral. The Commission declines to limit an RTO's or ISO's exercise of such discretion and so we will not require each RTO and ISO to modify its proposed tariff revisions to expressly require that it must consider the totality of the circumstances in determining whether a material adverse change has occurred.

63. The Commission does not see a need to require that RTOs and ISOs clarify that they, rather than market participants, have the sole responsibility to monitor conditions associated with a material adverse change, as Indicated Participants request. In Order No. 741, the Commission required only that each RTO and ISO revise its tariff to establish and clarify when a market administrator may invoke a "material adverse change clause". Under the tariff revisions submitted here, which we find to be in compliance with that directive, ISO-NE ultimately will be responsible for determining, based on information obtained as part of its monitoring efforts, whether a material adverse change under its tariff has occurred and will be responsible for taking appropriate actions. Order No. 741 did not address responsibility for monitoring conditions associated with material adverse changes. Certainly, market participants would likely be among the first to know when sanctions or changes in market capitalization have occurred and whether they result in a material adverse change. They would therefore be in a better position than ISO-NE to act timely to protect the market. We anticipate that every market participant has, or will have, sufficient resources for the participant to be aware of and report those events and circumstances identified by the ISO/RTO's illustrative list of material adverse changes. However, we impose no requirement on market participants to themselves monitor the market, and there is nothing in ISO-NE's proposal which requires market participants to purchase additional software review packages or proprietary tools to conduct monitoring. Therefore, the Commission declines the Indicated Participants' and EPISA's requested clarification on this matter.

64. The Commission finds that ISO-NE's proposed revisions to its material adverse change provisions to be consistent with the directives of Order No. 741 and to be just and reasonable. The additional two examples provided by ISO-NE appropriately clarify what

ISO-NE considers to be a material adverse change. Additionally, ISO-NE's proposed revisions that allow it to require additional financial assurance, add flexibility to require market participants to cease one or more transactions in the New England markets, and provide notice within two Business Days before taking action against a market participant appear reasonable (and also are unopposed). Therefore, the Commission accepts the proposed revisions effective October 1, 2011.

**6. Grace Period to "Cure" Collateral Posting**

65. In Order No. 741, the Commission directed each RTO and ISO to revise its tariff to allow no more than two days to post additional collateral due to invocation of a "material adverse change" clause or other provision of its tariff.<sup>54</sup>

**a. Filing**

66. ISO-NE states that its current provisions regarding cure period allow for five days. Therefore, to become compliant with Order No. 741, ISO-NE proposes to reduce the time period to cure a collateral call from five days to two days. In addition, ISO-NE proposes to establish a two-day cure period in all cases when a credit test percentage<sup>55</sup> exceeds 100 percent due to a downgrade in a market participant's investment grade rating. Additionally, ISO-NE proposes that, if the resulting grade is lower than BBB-/Baa3, then the market participant will have only one Business Day to cure.<sup>56</sup>

67. No protests were filed on this proposal.

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<sup>54</sup> Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 160.

<sup>55</sup> Section III.B.1 of ISO-NE's Financial Assurance Policy identifies three credit test percentages: (1) Market Credit Test Percentage; (2) FTR Credit Test Percentage; and (3) Transmission Credit Test Percentage. These credit test percentages describe where the financial assurance provided by a market participant will be applied. For example, financial assurance shall first be allocated so as to ensure that the market participant's Market Credit Test Percentage is no greater than 100 percent. Any financial assurance that remains after the first allocation shall then be allocated so as to ensure that the market participant's FTR Credit Test Percentage is no greater than 100 percent. Finally, any financial assurance that remains after the second allocation shall then be allocated so as to ensure that the market participant's Transmission Credit Test Percentage is no greater than 100 percent.

<sup>56</sup> ISO-NE Filing at 23-24.

**b. Commission Determination**

68. The Commission finds that ISO-NE's proposed revisions are compliant with the directive of Order No. 741. Therefore, the Commission accepts ISO-NE's revisions to become effective October 1, 2011.

The Commission orders:

(A) ISO-NE is hereby directed to make a compliance filing within 90 days of the date of issuance of this order, as discussed in the body of this order.

(B) ISO-NE's compliance filing is hereby conditionally accepted, subject to the compliance filing ordered above, effective October 1, 2011, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.