

137 FERC ¶ 61,056
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER11-3891-000

ORDER ACCEPTING FORWARD CAPACITY AUCTION RESULTS FILING AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued October 20, 2011)

1. In this order, the Commission accepts a filing by ISO New England Inc. (ISO-NE) detailing the results of its fifth Forward Capacity Auction (FCA), to become effective October 25, 2011, except for the dynamic de-list bid submitted by Entergy Nuclear Power Marketing (Entergy) for the Vermont Yankee Power Station (Vermont Yankee), which we accept, suspend for a nominal period, effective October 25, 2011, subject to refund, and set for hearing and settlement judge procedures.

I. Background

2. As discussed in prior orders,¹ on March 6, 2006, ISO-NE filed a Settlement Agreement establishing the framework for New England's Forward Capacity Market (FCM). Under the FCM mechanism, ISO-NE provides capacity payments to resources that provide capacity to the New England region, and capacity resources compete, through the annual FCA, to be selected to provide capacity on a three-year forward basis. ISO-NE conducted its fifth FCA on June 6 and 7, 2011 for the June 1, 2014 through May 31, 2015 Capacity Commitment Period.

¹ See, e.g., *ISO New England Inc.*, 130 FERC ¶ 61,145 (2010); *ISO New England Inc.*, 127 FERC ¶ 61,040 (2009); *ISO New England Inc.*, 123 FERC ¶ 61,290 (2008). See generally *Devon Power LLC*, 115 FERC ¶ 61,340 (FCM Settlement Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006) (FCM Rehearing Order), *aff'd in relevant part sub nom. Maine Public Utilities Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *order on remand*, *Devon Power LLC*, 126 FERC ¶ 61,027 (2009).

3. On June 27, 2011, ISO-NE submitted a filing to the Commission containing the results of the fifth FCA (fifth FCA Results Filing). ISO-NE states that, pursuant to section III.13.8.2 of its Transmission, Markets, and Services Tariff (Tariff), the filing includes the final set of Capacity Zones resulting from the auction, the Capacity Clearing Price in each of those Capacity Zones and the Capacity Clearing Price associated with certain imports pursuant to section III.13.2.3.3(d), a list of resources that received Capacity Supply Obligations in each Capacity Zone, and the amount of those Capacity Supply Obligations.

4. Pursuant to ISO-NE's Tariff, the FCA was required to procure capacity equal to the Net Installed Capacity Requirement (NICR) of 33,200 MW.² In its fifth FCA Results Filing, ISO-NE states that the cost of new entry (CONE) for the fifth FCA was set at \$5.349/kW-month for the Maine and Rest-of-Pool Capacity Zones. Accordingly, the fifth FCA starting price was \$10.698/kW-month or two times CONE.

5. ISO-NE states that, when the auction reached the price floor of \$3.209/kW-month, 3,718 MW of excess capacity remained in the auction. ISO-NE states that the auction resulted in one Capacity Zone for the entire New England region. In accordance with the Tariff, the auction concluded when the auction floor price was reached, with load expected to pay only NICR times the floor price.

6. Because the auction cleared at the floor price with capacity remaining in excess of the NICR and because the Tariff specifies that load will pay no more than NICR times the floor price, resources will choose between receiving a Capacity Supply Obligation of their full cleared capacity at an effective payment rate, or receiving the floor price of \$3.209/kW-month and prorating their Capacity Supply Obligation by the same ratio. Thus, the auction will purchase between 33,200 MW, which is the NICR, and 36,918 MW, depending on the proration elections of the auction participants.

7. Most relevant here, FCM rules allow an existing resource to opt out of the market by submitting a dynamic de-list bid. Dynamic de-list bids must be submitted during the auction, below the price of 0.8 times CONE, and are not subject to review by the Internal

² The NICR is the quantity of supply necessary to meet the reliability requirements for the New England Control Area and is here used interchangeably with the term ICR, or installed capacity requirement. The "net" in NICR refers to the deduction of Hydro Quebec Interconnection Capability Credits. The NICR of 33,200 MW for the 2014-2015 Commitment Period was approved by order in Docket No. ER11-3048-000. *See ISO New England, Inc.*, 135 FERC ¶ 61,135 (2011) (accepting ISO-NE's proposed installed capacity requirement, Hydro Quebec interconnection capability credits, and related values).

Market Monitor.³ Unless ISO-NE finds that the relevant resource is needed for reliability,⁴ that resource will withdraw from the auction when the auction clearing price drops below its dynamic de-list bid. Section III.13.8.2 of ISO-NE's Tariff requires ISO-NE to enumerate any de-list bids it rejects for reliability reasons. ISO-NE states that it reviewed 201⁵ de-list bids to determine if those resources were needed for reliability. Approximately 1,775 MW of de-list bids were reviewed for reliability and, of that total, 1,170 MW of de-list bids were cleared to leave the auction.

8. ISO-NE states that, for reliability reasons, it rejected two non-price retirement (NPR) requests submitted by Dominion Energy Marketing, Inc. (Dominion) for Salem Harbor Units 3 and 4. A resource with a rejected NPR nevertheless has the option to retire.⁶ On May 11, 2011, Dominion informed ISO-NE that it elected to retire the Salem Harbor Units 3 and 4 beginning with the June 1, 2014 Capacity Commitment Period and, therefore, these resources were not included in the fifth FCA.

9. ISO-NE states that it also rejected, for reliability reasons, a dynamic de-list bid submitted by Entergy for Vermont Yankee. According to ISO-NE, although Vermont Yankee was de-listed at \$4.278/kW-month, its compensation is subject to Commission review and approval pursuant to ISO-NE Tariff section III.13.2.5.2.5.1(a)(i). Through the testimony of Mr. Stephen Rourke, ISO-NE explains that it rejected the bid for reliability reasons, because allowing the resource to leave the market would have resulted in a violation of NERC, Northeast Power Coordinating Council (NPCC), or ISO-NE reliability-related criteria.

10. Additionally, as required by section III.13.8.2(b) of the Tariff, ISO-NE provided documentation regarding the competitiveness of the FCA, including certification that all entities offering and bidding in the auction were properly qualified in accordance with Tariff section III.13.1 and that the auction was conducted in accordance with Tariff section III.13.

³ Alternatively, existing resources submit a static de-list bid. Under ISO-NE's current Tariff, a static de-list bid must be submitted prior to the auction, at or above the price of 0.8 times CONE, and is subject to review by the Internal Market Monitor.

⁴ ISO-NE Tariff § III.13.2.5.2.5.

⁵ This amount includes 45 permanent and static de-list bids and 156 dynamic de-list bids.

⁶ ISO-NE Tariff § III.13.2.5.2.5.3(a)(iii).

II. Notice of Filing, Interventions, Comments, Protests, and Answers

11. Notice of the filing was published in the *Federal Register*, 76 Fed. Reg. 39,081 (2011), with interventions and protests due on or before August 11, 2011.

12. New England Power Pool Participants Committee (NEPOOL); Exelon Corporation; Dominion Resources Services, Inc.; Green Mountain Power Corporation; New England Conference of Public Utilities Commissioners; and Northeast Utilities Service Company filed timely motions to intervene. The Maine Public Utilities Commission, the New Hampshire Public Utilities Commission, and the Department of Public Utilities of the Commonwealth of Massachusetts filed notices of intervention. The Massachusetts Attorney General (Mass AG) and Vermont Department of Public Service (Vermont DPS) filed timely motions to intervene and protest. Central Vermont Public Service Corporation, and Entergy and Entergy Nuclear Vermont Yankee, LLC filed motions to intervene out-of-time. ISO-NE, Entergy, and the Vermont DPS filed answers.

III. Discussion

A. Procedural Issues

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and the timely-filed unopposed motions to intervene serve to make the entities filing them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), we will grant the motions to intervene out-of-time, given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

14. 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. We will accept the answers filed by ISO-NE, Entergy, and Vermont DPS because they have provided information that assisted us in our decision-making process.

B. Auction Results

15. As the Commission has stated in prior orders, ISO-NE is required to file the results of each FCA with the Commission, and we must evaluate the filing to determine whether ISO-NE conducted the FCA in accordance with its market rules.⁷ The fifth FCA

⁷ See, e.g., *ISO New England Inc.*, 130 FERC ¶ 61,145, at P 33 (2010); *ISO New England Inc.*, 133 FERC ¶ 61,230, at P 28 (2010).

acquired the NICR of 33,200 MW, clearing one capacity zone for all of New England, with an excess supply of 3,718 MW at the floor price of \$3.209/kW-month (equivalent to 60 percent of CONE). The Commission finds that ISO-NE has demonstrated the fifth FCA was conducted according to the FCM rules, and we accept the filing, effective October 25, 2011, except for the appropriate level of compensation for the rejected Vermont Yankee dynamic de-list bid, which we accept, suspend for a nominal period, effective October 25, 2011, subject to refund, and set for hearing and settlement judge procedures, as discussed below.

C. Compensation for Vermont Yankee Power Station

16. Vermont Yankee de-listed from the fifth FCA at a price of \$4.278/kW-month, but, as stated in its pleadings, ISO-NE rejected Vermont Yankee's de-list bid for reliability reasons. Under section III.13.2.5.2.5.1(a)(i) of the Tariff, because the rejected de-list bid was a dynamic de-list bid, the Commission must approve the de-list bid to ensure that the compensation to be paid to Vermont Yankee is just and reasonable.⁸

1. Protest and Responses

17. Vermont DPS protests the fifth FCA results Filing and, in particular, asserts that Entergy's \$4.278/kW-month dynamic de-list bid for Vermont Yankee is not just and reasonable because it substantially exceeds the unit's going-forward costs, which it asserts is the Commission's measure in determining just and reasonable compensation for resources whose dynamic de-list bids are rejected for reliability reasons.⁹ Vermont DPS argues that the just and reasonable rate for Vermont Yankee should be the fifth FCA floor

⁸ The relevant Tariff provision reads: "[A]ccepted Dynamic De-list Bids filed with the Commission as part of the [Forward Capacity Auction] results filing are subject to review and approval by the Commission pursuant to the 'just and reasonable' standard of [s]ection 205 of the Federal Power Act." ISO-NE Tariff § III.13.2.5.2.5.1(a)(i).

⁹ In support of its argument, Vermont DPS submits testimony from Richard Hahn, which includes methods to calculate going-forward costs. Mr. Hahn argues that use of the prorated floor price of \$2.855/kW-month rather than the submitted de-list bid is more appropriate and would reduce costs in the affected load zones by up to \$10.3 million.

price of \$3.209/kW-month.¹⁰ Alternatively, Vermont DPS seeks an evidentiary hearing to determine Vermont Yankee's just and reasonable level of compensation.¹¹

18. Vermont DPS argues that while the Commission has previously found it just and reasonable to compensate a de-list bid rejected for reliability reasons at the level of the offered bid, this position is premised on the assumption that the de-list bid reflects the unit's going-forward costs.¹² However, Vermont DPS argues that it is not reasonable to assume that Vermont Yankee's \$4.278/kW-month dynamic de-list bid reflects the unit's actual going-forward costs. Testimony submitted by Vermont DPS utilizes three methods to develop a proxy going-forward cost level for Vermont Yankee. These methods produce a range of going-forward costs from \$0.00-kW/month to \$2.30/kW-month, all of which are less than the fifth FCA floor price, which Vermont DPS asserts should be the level of compensation for Vermont Yankee.

19. Vermont DPS alleges that Vermont Yankee was likely aware that there was a good chance the plant would be required for reliability in the fifth FCA. Likewise, Vermont DPS argues that Vermont Yankee presumably was aware that there was a high likelihood that the fifth FCA would clear at the floor price, as it had in the fourth FCA. Given these circumstances, Vermont DPS alleges, Vermont Yankee had an incentive to submit a dynamic de-list bid slightly under 80 percent of CONE in hope of having its bid rejected for reliability reasons and being paid its de-list bid rather than the floor price, and without any Internal Market Monitor review.

20. ISO-NE states in its answer to the protests of Vermont DPS and the Mass AG that it takes no position on the appropriate compensation level for Vermont Yankee. ISO-NE does request, however, that if the issue is set for evidentiary hearing, the Commission approve the remaining results for the fifth FCA, since the results will be utilized in the qualification process for the upcoming sixth FCA. ISO-NE states that Entergy submitted the Vermont Yankee de-list bid in accordance with ISO-NE's Tariff, which allows an existing resource to submit a dynamic de-list bid at prices below 0.8 times CONE during the auction.

¹⁰ In its protest, Vermont DPS argues that the appropriate level of compensation for Vermont Yankee was the lower, prorated floor price. In its answer, however, it agrees that compensation should be at the floor price, or \$3.209/kW-month.

¹¹ The Mass AG incorporates by reference the arguments in the Vermont DPS protest and requests that the Vermont Yankee de-list bid be set at the fifth FCA prorated floor price.

¹² Vermont DPS Protest at 7-10.

21. In its answer to Vermont DPS, Entergy states that it believes compensation set at its dynamic de-list bid price is just and reasonable because it faces potential replacement cost exposure. Entergy asserts that it faces uncertainty as to the continued operation of the Vermont Yankee plant, due to an ongoing licensing dispute with the State of Vermont. Entergy argues that it reasonably sought to avoid a capacity supply obligation for the June 2014 to May 2015 Capacity Commitment Period by bidding in a manner intended to minimize its risks, including its replacement cost exposure, if ISO-NE rejected its bid for reliability reasons and yet the State of Vermont did not allow Vermont Yankee to operate beyond 2012.¹³ Entergy submits that, under ISO-NE's Tariff,¹⁴ Entergy is exposed to a potential replacement cost of two times CONE if it cannot deliver its Vermont Yankee capacity. Entergy also notes that a similar de-list bid for Vermont Yankee was accepted by the Commission in the fourth FCA and ISO-NE has confirmed that its current de-list bid complied with ISO-NE's tariff.

22. In its answer, Vermont DPS contends that Entergy's arguments about its alleged replacement cost risk are unsupported, speculative, and remote, and do not justify compensation at its de-list bid level. Vermont DPS asserts first that Entergy's arguments are premised largely on unsupported and undocumented claims about what Entergy was told by ISO-NE about how Vermont Yankee's capacity obligation would be addressed if the plant shuts down. Moreover, Vermont DPS argues, the fact that ISO-NE might enter a demand bid for Vermont Yankee of two times CONE in the third annual reconfiguration auction does not mean that Entergy will incur a replacement cost risk of two times CONE. Vermont DPS asserts that the level of any replacement cost to Entergy would depend on the clearing price of the third annual reconfiguration auction for the 2014-2015 Commitment Period or the price of other bilateral capacity contracts.

¹³ Entergy notes that Vermont Yankee has been re-licensed by the Nuclear Regulatory Commission to continue operations through March 21, 2032. However, according to Entergy, the State of Vermont claims that its law prohibits Vermont Yankee from operating beyond March 21, 2012 unless it first receives approval from the Vermont General Assembly and an amended certificate of public good from the Vermont Public Service Board. *See* Entergy Answer at 2-3.

¹⁴ Section III.13.4.2.1.3(b) states that if “[ISO-NE] determines that the plan does not demonstrate that the resource will be able to provide the necessary amount of capacity by the start of all months in the Capacity Commitment Period in which the resource has a Capacity Supply Obligation, then the ISO shall enter a demand bid at two times CONE on behalf of the resource (with all payments, charges, rights, obligations, and other results associated with such bid applying to the resource as if the resource itself had submitted the bid).” In this case, Entergy states that two times CONE would be \$10.698/kW-month for the fifth FCA.

Vermont DPS notes that the capacity price resulting from the third annual reconfiguration auction for the 2011-2012 Commitment Period was just \$0.93/kW-month. Additionally, Vermont DPS states that, under the ISO-NE Tariff, Entergy could be paid its de-list bid price even if Vermont Yankee is not operating. In this circumstance, according to Vermont DPS, Entergy's payments from ISO-NE would likely exceed the cost of meeting its capacity obligation from other available sources. Vermont DPS argues that under this scenario, Entergy would actually profit from the imposition of the "penalty." Finally, Vermont DPS argues that even if Entergy does face some replacement cost risk, Entergy has not established any correlation between the level of replacement cost risk it allegedly faces and the extra compensation it insists it should receive if Vermont Yankee is not authorized to continue operating past 2012.

23. Vermont DPS also asserts that Entergy's decision to submit a dynamic rather than a static de-list bid suggests that it did not think it would be able to justify a de-list bid above 0.8 times CONE to the Internal Market Monitor based on its replacement cost risk argument, preferring instead to take its chances that its de-list bid slightly under 0.8 times CONE would be accepted without detailed scrutiny by the Commission. The de-list bid resulting from such an approach, argues Vermont DPS, warrants particular scrutiny by the Commission.

24. Finally, Vermont DPS does not object to Vermont Yankee being compensated at the non-prorated floor price of \$3.209/kW-month.

2. Commission Determination

25. ISO-NE's Tariff, Section III.13.2.5.2.5.1(a)(i), provides that de-list bids rejected for reliability reasons "are subject to review and approval by the Commission pursuant to the 'just and reasonable' standard of Section 205 of the Federal Power Act." Entergy's dynamic de-list bid for Vermont Yankee raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

26. Our preliminary analysis indicates that Entergy's dynamic de-list bid for Vermont Yankee has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.¹⁵ Therefore, we will accept Entergy's dynamic de-list bid for Vermont Yankee, as set forth in ISO-NE's fifth FCA

¹⁵ In the fourth FCA results order, the Commission noted that although it was accepting Vermont Yankee's de-list bid of \$3.933/kW-month, "there may be situations in which this Commission may find this compensation unreasonable." *See ISO New England, Inc.*, 133 FERC ¶ 61,230 at P 18.

Results Filing, suspend it for a nominal period, effective October 25, 2011, subject to refund, and set it for hearing and settlement judge procedures.

27. At the hearing, the presiding judge shall consider the justness and reasonableness of Entergy's dynamic de-list bid for Vermont Yankee, with particular attention to the following issues: (1) whether, under ISO-NE's Tariff, Entergy would be responsible for replacement costs and if so, the likely amount of these costs; and (2) whether Entergy's going-forward costs properly include replacement cost risk and whether the expected replacement cost associated with this risk is accurately reflected in its dynamic de-list bid.

28. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011). If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

29. The Commission emphasizes that it is always supportive of parties' efforts to settle disputed matters and encourages resolution of this case through settlement, if possible.

¹⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov -- click on Office of Administrative Law Judges).

The Commission orders:

(A) ISO-NE's fifth FCA Results Filing, except Entergy's dynamic de-list bid submitted for Vermont Yankee in ISO-NE's fifth FCA, is hereby accepted for filing, effective October 25, 2011, as discussed in the body of this order.

(B) Entergy's dynamic de-list bid submitted for Vermont Yankee in ISO-NE's fifth FCA, as set forth in ISO-NE's fifth FCA Results Filing, is hereby accepted, suspended for a nominal period, effective October 25, 2011, subject to refund, and set for hearing and settlement judge procedures, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Entergy's dynamic de-list bid for Vermont Yankee submitted in ISO-NE's fifth FCA. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(E) Within sixty days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.