138 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

	Docket Nos.
ISO New England, Inc. and New England Power Pool Participants Committee	ER10-787-005 EL10-50-003 EL10-57-003
New England Power Generators Association v. ISO New England Inc.	ER10-787-006 EL10-50-004 EL10-57-004
PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC v. ISO New England Inc.	ER10-787-007 EL10-50-005 EL10-57-005

ORDER ON REHEARING AND CLARIFICATION AND ORDER ACCEPTING COMPLIANCE FILINGS

(Issued January 19, 2012)

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1. In this order, we address requests for rehearing and clarification of the Commission's April 13, 2011 order in this proceeding.[1] We maintain that an offer floor mitigation regime using asset-class-specific benchmarks appropriately mitigates buyer-side market power. We also continue to find that more comprehensive zonal modeling, in conjunction with mitigation rules that address seller-side market power, is appropriate. However, we grant partial rehearing on one issue,[2] and we grant clarification on two issues.[3] We also accept ISO New England Inc.'s (ISO-NE) May 13, 2011 compliance filing, as updated on August 22, 2011, establishing a timeframe for submitting revisions to the ISO-NE Tariff (Tariff) to comply with the April 13 Order.

I. Background

A. FCM

2. ISO-NE administers a forward market for capacity (FCM), in which resources compete in an annual Forward Capacity Auction (FCA) to provide capacity on a three-year-forward basis. Providers whose capacity is taken in the FCA acquire Capacity

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[1] *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011) (April 13 Order).

[2] Specifically, we grant partial rehearing regarding the mitigation of out-of-market (OOM) resources clearing after the third Forward Capacity Auction, but prior to the implementation of new market rules required by the April 13 Order.

[3] Specifically, we grant clarification on the issue of whether categorical exemptions from offer floor mitigation can be introduced and developed through the ISO-NE stakeholder process, and regarding whether the ISO-NE stakeholder process may consider the costs to be included in the demand response benchmark.

Supply Obligations, which they must fulfill approximately three years later.[4] ISO-NE held the first two FCAs in 2008, the third FCA in October 2009, the fourth FCA in August 2010 and the fifth FCA in June 2011. The sixth FCA will be held in April 2012.

B. The Joint Filing and Related Complaints

3. As recounted in earlier orders,[5] on February 22, 2010, under section 205 of the Federal Power Act (FPA),[6] ISO-NE and the New England Power Pool Participants Committee (NEPOOL) submitted significant revisions to the FCM market rules (the Joint Filing) as set forth in the ISO-NE Tariff. These proposed revisions received more than 70 percent support in the Participants Committee, and thus passed over the strenuous objection of the entire generation sector and much of the supply sector. New England Power Generators Association (NEPGA) and PSEG Energy Resource & Trade LLC, *et al.* (Joint Complainants) subsequently filed complaints against ISO-NE under section 206 of the FPA,[7] both of which assailed the substance of the proposed FCM market rule revisions in the Joint Filing and presented alternative proposals.

C. The Paper Hearing Process

4. The Commission ruled on the Joint Filing in an order issued April 23, 2010. The Commission found certain proposed Tariff revisions to be just and reasonable, and accepted them without suspension. The Commission stated that its preliminary analysis indicated that the remainder of the filing had not been shown to be just and reasonable and that it may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. The Commission suspended these remaining Tariff provisions for a nominal period, made them effective on April 23, 2010, and set them for paper hearing.

5. The issues set for hearing concerned Tariff provisions relevant to the mitigation of buyer-side market power (then referred to as the Alternative Price Rule, or APR); the

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[4] The Commission accepted a portion of the market rules that implemented the FCM on April 16, 2007 (*ISO New England Inc*., 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007)), and the remainder on June 5, 2007 (*ISO New England Inc*., 119 FERC ¶ 61,239 (2007), *reh'g denied*, 122 FERC ¶ 61,171 (2008)).

[5] *ISO New England Inc.*, 131 FERC ¶ 61,065 (2010) (April 23, 2010 Order), *order on reh'g and clarification*, 132 FERC ¶ 61,122 (2010). *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011) (April 13 Order).

[6] 16 U.S.C. § 824d (2006).

[7] 16 U.S.C. § 824e (2006).

modeling of capacity zones and associated mitigation of seller-side market power; and the proper value of Cost of New Entry (CONE). The Commission further consolidated the complaints filed by NEPGA and Joint Complainants with the provisions of the Joint Filing set for hearing "so as to ensure that NEPGA and Joint Complainants are able to obtain full consideration of the arguments and alternative proposals they have raised in their complaints."[8] Parties were given the opportunity to submit multiple briefs. In the first round of briefs, ISO-NE did not provide further support for the Joint Filing, but instead submitted an entirely new proposal on the paper hearing issues (July 1 Proposal).

D. The April 13 Order

6. The Commission issued an order on the paper hearing on April 13, 2011.[9] The Commission found unjust and unreasonable the buyer-side market power mitigation regimes proposed in the Joint Filing and ISO-NE's July 1 Proposal. The Commission instead directed ISO-NE to implement an offer floor mitigation regime using asset-class-specific benchmarks. The Commission accepted both the Joint Filing proposal that out-of-market (OOM) resources that had cleared in the first three FCAs (so called "historical" OOM capacity) should not be carried forward for future mitigation and the Joint Filing proposal to extend the price floor through FCA 6. The Commission accepted ISO-NE's July 1 Proposal to "model all zones all the time" and its proposed treatment of seller-side market power in those zones.[10] The Commission found the final issue set for hearing, the proper value of CONE, to be moot. The Commission required ISO-NE to retain only the function of the CONE parameter that determined the price floor and accepted ISO-NE's proposal to eliminate all other uses of CONE prospectively.

E. Requests for Rehearing and/or Clarification of the April 13 Order, and Answers

7. Requests for rehearing and/or clarification of the April 13 Order were filed by the entities noted in the appendix to this order.

8. Answers were filed by the entities noted in the appendix to this order. NEPGA filed an answer to an answer.

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[8] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 17.

[9] April 13 Order, 135 FERC ¶ 61,029.

[10] To "model all zones all the time" means that theoretical capacity zones are modeled in advance of the auction, and if, during any auction for the capacity commitment period, transmission constraints bind, capacity prices for that particular zone or zones will separate from the overall ISO-NE capacity price.

9. On May 19, 2011, comments were filed by the American Public Power Association, *et al.*, in both this docket and in *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-000. These commenters expressed concern that the Commission's actions both in this docket and in Docket No. ER11-2875-000 will impair the ability of Load Serving Entities (LSE) to meet their capacity needs through self-supply. Because these commenters do not specifically seek rehearing or clarification, however, we will not address their concerns in this order.

F. Compliance Filing, Comments, and Request for Technical Conference

10. ISO-NE made a compliance filing on May 13, 2011 providing the Commission with a proposed schedule for filing market rules in accordance with the April 13 Order.

11. Notice of the filing was published in the *Federal Register*, with interventions and protests due on or before June 3, 2011.[11] Timely comments were filed by NEPGA, State Commissions and Associated Parties, and Public Systems. On August 22, 2011, ISO-NE filed an update to that compliance filing.

12. Additionally, on July 1, 2011, Public Systems filed a request for a technical conference on the treatment of self-supplied resources. On July 7, 2011, NEPGA filed an answer to that request.

II. Rehearing and Clarification

A. Procedural Issues

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority.[12] We are not persuaded to accept the answers to the petitions for rehearing and clarification filed by State Commissions and Associated Parties, NEPGA, NEPOOL, and HQ-US, and the answer filed by NEPGA to State Commissions and Associated Parties' answer. We will, therefore, reject them.

B. Buyer-Side Mitigation

14. In their requests for rehearing and clarification, parties raise the following issues relevant to the mitigation mechanism directed in the April 13 Order.

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[11] 76 Fed. Reg. 30699 (2011).

[12] 18 C.F.R. § 385.213(a)(2) (2011).

1. The Joint Filing APR Proposal

a. April 13 Order

15. In the April 13 Order, the Commission found the Joint Filing APR proposal to be unjust and unreasonable. The Commission stated that the concerns it had expressed in setting the issue for paper hearing had not been satisfactorily addressed, including concerns that the proposed APR triggering conditions were too narrow, and that the proposed price adjustments failed to fully mitigate the suppressing effects of OOM capacity on the FCA price. The Commission found that parties supporting the Joint Filing APR proposal disregarded the fact that OOM resources can affect prices even when no new capacity is needed. The Commission noted that it had previously stated that "all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address."[13]

b. Requests for Rehearing

16. NSTAR/UI contend that, instead of relying on substantial evidence as required by the FPA, the Commission's sole basis for rejection of the Joint Filing APR proposal was that the proposal did not account for the hypothetical circumstance posed by the Commission in which OOM capacity could depress FCM prices when no new entry is required. According to NSTAR/UI, this hypothetical concern is implausible. NSTAR/UI state that the record is clear that resources considered by the Commission to be OOM have not affected any auction conducted to date, since existing capacity has been more than ample to meet the installed capacity requirement with a comfortable margin. NSTAR/UI further state that price suppression has not been the motive for introducing OOM resources into the market. Moreover, NSTAR/UI assert that an OOM resource recovering less than its cost is a matter between the developer and the sponsor. NSTAR/UI argue that the Commission did not have any evidence to support its abrogation of the market-based FCM construct that it found just and reasonable in 2006. If necessary, NSTAR/UI argue, the Commission should, instead, have allowed NEPOOL to determine whether the membership wished to pursue an amendment of the APR rule.[14]

c. Commission Determination

17. We reject NSTAR/UI's request for rehearing on this issue. The Commission rejected the Joint Filing APR proposal because the evidence showed that the proposal

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[13] April 13 Order, 135 FERC ¶ 61,029 at P 61, *citing N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008).

[14] NSTAR/UI Rehearing Request at 26.

was not an appropriate method of buyer-side market power mitigation for the ISO-NE capacity market, considering past and present market rules, past and present market conditions, and likely future scenarios.

18. NSTAR/UI erroneously contend that the Commission's sole basis for rejecting the Joint Filing APR proposal is that it did not respond to a hypothetical circumstance posed by the Commission itself. However, as noted by ISO-NE, NEPOOL, and Potomac Economics, ISO-NE's external market monitor, there are numerous concerns with the Joint Filing APR proposal. Specifically, in proposing the Joint Filing APR, ISO-NE and NEPOOL acknowledged that the proposal "does not resolve all the major issues regarding the FCM design,"[15] and that "future stakeholder processes will continue to consider how to improve the FCM and, among other issues, consider further refining the definition of OOM resources, when the APR should be triggered, and how the price should be set under the APR."[16] Further, the external market monitor criticized the Joint Filing APR proposal for only providing for an APR adjustment when OOM capacity exceeds the entire demand for new capacity, thus excluding situations when new capacity is not needed and when the OOM quantity is less than the amount of new capacity needed. According to the external market monitor, in such cases, "OOM capacity affects prices but APR does not correct for the effects."[17] The Commission agrees.

19. Moreover, we disagree with NSTAR/UI that the possibility of OOM capacity depressing FCM prices is "implausible." Under the Joint Filing APR proposal, any OOM resources bid into the FCA would be added to the supply stack, potentially displacing what would otherwise be the marginal, price-setting resource. As NSTAR/UI assert, in previous auctions, OOM capacity did not have an effect on the FCA clearing price, since existing capacity was more than ample to meet the installed capacity requirement, and since these auctions utilized a price floor that prevented prices from falling below a pre-determined level. However, the fact that OOM capacity has not affected the FCA clearing price in the past does not mean that it will not do so in the future. On the contrary, in its order setting aspects of the Joint Filing proposal for paper hearing, the Commission stated that it anticipated terminating the price floor in its final order accepting an appropriate APR mechanism. The Commission also noted that it generally does not approve of price floors, since it would prefer that the market be allowed to clear naturally.[18] Without a price floor establishing a minimum clearing price – and the price

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[15] Joint Filing at 3.

[16] *Id.* at 10.

[17] External Market Monitor First Brief at 4.

[18] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 97.

floor is scheduled to terminate shortly – it is more likely that OOM resources will depress the clearing price, even if no new capacity is needed.

20. Regarding NSTAR/UI's statements that most OOM entry is not motivated by price suppression, and that the failure of an OOM resource to recover its cost is a matter between that resource's developer and sponsor, we note that the Commission has found that "OOM capacity suppresses price regardless of intent."[19] Moreover, because other resources in the FCA will be affected by such price suppression, the Commission has a duty to ensure just and reasonable rates by requiring that bids in the FCA represent a resource's true cost of entry, regardless of agreements between a resource's developer and sponsor. Thus, we do not find that such statements sufficiently support the Joint Filing proposal.

21. Additionally, we disagree with NSTAR/UI that, instead of rejecting the Joint Filing APR proposal, the Commission should have allowed ISO-NE stakeholders to determine whether to amend the APR rule. As the Commission noted in the April 13 Order, "the stakeholder process had arrived at a seeming impasse when the Commission stepped in and established the paper hearing."[20]

2. The Two-Tiered APR Proposal

a. April 13 Order

22. In the April 13 Order, the Commission found that, in light of the design and history of the FCM, the two-tiered pricing model formulated by ISO-NE in its July 1 Proposal failed to appropriately balance the competing interests at issue, in particular, the objective of limiting purchases to the installed capacity requirement. The Commission noted that one of the bedrock principles of the FCM is that customers should not be required to purchase more capacity than the installed capacity requirement. The Commission recognized that this principle is not present in all capacity markets, but is instead a function of the difference between the FCM and other capacity market designs. The Commission observed that the two-tiered mechanism would, in the presence of OOM capacity, result in ISO-NE procuring capacity in excess of the installed capacity requirement, risking a material increase in customers' capacity charges. The Commission found that, in balancing the cost to ratepayers of procuring capacity above the installed capacity requirement against buyer-side market power, it was not just and

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[19] April 13 Order, 135 FERC ¶ 61,029 at P 170.

[20] *Id.* P 15. Arguments regarding whether it was appropriate for the Commission to revise the FCM construct previously found to be just and reasonable are discussed later in this order.

reasonable or consistent with the design of the FCM to require ISO-NE to purchase additional capacity above the installed capacity requirement.[21]

b. Requests for Rehearing

23. NEPGA/NextEra argue that the Commission erred in rejecting ISO-NE's proposed two-tiered APR solution, as it reconciled the divergent requirements imposed on FCM pricing by the Commission's orders, the demands of load, the historical OOM capacity overhang, and the principles of economics. NEPGA/NextEra argue that both competitive and subsidized load would have been able to clear and receive the capacity clearing price that corresponds to their legitimate expectations and economic requirements, reflecting, respectively (i) a competitive price, based on competitive offers and proxies for competitive resources (where offered below competitive levels), or (ii) a potentially lower price determined by the quantity of uneconomic resources pushed into the market for those who sponsor them. NEPGA/NextEra assert that the two-tiered solution was supported by substantial expert evidence, as well as through a clear dissenting opinion of Commissioner Spitzer, and that rejecting the proposal violated section 205 of the FPA. At the very least, argue NEPGA/NextEra, the Commission should require stakeholders to adopt some alternative mechanism that eliminates the price-suppressing effects of each resource excepted from the minimum offer price mitigation. NEPGA/NextEra state that the Commission erroneously rejected ISO-NE's two-tiered APR proposal because it could procure capacity in excess of the installed capacity requirement.

24. NEPGA/NextEra further argue that the two-tiered APR solution would eliminate the price-suppressing effects caused by uneconomic entry, because existing in-merit resources would be paid a clearing price that assumes that all uneconomic entry is competitively priced. NEPGA/NextEra note that one key issue that arises with buyer-side market power mitigation involves a state or other entity sponsoring an uneconomic resource; without two-tiered pricing, the critical issue becomes whether the new resource will be granted an exemption to mitigation. NEPGA/NextEra state that there will be tremendous pressure to grant many of these exceptions in order to permit states to fulfill their other policy objectives. Therefore, explain NEPGA/NextEra, if each exception is permitted to bid into the market as a price taker to ensure it clears, each granted exception will artificially suppress prices, resulting in extensive litigation for every determination. Further, NEPGA/NextEra state that two-tiered pricing would protect existing in-market resources from the unforeseen effects of future entry of OOM capacity,[22] a necessary condition to continue competitive entry into the capacity market. NEPGA/NextEra also state that the two-tiered mechanism would solve the problem of how to mitigate historical

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[21] *Id.* P 19, 156-163.

[22] NEPGA/NextEra Comments at 15.

OOM entry, as such resources would be allowed to clear without suppressing prices paid to existing in-merit resources. Otherwise, argue NEPGA/NextEra, each grandfathered OOM resource or exception granted in a section 206 proceeding would become "another blow to the capacity markets."[23]

25. NEPGA/NextEra additionally assert capacity in excess of the installed capacity requirement would clear only when the sponsors of uneconomic capacity – capacity not needed by the market – build anyway, and the proxy price for that capacity resource was above the APR clearing price. NEPGA/NextEra argue that, when the Commission referred to "three competing objectives," the Commission's order gives the third element – ensuring that total purchases do not exceed the installed capacity requirement – complete supremacy. Under the April 13 Order, note NEPGA/NextEra, OOM capacity does not clear and it appears that any exemptions would be permitted to suppress prices. In response to the Commission's statement that PJM Interconnection, L.L.C. (PJM) and New York Independent System Operator (NYISO) have sloped, administrative demand curves and thus it is possible to procure more or less than the installed capacity requirement, NEPGA/NextEra argue that purchasing less than the installed capacity requirement is unprecedented under modern capacity market design and unlikely to occur going forward.

26. NEPGA/NextEra also argue that the two-tiered APR solution addressed unique ISO-NE market characteristics that are not present in PJM or NYISO. NEPGA/NextEra explain that unique characteristics in ISO-NE, such as the large oversupply of OOM capacity and no sloped administrative demand curve, means that even a tiny increase in uneconomic bid quantities can have a profound effect on clearing prices.[24] NEPGA/NextEra assert that the Commission routinely permits – even advocates – regional differences in market design where appropriate.

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[23] *Id.* at 16.

[24] NEPGA/NextEra assert that state regulatory authorities deliberately developed demand resources for the purpose of depressing the capacity price, and that the Commission failed to address this concern in the April 13 Order (NEPGA/NextEra Rehearing Request at 18 n.5). NEPGA/NextEra do not, however, seek rehearing on this question. Moreover, the Commission did, in fact, address this question, stating that in the April 13 Order, stating that, with regard to "arguments offered by NEPGA and [Boston Generating, LLC] that [Connecticut Department of Public Utility Control (CT DPUC)] deliberately engaged in buyer-side market manipulation …, we note that neither party seeks Commission enforcement action, nor does either allege that CT DPUC violated the FCM market rules or any other Tariff provisions." April 13 Order, 135 FERC ¶ 61,029 at P 218, footnote omitted.

27. Finally, NEPGA/NextEra argue that a minimum offer price rule (MOPR)-like remedy is likely to engender significant controversy and delay. NEPGA/NextEra assert that the Commission should not have sent the design of yet another mitigation regime back to stakeholders for development, especially when net buyers that fundamentally oppose effective buyer-side market power mitigation dominate the ISO-NE stakeholder process.

c. Commission Determination

28. We deny rehearing of our rejection of two-tiered pricing. ISO-NE states that its two-tiered pricing proposal was designed to balance three competing objectives: (1) to allow new OOM capacity to clear and obtain a capacity supply obligation, (2) to prevent new OOM capacity from distorting the market for existing capacity, and (3) to ensure that total purchases do not exceed the installed capacity requirement. Two-tiered pricing achieves the first two objectives but fails to achieve the third. The offer floor mitigation that we adopted in the April 13 Order accomplishes the second and third objectives but not the first. As we have explained, we share the view of ISO-NE and other commenters that just and reasonable market rules must achieve the second objective – preventing new OOM capacity from distorting the market for existing capacity.[25] But no one disputes the conclusion that objectives (1) and (3) cannot both be achieved. In the April 13 Order, we concluded that it is more important to ensure that purchases do not exceed the installed capacity requirement, objective (3), since the FCM design does not allow for the possibility of procuring less than the installed capacity requirement to achieve objective (3). NEPGA/NextEra argue that, in balancing the relative merits of the two mutually exclusive objectives, the Commission made the wrong choice; they argue that it is more important to allow OOM capacity to clear (objective (1)). Taking into account all the interests of all the parties, as well as the Commission's statutory duty to ensure just and reasonable rates in the capacity market, we disagree. We maintain, as the Commission found in the April 13 Order, that offer floor mitigation is just and reasonable because it spares customers the cost of procuring capacity that is not needed to meet ISO-NE's reliability objectives while simultaneously preventing new resources from offering significantly below their true net cost of entry and thereby suppressing capacity market prices.[26] Moreover, as the Commission noted in the April 13 Order, resources initially

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[25] *See, e.g.,* April 23, 2010 Order, 131 FERC ¶ 61,065 at P 85-87 (encouraging the development of mitigation mechanisms that result in market clearing prices that do not reflect the exercise of market power because "[m]echanisms that fail to address OOM capacity surpluses do not provide the long term price signals that support efficient private investment").

[26] April 13 Order at P 167 – 168.

classified as OOM are not necessarily precluded from clearing; a resource seeking to offer below its benchmark will have the opportunity to justify its costs with the IMM.[27]

29. We do not believe that OOM capacity that has not justified an offer floor exemption should be allowed to clear the FCA, since the result would either suppress capacity prices or impose an extra cost on New England load. Neither result is just and reasonable. NEPGA/NextEra's assertion that two-tiered pricing will help alleviate the "tremendous pressure to grant" exemptions does nothing to render the procurement of capacity in excess of the installed capacity requirement just and reasonable. Moreover, all exemption requests will be subject to appropriate scrutiny; nothing in the April 13 Order affects the Commission's ability to ensure that uneconomic new resources that will result in unwarranted price suppression will not be granted exemptions. Rather, as was stated in the April 13 Order, the Commission will consider each case's unique facts in determining whether to grant an exemption.[28] NEPGA/NextEra argue that the only capacity in excess of the installed capacity requirement that would be procured is the uneconomic capacity that its sponsors want (for example, to meet state policy objectives like renewable portfolio standards). NEPGA/NextEra argue that since such capacity is not needed by the market, it is only fair that the unneeded capacity be procured on top of the installed capacity requirement. However, NEPGA/NextEra's fairness argument fails, as it is not only the sponsors of uneconomic capacity who would pay for capacity in excess of the installed capacity requirement, it is all load, most of which has not sponsored uneconomic capacity.

30. While the Commission concluded that it was unreasonable to require load in New England to purchase more than its capacity target, the Commission observed in the April 13 Order that the capacity markets in PJM and NYISO, which rely on a sloped demand curve, allowed for purchases in excess of their respective capacity targets. The Commission found that such a result was reasonable in PJM and NYISO because their sloped demand curves also permitted the possibility of procuring less than the targets. The Commission determined that allowing the procurement in excess of the capacity target in some periods is reasonable in these markets to offset the potential for procuring less than the capacity target in other periods. NEPGA/NextEra dismiss the Commission's observation, stating that purchasing less than the capacity target is unprecedented under modern capacity market design and unlikely to occur going forward. NEPGA/NextEra are mistaken. While cleared capacity in most auctions in these markets has equaled or exceeded their respective capacity targets, the amount of cleared capacity in the Eastern Mid-Atlantic Area Council (EMAAC) and Southwestern Mid-Atlantic Area Council (SWMAAC) capacity zones was less than their respective

[27] *Id.* P 168.

[28] *Id.* P 171.

capacity targets in the 2007-2008 Delivery Year,[29] and the amount cleared in the SWMAAC capacity zones was also less than its capacity target in the 2008-2009 Delivery Year.[30]

31. In summary, we continue to find that the tradeoff proposed by ISO-NE – that is, to require purchases in excess of the capacity target in order to permit all OOM capacity to clear – is unjust and unreasonable. At the same time, we continue to find that offer floor mitigation under market rules that limit the purchase of capacity to the installed capacity requirement is just and reasonable.

3. Historical OOM

a. April 13 Order

32. In the April 13 Order, the Commission accepted the Joint Filing's proposal that OOM resources that cleared in the first three FCAs (so-called "historical OOM" capacity) should not trigger the APR, the then-existing buyer-side mitigation regime. The Commission acknowledged that historical OOM capacity already in the market had contributed to a large capacity surplus in New England. The Commission noted, however, that the investment in that OOM capacity had already occurred, and that "the purpose of buyer-side mitigation is to prevent uneconomic entry"; therefore subjecting historical OOM resources to future mitigation would not prevent the fact that those resources had already entered the market.[31] Because of this decision not to carry forward historical OOM capacity for future mitigation, the Commission found it reasonable to also accept the Joint Filing's proposal to extend the price floor until revisions to the APR were implemented.[32]

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[29] *See* PJM Market Monitoring Unit, "Analysis of the 2007-2008 RPM Auction," August 16, 2007 at 16, 20. For the 2007-2008 Delivery Year, SWMAAC was short 175 MW, or about 1.1 percent of its reliability target, and EMAAC was 594 MW short, or about 1.6 percent of its target.

[30] *See* PJM, "2008/2009 RPM Base Residual Auction Results," at 10, *available at* http://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/20070713-rpm-base-residual-08-09.ashx. For the 2008-2009 Delivery Year, SWMAAC was short by approximately 200 MW.

[31] April 13 Order, 135 FERC ¶ 61,029 at P 214.

[32] *Id.* P 21, 64, 213.

b. Requests for Rehearing

33. NEPGA/NextEra argue that, in rejecting mitigation of historical OOM entry, the Commission effectively granted these resources a perpetual exemption from mitigation permitting them to artificially suppress capacity prices for many years, even decades, to come. NEPGA/NextEra state that the FPA requires the Commission to enforce just and reasonable *rates*, and no rate can be just and reasonable when it continues to be artificially suppressed by the uneconomic offers of thousands of megawatts of OOM capacity. Further, NEPGA/NextEra state that the Commission's insistence that the sole purpose of mitigation is to deter uneconomic entry into the market is wrong, since it mistakenly conflates the purpose of mitigation (setting just and reasonable rates) with only one of several means by which mitigation can achieve that purpose (deterring uneconomic entry).[33] NEPGA/NextEra state that the first line of defense – deterring uneconomic entry – failed because the Tariff was flawed, but the Commission can still prevent unjust, unreasonable and unduly discriminatory rate outcomes on a going-forward basis.

34. NEPGA/NextEra argue that mitigation is routinely imposed after a market power issue emerges, arguing that the Commission has long rejected claims that a party should be excused from mitigation forever because there were no bid caps when they first entered the market. NEPGA/NextEra assert that past auction results are protected but *future* bids and their market impacts are not.[34] In the same vein, NEPGA/NextEra assert, the Commission routinely applies new mitigation rules to existing resources, and this concept supports applying new mitigation rules to existing OOM resources.[35] NEPGA/NextEra explain that load's main counterargument appears to be that there is some "reliance interest" in not having capacity prices mitigated for existing state-sponsored OOM resources. But, argue NEPGA/NextEra, if any such expectation ever

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[33] NEPGA/NextEra assert that the Commission's view here conflicts with the Commission's orders upheld in *Connecticut Department of Public Utility Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009) (*CT DPUC*), (finding New England's capacity market did not mandate, or preclude, the construction of generation, but rather was intended to bring about just and reasonable rates for capacity).

[34] NEPGA/NextEra Rehearing Request at 26 *citing New York Independent System Operator, Inc.,* 92 FERC ¶ 61,073 (2000) (accepting prospective bid cap proposal over objections that it interfered with existing contractual arrangements and expectations), *order on reh'g and clarification*, 97 FERC ¶ 61,154 (2001).

[35] *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169 at P 40-45, *order on reh'g*, 125 FERC ¶ 61,340 (2008) and *ISO New England Inc.*, 129 FERC ¶ 61,008, at P 20 (2009).

existed, it was not justified. NEPGA/NextEra explain that they only propose to prevent historical OOM capacity from artificially suppressing future auction prices. NEPGA/NextEra state that, if any reliance interest were justified, it would only be the interest of the sponsors of OOM entry to be able to rely on that capacity to help meet their capacity obligations and not to be able to rely on OOM capacity to suppress prices. NEPGA/NextEra argue that the obvious remedy for any such reliance interest would be to permit the resource to clear in future auctions, while precluding it from suppressing price outcomes. As noted in the prior section, NEPGA/NextEra assert that the two-tiered APR would provide this exact remedy.

35. According to NEPGA/NextEra, the Commission's decision not to mitigate historical OOM capacity was based on its holding in *New York Independent System Operator* (*NYISO*),[36] a case in which the Commission declined to apply a new mitigation rule to two historical OOM resources already in the market, on the basis that the purpose of the rule was to affect future auctions. NEPGA/NextEra argue that *NYISO* is inapplicable here. NEPGA/NextEra state that it is true that the costs for OOM resources that entered the market in FCAs 1, 2, and 3 are already "sunk" and the decision to build can no longer be affected.[37] However, NEPGA/NextEra argue that the main purpose of mitigation is to ensure just and reasonable rates in both current and future auctions;[38] they therefore claim that the Commission's holding in this case does not survive scrutiny.

36. NEPGA/NextEra further distinguish *NYISO* from this proceeding, arguing that the mitigation contemplated in *NYISO* may have prevented the units in question from clearing in future auctions; in contrast, they argue, in this case, the two-tiered pricing proposal could have been applied to historical OOM resources to permit them to continue to clear. Other differences, state NEPGA/NextEra, include the fact that there was no equivalent to the APR at the time the two new resources in NYISO were built,[39] and the

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[36] *NYISO*, 122 FERC ¶ 61,211, *order on reh'g*, 124 FERC ¶ 61,301 (2008), *order on clarification and reh'g*, 131 FERC ¶ 61,170 (2010).

[37] NEPGA/NextEra Rehearing Request at 22 *citing* Opening Brief of the New England Power Generators Association, Exhibit 2, Stoddard Testimony at 34:11-16.

[38] *Id. citing Wisc. Pub. Power, Inc.*, 493 F.3d at 256–63; *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 802–04 (D.C. Cir. 2007); and *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 17 (2011).

[39] NEPGA/NextEra state that, while the historical APR was ineffective, its existence should have put OOM entrants on notice that their offers were subject to mitigation and should not be allowed to artificially reduce capacity market clearing prices.

fact that ISO-NE has a vertical demand curve while NYISO has a sloped demand curve, meaning that capacity in excess of the minimum requirement in NYISO does not create the same degree of capacity price suppression it does in ISO-NE.[40]

37. NEPGA/NextEra further assert that it appears that the April 13 Order erroneously draws a distinction between buyer market power – at issue in this case – and seller market power. The parties assert there is no support for such a distinction;[41] in either case, the Commission has the statutory requirement to ensure just and reasonable rates according to the FPA. Failure to apply the same mitigation standards to buyers, argue NEPGA/NextEra, is unduly discriminatory. NEPGA/NextEra state that "world-renowned economists" testified that the exercise of market power through historical OOM resources needs to be mitigated in future auctions, and the Commission gave no substantive attention to these highly qualified opinions.[42]

c. Commission Determination

38. We deny rehearing with respect to historical OOM capacity. NEPGA/NextEra primarily argue that the Commission's decision to not carry forward historical OOM capacity is based on the erroneous assumption that the purpose of mitigation is to prevent uneconomic entry, when, according to NEPGA/NextEra, the purpose of mitigation is to set just and reasonable rates.

39. NEPGA/NextEra pose a false choice. The Commission's responsibility under the FPA is to ensure just and reasonable rates, terms, and conditions, and thus any analysis of whether the tariff rule governing historical OOM capacity is just and reasonable must take into account the rule's impact on the market, including deterring uneconomic entry. In the April 13 Order, the Commission found it reasonable to extend the price floor for an additional period of time to address the effect of historical OOM capacity on market prices.[43] The Commission also explained that applying buyer-side mitigation to OOM

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[40] NEPGA/NextEra state the Commission cited the price stabilizing benefits inherent in the NYISO ICAP Demand Curve structure as one of the primary bases for approving it. *See New York. Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201, at P 31 (2003) (a capacity "Demand Curve will help stabilize these prices and send better price signals to encourage the construction of generation before a shortage occurs").

[41] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321–22 (2007).

[42] NEPGA/NextEra Rehearing Request at 23-24.

[43] April 13 Order, 135 FERC ¶ 61,029 at P 22.

resources that entered the market *before* such mitigation was in the tariff cannot deter investment in these resources, since the resources have already entered the market; [44] this is the fundamental flaw in NEGPA/NextEra's argument. Moreover, the mitigation of historical OOM capacity would be inconsistent with the FCM's purpose of providing accurate market signals. Given the significant capacity surplus already present in the New England capacity market, mitigation of historical OOM capacity would only encourage older, higher-cost resources to remain in the market rather than retire, due to the higher capacity prices that such mitigation would produce.[45]

40. NEPGA/NextEra argue that mitigation is routinely imposed after a market power issue emerges. We agree that it is generally reasonable to apply mitigation to sellers with market power that had not initially been mitigated. Mitigation in this context typically involves offer caps and/or must-offer requirements, which tend to lower the price of capacity, which in turn is likely to increase the amount of output that buyers are willing to purchase. This is an efficient result, because the value of the extra output to buyers (reflected by the price they are willing to pay) equals or exceeds the seller's incremental cost of producing it. But in the case of historical OOM capacity, in this proceeding, where buyer-market power is at issue, applying after the fact mitigation may result in inefficient decisions, as explained above, by encouraging less efficient resources to remain in the market rather than retire. Therefore, it is reasonable under the circumstances before us to not apply mitigation to historical OOM capacity. Finally, our decision not to mitigate historical OOM capacity is not based on a "reliance interest," as NEPGA/NextEra claim, but rather on our finding that mitigation of historical OOM capacity would produce inefficient decisions. The Commission has previously explained that "buyer market power mitigation clearly applies to 'new' uneconomic entrants, not existing capacity," and that once "[d]eterrence of the entry of existing units . . . is no longer possible," existing units should not be mitigated.[46]

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[44] *Id.* P 214.

[45] Surplus capacity has been present in the FCA since the inception of the auction. The surplus of cleared capacity above the installed capacity requirement increased from 2,400 MW in the first FCA to 4,755 MW in the second FCA to 5,031 MW in the third FCA. *See* April 23, 2010 Order, 131 FERC ¶ 61,065 at fn. 32. The April 13 Order recognized that this surplus is likely to last for many years. *See* April 13 Order, 135 FERC ¶ 61,029 at P 214.

[46] *NYISO*, 124 FERC ¶ 61,301 at P 44, footnotes omitted. The Commission also rejected requests for transition mechanisms "that are essentially requests to increase prices that would otherwise result" from mitigation of the two units in question. *Id.*

41. As the Commission found in the April 13 Order, NEPGA/NextEra's attempt to distinguish *NYISO* from ISO-NE does not require a different result here.[47] NEPGA/NextEra argue that the mitigation at issue in *NYISO* could prevent an OOM resource from clearing, while ISO-NE's two-tiered pricing would allow historical OOM resources to clear. NEPGA/NextEra argue that, unlike in NYISO, OOM resources were built at a time when a buyer-side mitigation measure was in place. And NEPGA/NextEra argue that under ISO-NE's vertical demand curve, OOM resources create greater price suppression than under NYISO's sloped demand curve. But none of the factors cited by NEPGA/NextEra are relevant to the Commission's seminal conclusion that mitigating historical OOM resources in either NYISO or ISO-NE would fail to either deter the uneconomic entry of the historical OOM resources or encourage efficient decisions.[48]

4. Interim OOM

a. April 13 Order

42. As distinguished from historical OOM resources that cleared in FCAs 1 through 3, so-called "interim OOM" resources are OOM resources that have cleared, or will clear, beginning in FCA 4, continuing through the implementation of new auction rules.[49] The April 13 Order stated that the APR proposal from the Joint Filing would be in effect during the interim period, but did not directly address the issue of how resources designated OOM capacity in the interim auctions and carried forward for potential mitigation would be treated once the new mitigation rules are in place.

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[47] *See* April 13 Order, 135 FERC ¶ 61,029 at P 215.

[48] Nor do we agree that the Commission's decision here not to mitigate historical OOM resources going forward is inconsistent with the cases cited by NEPGA/NextEra at fn. 35, above, in which the Commission did alter mitigation mechanisms on a going-forward basis. Both *Md. Public Service Commission* and *ISO New England* involved situations in which the Commission found that imposition of mitigation could prevent the relevant entities from exercising market power in the future. By contrast, in this case, as we note in P 40 above, once an OOM resource has entered the capacity market, forward-looking mitigation mechanisms will no longer deter their entry. Thus, the reasoning relied upon in *Md. Public Service Commission* and *ISO New England* is inapplicable here.

[49] ISO-NE states in its August 22, 2011 Compliance Filing Update that new rules can be implemented for FCA 7, which will be held in February 2013.

b. Requests for Rehearing

43. NEPGA/NextEra argue that the Commission was explicit that the grandfathered historical OOM category is limited to OOM entry from the first three auctions, thereby distinguishing any interim OOM entry that occurs thereafter.[50] Therefore, NEPGA/NextEra seek clarification of what specific type of mitigation will apply to interim OOM resources after the compliance phase of this proceeding. NEPGA/NextEra assert that mitigation *during* the interim period (FCAs 4, 5, 6 and potentially 7) has been settled—the Commission extended the price floor and left in place, on an interim basis, the APR as proposed in the Joint Filing. NEPGA/NextEra explain that the Joint Filing's APR-2 requires that OOM resources be identified beginning with FCA 4 and carried forward even if APR-2 is not triggered;[51] they argue that the mitigation to be applied to interim OOM entry in *future* auctions, after this interim period and after the new mitigation regime is put into effect, is unclear. NEPGA/NextEra are concerned that, since load has already signaled in the stakeholder process that interim OOM entry should not be subject to any mitigation in future auctions, load will flood the market with even more OOM capacity during this interim period.

44. NEPGA/NextEra argue that all interim OOM resources should be treated as new resources in the first year that an offer floor-based regime is implemented, and that their offers should be compared to a resource-specific benchmark and mitigated up to that level, if necessary; any resource that does not clear at or above its benchmark would not qualify as a capacity resource. NEPGA/NextEra argue that mitigation should continue for as long as provided in the new offer floor-based regime. NEPGA/NextEra state that,

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[50] NEPGA/NextEra rest this assertion on the following Commission statement in the April 23, 2010 Order, 131 FERC ¶ 61,065 at P 83:

> Different considerations apply regarding the treatment of OOM resources that clear after the third FCA (i.e., FCAs held after the issuance of this order). A primary objective of APR mitigation is to address the suppression of market clearing prices due to OOM capacity. This is a principal reason for accepting the Filing Parties' proposal to consider the effect of OOM resources built after the issuance of this order that affect the capacity price in multiple years.

[51] The Joint Filing APR proposal established three different APRs, each triggered under a mutually exclusive set of conditions. "APR-2" was designed to address the situation in which a sufficiently large amount of OOM capacity from previous FCAs would have eliminated the need for new capacity, thus depressing the price in a subsequent FCA. *See id.* P 43.

if there is concern about not permitting interim OOM entry to clear in future auctions,[52] the mitigation applied to these resources could be altered: two-tiered pricing would work well for interim OOM entry, or two-tiered pricing could be limited solely to interim OOM resources (and historical OOM resources, if the Commission grants rehearing), while all future resources could be subject to an offer floor-based mitigation. NEPGA/NextEra state that another possible mechanism would be to extend a price floor, albeit at a higher level, or to require transition payments. However, conclude NEPGA/NextEra, the simplest solution would be to apply the mitigation ultimately approved in this case to interim OOM entry when that mitigation is implemented. This solution, NEPGA/NextEra assert, would deter future OOM entry, while preventing price outcomes from being suppressed downward in unjust, unreasonable, and unduly discriminatory ways.

c. Commission Determination

45. We grant partial rehearing to find that resources designated as OOM in FCA 6 or in any subsequent FCAs prior to the implementation of the new rules will be carried forward under the existing rules and treated as new resources in the first auction in which offer floor mitigation is put into place. As noted by ISO-NE, the rules that will apply until the mechanism described in the April 13 Order is implemented are settled: "the currently effective market rules – those accepted by the Commission in the April 23, 2010 order and which applied for the fourth FCA – will apply for the fifth and sixth FCA, and for the seventh FCA if the ISO cannot implement the new rules until the eighth FCA."[53] What is less clear, and what is at issue here, is how to transition from one mitigation regime to the next—that is, how to treat OOM carried forward under one set of rules under a new and different set of rules. The Commission's April 23, 2010 Order indicated that the buyer-side mitigation regime proposed in the February 22, 2010 Joint Filing might not be sufficiently rigorous, but it was not until the April 13 [2011] Order that the Commission conclusively found that the Joint Filing mitigation proposal was insufficient to prevent the suppression of market prices and instead directed that a minimum offer price rule be instituted. The April 13 Order was issued after FCA 4 and just prior to FCA 5. Therefore, while market participants in FCA 4 were on notice that

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[52] NEPGA/NextEra argue that there should be no concern on this point: "There is no cause for sympathy about the prospect of [i]nterim OOM failing to clear in future auctions, and thus failing to qualify as capacity resources, because the sponsors of these resources already were on notice of this possibility, and built [i]nterim OOM during the compliance phase of this proceeding at their own peril." NEPGA/NextEra Rehearing Request at 35.

[53] ISO-NE May 13, 2011 Compliance Filing at 6.

stronger mitigation rules were under consideration, they did not yet know what those rules would be, or if the Commission would find, at the conclusion of the paper hearing, that the Joint Filing mitigation proposal was acceptable. We therefore find that, as a matter of fairness, OOM resources that entered in FCA 4, under the Joint Filing mitigation regime, should be treated as existing resources and not mitigated further when the offer floor regime is instituted.

46. While market participants were notified shortly before FCA 5 that the Commission had found the Joint Filing mitigation proposal unjust and unreasonable and had instead directed a minimum offer price regime, these market participants were reasonably guided by the Commission's statement in the April 13 Order that "the rules the Commission approved in the April 23[, 2010] Order will remain in effect pending any new rules."[54] Because of the timing of the order's issuance, and because no party could know in advance that the order would institute an offer floor mitigation regime, no party had the opportunity to raise the question of how OOM entry in FCA 5 would be treated once the offer floor regime was implemented. In light of these procedural considerations and the fact that further mitigation cannot prevent OOM entry in an auction that has already taken place, we find that fairness and efficiency dictate that OOM resources that entered in FCA 5, under the Joint Filing mitigation regime, should, like OOM entry from FCA 4, be treated as existing resources when the offer floor regime is instituted.

47. Different considerations apply to any resources that are designated OOM in FCA 6, which will be held in April 2012 or in any subsequent FCAs prior to implementation of the new rules. Market participants have been on notice since the issuance of the April 13 [2011] Order that the Commission finds the currently effective Joint Filing mitigation provisions unjust and unreasonable and that it has directed instead that an offer floor mitigation regime be implemented. Participants have had the opportunity to raise the question of how the transition from one regime to the next will occur, and they have done so. Furthermore, because FCA 6 and subsequent FCAs have not yet occurred, treating carried-forward OOM entry from FCA 6 as new under the offer floor mitigation regime can prevent uneconomic entry. For these reasons, we grant partial rehearing to find that OOM resources entering in FCA 6 or any subsequent FCAs prior to the implementation of the new rules will be carried forward under the existing rules and treated as new in the first auction in which offer floor mitigation is put into place.

48. NEPGA/NextEra argue that the Commission's statement in the April 23, 2010 Order that "[d]ifferent considerations apply regarding the treatment of OOM resources that clear after the third FCA (i.e., FCAs held after the issuance of this order)" indicates that the Commission intended that resources entering from FCA 4 onward would be

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[54] April 13 Order, 135 FERC ¶ 61,029 at P 366.

subject to additional mitigation after the new mitigation regime is implemented.[55] In fact, read in context, the statement signals the end of a discussion of historical OOM capacity and the start of a discussion of the appropriate duration of mitigation once an OOM resource has triggered APR mitigation. At the conclusion of the discussion, the Commission stated that both sides had raised important points about this issue, and set it for paper hearing. Relevant to the question of which mitigation regime will be applied to OOM entry during the "interim" period is the Commission's statement in the April 13 Order that "the rules the Commission approved in the April 23 [, 2010] Order will remain in effect pending any new rules."[56] This set of rules include the Joint Filing's APR regime, the mitigation regime that was in effect for FCA 4, and that will remain in place until the offer floor regime becomes effective.

49. In response to the NEPGA/NextEra suggestion that interim OOM entry be mitigated under a two-tiered pricing regime, we found above at P 28-31 that two-tiered pricing is not a just and reasonable solution for ISO-NE: it results, in the presence of OOM entry, in the procurement of more capacity than the installed capacity requirement. We reject NEPGA/NextEra's suggestion that two-tiered pricing be applied to interim OOM entry while all other new resources are subject to offer floor mitigation, because it would result in the same outcome, which we have previously found to be unjust and unreasonable. We also reject this suggestion because it would result in subjecting new OOM capacity to two forms of mitigation simultaneously. While NEPGA/NextEra also make broad references to the possibility of "lump sum transition payments" in lieu of applying further mitigation to historical or interim OOM resources, it is unclear how a transition payment scheme would work, or how such payments could be calculated. As discussed in the following section, the Commission also rejects NEPGA/NextEra's suggestion that interim OOM capacity can be addressed by an extension of the price floor.

5. <u>Price Floor</u>

a. <u>April 13 Order</u>

50. In the April 13 Order, the Commission found that the price floor should remain in place until revisions to the current APR are implemented, after which the price floor should expire.[57] Because historical OOM capacity is not carried forward under the

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[55] NEPGA request for rehearing at 33, citing April 23, 2010 Order, 131 FERC ¶ 61,065 at P 81.

[56] April 13 Order, 135 FERC ¶ 61,029 at P 366.

[57] As stated previously, this may require ISO-NE to make a subsequent filing to extend the price floor beyond FCA 6 (depending on the timing of the stakeholder process

(continued…)

revised proposal, the Commission found it reasonable to extend the price floor for an additional period of time to address the effect of historical OOM capacity on market prices. The Commission "therefore preserve[d] the Joint Filing's proposal to extend the price floor through [FCA 6]."[58] The Commission also found that the price floor should not be extended indefinitely, because a permanent price floor would send the wrong price signals regarding the need for capacity, effectively discouraging some old and inefficient existing capacity from retiring. While in the April 13 Order, the Commission accepted ISO-NE's proposal to eliminate references to the CONE parameter, the Commission required ISO-NE to retain only this price floor function of the CONE parameter until the price floor is eliminated.[59]

b. Requests for Rehearing

51. NEPGA/NextEra and the Joint Complainants argue that the Commission erred in extending the price floor for only two years at a level that does not reflect actual capacity market requirements or the cost of new entry. Joint Complainants contend that the Commission shirked its obligation to determine a just and reasonable price floor and instead picked an arbitrary price floor based on what parties admit is an outdated CONE parameter that has been adjusted by virtue of flawed FCM rules and thus bears no relation to the actual cost of new entry. Joint Complainants state that it is these flawed rules that have caused ISO-NE's CONE value to fall over the first four years of the FCM's operation, and note that the Commission, in its April 23, 2010 Order, stated that "the CONE value in ISO-NE is well below the CONE value in both NYISO and PJM."[60] Joint Complainants assert that the April 13 Order provides no justification for not using the actual levelized cost of constructing a new facility in New England, particularly when that data was provided to the Commission.

52. Regarding the duration of the price floor, NEPGA/NextEra argue that the price floor should remain in effect until all historical OOM capacity is absorbed by the market through load growth or retirement. They argue that the prior APR allowed vast quantities

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triggered by our requirement that New England develop market rules to implement offer floor mitigation). However, ISO-NE's recent compliance filing update indicates that it does not anticipate that an extension of the price floor beyond FCA 6 will be necessary. ISO-NE August 22, 2011 Compliance Update at 3 n.7.

[58] April 13 Order, 135 FERC ¶ 61,029 at P 22.

[59] *Id.* P 213-218.

[60] Joint Complainants Rehearing Request at 24-29, *citing* April 23, 2010 Order, 131 FERC ¶ 61,065 at P 151.

of new supply to be offered below cost without being classified as OOM capacity, or, even if classified as OOM capacity, mitigated only for a single year, with no impact on capacity clearing prices. NEPGA/NextEra claim that given the magnitude of excess supply in FCA 3 and FCA 4, absent plant retirements, it will take many years to absorb the excess supply. NEPGA/NextEra contend that, since the historical OOM capacity surplus will last far beyond the implementation of new mitigation rules, some transitional mechanism must continue as long as unmitigated OOM capacity continues to depress clearing prices. The parties argue that otherwise economic resources may prematurely retire and ISO-NE will likely be forced to rely on reliability-must-run agreements to maintain reliability, increasing the overall costs of capacity over time.[61] Further, Joint Complainants argue that the Commission arbitrarily predicated the duration of the price floor on the time it takes stakeholders to develop rules, rather than on a market outcome.[62]

53. NEPGA/NextEra advocate applying two-tiered pricing to historical OOM capacity and also note various other alternatives to an extended price floor,[63] including applying the offer floor mitigation regime, or whatever other mitigation is ultimately approved, to historical OOM capacity. Other options, NEPGA/NextEra note, include lump-sum transitional payments or a hybrid that includes a single adjusted price under the APR and pro-rating of payments to respect the constraint of purchasing no more than the installed capacity requirement. The parties also note that the floor itself could be modified.

54. Joint Complainants also contend that the Commission erred in finding that arguments surrounding whether the CONE parameter should be reset were moot, while still using CONE to set the price floor. Joint Complainants state that, given ISO-NE's capacity surplus, there is a reasonable possibility that FCAs 5, 6, and 7 will clear at the price floor, and therefore the rate at which the price floor is set is not moot, but is instead a defining element of the FCM.[64] Further, Joint Complainants argue that the April 23, 2010 Order recognized the importance of the CONE parameter and the Commission inexplicably reversed its position in the April 13 Order.

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[61] NEPGA/NextEra Rehearing Request at 28, 30, 31.

[62] Joint Complainants Rehearing Request at 25-26.

[63] NEPGA/NextEra Rehearing Request at 31-32.

[64] FCA 5 was held in June 2011, subsequent to Joint Complainants' filing.

c. **Commission Determination**

55. The Commission denies the requests for rehearing on the price floor. In the April 23, 2010 Order, the Commission found that the Joint Filing's proposed extension of the price floor (to FCAs 4, 5 and 6) "has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful."[65] The Commission noted that while it generally does not approve of price floors, it "understand[s] that [ISO-NE and NEPOOL] view the price floor extension as a compromise to address historical OOM."[66] Because of this, the Commission found it "appropriate to extend the price floor as a transitional measure pending APR revisions."[67] In response to the request of generator parties for an increase in the level of the price floor, in addition to their request for an extension of the price floor, the Commission observed that, according to the internal market monitor, clearing prices in the first three FCAs would have reached the price floor even without OOM capacity. This indicated that New England would have had a significant capacity surplus even without OOM entry and therefore, reasoned the Commission, an increase in the price floor would provide the wrong economic signal at that time. We find that this logic continues to hold true today.[68]

56. The Commission, while expressing a general disapproval of price floors, approved the price floor here as a compromise, interim measure, noting that "in the Commission's final order accepting an appropriate APR mechanism, we will terminate the price floor coincident with the implementation of that new mechanism."[69] While it is true that the

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[65] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 19.

[66] *Id.* at 97.

[67] *Id.*

[68] According to both ISO-NE's FCA 4 Results Filing in Docket No. ER10-2477-000, and its FCA 5 Results Filing in Docket No. ER11-3891-000, "[a] significant amount of new and existing capacity participated in the FCA[s] and remained in the auction until the [price floor] was reached]." Specifically, there was 5,374 MW of excess supply in FCA 4, and 3,718 MW of supply in FCA 5. *See* FCA 4 Results Filing at 6 and FCA 5 Results Filing at 5. The majority of this excess capacity was existing: in FCA 4, 659 MW of new resources cleared (*see* FCA 4 Press Release at http://www.iso-ne.com/nwsiss/pr/2010/fca4_filing_release.pdf); in FCA 5, 305 MW of new resources cleared (*see* FCA 5 Press Release at http://www.iso-ne.com/nwsiss/pr/2011/fca5_filing_release_06272011.pdf).

[69] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 97.

FCM, over the long run, must provide generators a reasonable opportunity to recover their costs and is therefore designed to provide a price signal that averages, over the long term, the cost of new entry, it does not follow that a price floor must be set at that same level. Indeed, a price floor set at such a level might well conflict with Commission precedent by providing suppliers, for the duration of the price floor, a guarantee of, at a minimum, full cost recovery.[70] While Joint Complainants state that CONE (and therefore, the price floor) fell precipitously over the first four years of FCM operation,[71] we note that neither CONE nor the price floor fell in FCA 4 (when they were equal to their FCA 3 values). Moreover, the April 23, 2010 Order approved a mechanism to update the value of CONE, and CONE was updated accordingly; CONE and the price floor increased in FCA 5 above the FCA 4 level.[72] We therefore find that no further changes to the level of the price floor are necessary.

57. Regarding the duration of the price floor, the Commission notes that the price floor is a temporary mechanism to address the effect of OOM entry on capacity market prices due to the fact that OOM entry through FCA 5 is not being carried forward. As stated previously, the price floor should remain in place until revisions to the current APR are implemented, after which the price floor should expire. We disagree with NEPGA/NextEra that extending the price floor is necessary to prevent otherwise economic resources from prematurely retiring. To the contrary, extending the price floor, and thus keeping prices above market clearing levels, would delay efficient retirement. Thus, we find that the price floor should not be extended until historical OOM capacity is absorbed by the market, which according to the generator parties might be as long as ten years, because such an indefinite price floor would send the wrong price signals regarding the need for capacity, and could discourage some old and inefficient existing capacity from retiring.

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[70] The Commission, in declining to increase the level of the price floor in the April 23, 2010 Order in the face of a "significant capacity surplus" observed that "[a]s we stated in *Bridgeport Energy, LLC*, in a competitive market, the Commission is responsible for providing a resource with 'the opportunity to recover its costs,' not a guarantee." April 23, 2010 Order, 131 FERC ¶ 61,065 at P 98, *citing Bridgeport Energy, LLC,* 113 FERC ¶ 61,311 (2005) (*Bridgeport*).

[71] Joint Complainants Rehearing Request at 28.

[72] The April 23, 2010 Order revised how CONE is calculated so that when the FCA price is set according to the price floor, the following year's CONE will no longer be calculated, in part, according to the prior year's clearing price. Rather, CONE is adjusted using a rolling three-year average of the Handy-Whitman Index of Public Utility Construction Costs.

58. As to NEPGA/NextEra's proposed alternatives to the price floor, we have already discussed the unjust and unreasonable results of two-tiered pricing and we reiterate that because investment in OOM entry through FCA 5 has already occurred, subjecting this capacity to mitigation would not prevent the entry of these uneconomic resources. For reasons discussed in the prior section, we also reject the various other proposed alternatives to the price floor.

59. To the extent that parties argue that the Commission erred in finding that arguments surrounding whether the CONE parameter should be reset were moot while still using CONE to set the price floor, CONE, as was recognized by the Commission in the April 13 Order, is still an input that is updated by the Handy-Whitman Index. With respect to the price floor, the Commission's intent in not revisiting the overall value of CONE in the April 13 Order was to preserve the current method of addressing the impact of historical OOM capacity until the new APR proposal has been implemented. As the Commission noted in the April 23, 2010 Order, under the FCM construct, the value of CONE is most significant in determining mitigation review thresholds.[73] Given that the use of CONE in determining mitigation review thresholds was eliminated, as were various other uses of CONE, we continue to find revisiting the value of CONE to be unnecessary.

6. Self-Supply

a. April 13 Order

60. In the April 13 Order, the Commission stated that because new self-supply has the same price effect as offering the new resource at a price of zero, failure to classify new self-supply as OOM capacity would allow the mitigation mechanism to be circumvented. The Commission concluded that any new self-supplied capacity that clears (through a zero price offer rather than at full net entry cost) would distort the market clearing price. Therefore, the Commission found that new self-supply offers should be subject to offer floor mitigation.[74]

b. Requests for Rehearing

61. EMCOS argues that the April 13 Order misinterprets the treatment of self-supply under the FCM settlement,[75] noting that the April 13 Order refers to self-supply offers at

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[73] April 13 Order, 135 FERC ¶ 61,029 at P 81.

[74] *Id.* P 232.

[75] The parties' settlement leading to the implementation of the FCM was accepted in *Devon Power, LLC*, 115 FERC ¶ 61,340 (2006).

a "zero price" while the FCM settlement and the market rules provide for self-supply to be treated as a "price-taker." EMCOS also asserts that because the FCM settlement and the market rules provide that self-supplied resources and associated self-supplied load are treated as mutually offsetting, self-supply cannot have any effect on price.[76]

62. A number of load-serving entities[77] argue that the April 13 Order errs in fundamentally altering the FCM settlement agreement without justification. Public Systems and NSTAR/UI argue that the capacity market was intended to supplement, on a voluntary basis, more traditional means of securing capacity through self-supply or bilateral agreements. Public Systems argue that the April 13 Order instead transforms the FCM into a mandated purchase of capacity through a centralized structure.[78] NSTAR/UI argue that the April 13 Order transforms a narrowly drafted market power mitigation measure into an essentially flat, administratively determined, supply curve based on asset type. Public Systems assert that the April 13 Order announces, for the first time, that self-supplied resources cannot clear the FCA unless they are bid in compliance with economic benchmarks, and thereby changes a key component of the FCM design. EMCOS agrees, asserting that the right to self-supply was every bit as much a "bedrock principle" of the FCM settlement as limiting capacity purchase to the installed capacity requirement.[79] NSTAR/UI assert that such fundamental departures from a settlement agreement require a showing of "special circumstances."[80]

63. In addition, NSTAR/UI argue that the Commission's actions may violate the *Mobile-Sierra* doctrine,[81] under which, when parties negotiate a contract that specifies rates, the Commission "must presume that the rate set out in a freely negotiated

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[76] EMCOS Rehearing Request at 6.

[77] EMCOS, Public Systems, NSTAR/UI.

[78] Public Systems Rehearing Request at 7, 12; NSTAR/UI Rehearing Request at 9.

[79] EMCOS Rehearing Request at 9.

[80] NSTAR/UI Rehearing Request at 8 *citing Equitrans, LP.,* 104 FERC ¶ 61,008, at P 32 (2003) (the Commission "will not disturb a settlement it has approved over the objections of parties to the settlement unless special circumstances exist which dictate that the public interest will be served by abrogating the settlement"), *order on reh'g,* 106 FERC ¶ 61,013 (2004).

[81] The "*Mobile-Sierra* doctrine" derives from two cases: *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pac. Power Co*., 350 U.S. 348 (1956) (*Sierra*).

wholesale energy contract meets the 'just and reasonable requirement' of the FPA[, and t]he presumption may be overcome only if FERC concludes that the contract harms the public interest."[82] NSTAR/UI state that the FCM settlement prohibited challenges to the capacity prices derived through the FCA, absent the *Mobile-Sierra* "public interest" showing. While NSTAR/UI acknowledge that *Mobile-Sierra* protection attached only to specific portions of the FCM settlement,[83] it nonetheless states that the settlement required the market rules to be "consistent with, and in furtherance of" all of the terms of the settlement agreement.[84]

64. NSTAR/UI further assert that the Commission has stated that it will provide the heightened "public interest" level of review to challenges to the FCM settlement,[85] but that the April 13 Order disregards this heightened level of review. NSTAR/UI argue that

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[82] *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 530 (2008) (*Morgan Stanley*).

[83] The FCM settlement provides that:

> [A]bsent the agreement of all Settling Parties to the proposed change, the standard of review for: (i) challenges to the Capacity Clearing Prices derived through the FCA and prices resulting from reconfiguration auctions . . . , and (ii) proposed changes to Section 11, Part VIII below (Agreements Regarding Transition Period [the period between December 1, 2006 and May 30, 2010]) . . . shall be the "public interest" standard of review set forth in [*Mobile-Sierra*] whether the change is proposed by a Settling Party, a non-Settling Party, or the FERC acting *sua sponte*.

Section 4.C of the FCM settlement, "Explanatory Statement in Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues under ER03-563 *et al*.," filed by ISO-NE on March 6, 2006, in Devon Power LLC, Docket No. ER03-563-030.

[84] NSTAR/UI Rehearing Request at 14 n. 38, *citing* FCM settlement, Section 3.B. NSTAR/UI also cite Section 3.D, which provides that "all filings pursuant to [Section 3 of the settlement] shall be subject to the stakeholder process for Market Rules that provides for consultation with state utility regulatory agencies." *Id*. at 14 n. 39.

[85] NSTAR/UI Rehearing Request at 13, citing *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (NRG Remand Order), *reh'g. denied*, *Devon Power LLC*, 137 FERC ¶ 61,073 (2011) (NRG Remand Rehearing Order).

the Commission has not refined the FCM settlement construct, but rather, has rejected a market-based approach to the pricing and acquisition of capacity, and replaced it with a scheme that establishes an administratively-determined supply curve, favors existing resource owners over new entrants, and repudiates states' good-faith efforts to address capacity deficiencies. NSTAR/UI claim that the Commission's action will affect "the Capacity Clearing Prices derived through the FCA," and it may only take such actions if it makes a determination that such action meets the "public interest" test of *Mobile-Sierra*. NSTAR/UI further assert that the Commission is violating the requirement in the FCM settlement that market rules should be vetted through the stakeholder process before being submitted to the Commission, since the proposals in ISO-NE's First Brief were not so vetted, and, regardless of whether these requirements are subject to *Mobile-Sierra*, the April 13 Order provides no support for violating them.

65. According to Public Systems, the language of the FCM settlement makes clear that a self-supplied resource that meets applicable technical and locational requirements must clear regardless of the resource's bid.[86] Public Systems assert that because, under the April 13 Order, technically qualified self-supplied resources will not clear the FCA unless they are bid in compliance with economic benchmarks, the Commission has dictated the specific (FCM-selected) resources that LSEs must use to satisfy their capacity obligations. Thus, Public Systems argue, the Commission has exceeded its jurisdiction under section 201 of the FPA.[87] Public Systems argue that at the time it approved the FCM settlement, the Commission rejected protests that the FCM would impose a resource adequacy requirement on load-serving entities in contravention of the FPA by stating that "the provisions in the Settlement Agreement permit parties to self-supply their capacity obligations"[88] and that "the performance obligations for capacity resources (including those self-supplied) . . . do not require that a specific level of generation be procured or infringe on the states' traditional role in determining resource adequacy requirements."[89] Public Systems argue that these principles of the FCM

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[86] Public Systems Rehearing Request at 7, *citing* section II.F of the FCM settlement: "If designated as a Self-Supplied FCA Resource, the Resource will clear the FCA … and offset an equal number of megawatts of the projected share of ICR [the installed capacity requirement] … for the LSE designating that Resource." Settlement Agreement Resolving All Issues, Devon Power LLC, Docket No. ER03-563-000, (Mar. 6, 2006).

[87] *See* section 201 of the FPA, 16 U.S.C. § 824 ("The Commission … shall not have jurisdiction, … over facilities used for the generation of electric energy").

[88] Public Systems Rehearing Request at 10, *citing Devon Power LLC*, 115 FERC ¶ 61,340, at P 210 (2006).

[89] *Id.* at 11, *citing Devon Power LLC*, 117 FERC ¶ 61,133, at P 110 (2006).

settlement were carried forward into the FCM rules, for example at section III.13.1.6 of the tariff, which provides: "If designated as a Self-Supplied FCA Resource and otherwise accepted in the qualification process, the resource will clear in the Forward Capacity Auction…."

66. Public Systems assert that subjecting new self-supplied resources to offer floor mitigation and denying FCM credit to technically-capable, self-supplied resources also results in the Commission's compelling unneeded capacity purchases, which exceeds the Commission's jurisdiction. Public Systems state that the court in *CT DPUC* upheld the Commission's authority to review New England's determination as to the total amount of capacity that load-serving entities (LSEs) must procure each year (installed capacity requirement) precisely because the installed capacity requirement is *not* a requirement to install new capacity. Rather, Public Systems argue, the installed capacity requirement tells ISO-NE's LSEs how much capacity they are required to contribute to the system, but does not require the construction of any particular type of resource.[90]

67. Under the April 13 Order, however, according to Public Systems, LSEs no longer retain control over how much capacity they procure through the FCM and how much capacity they obtain by other means. Public Systems assert that determining which resources an LSE may use to satisfy its resource-adequacy requirements violates both the FPA's prohibition on the Commission's exercise of jurisdiction over electric generating facilities and its restriction of the Commission's authority to the regulation of "matters . . . not subject to regulation by the states."[91] Public Systems also point to one of the Commission orders underlying the *CT DPUC* decision, in which the Commission stated that the installed capacity requirement does not "prevent[] a state from requiring its LSEs to meet capacity requirements through demand response, or through contracts to purchase power (from resources located inside or outside the state), or through more environmentally-friendly generation, or, generally speaking, through resources that meet state health or environmental or land-use planning goals."[92] Similarly, Public Systems argue, compelling LSEs that have acquired non-FCM resources to nonetheless purchase

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[90] Public Systems Rehearing Request at 14, *citing CT DPUC*, 569 F.3d at 481 (ICR is "better understood not as a capacity requirement but as something more like a peak demand estimate" that affects the price of capacity) and *ISO New England, Inc.,* 120 FERC ¶ 61,234, at P 29 (2007) (" . . . ISO-NE says to its LSEs, 'Provide X amount of resources.' But *how* those resources are provided is up to the LSEs and the states" (emphasis added)).

[91] Public Systems Rehearing Request at 14 *citing* FPA section 201, 16 U.S.C. § 824(a) (2006).

[92] *Id.* at 14, *citing ISO New England Inc.*, 120 FERC ¶ 61,234, at P 29 (2007).

their full allotment of FCM capacity "compels the enlargement of generating facilities" in violation of the FPA.[93]

68. Additionally, Public Systems argue that, even if subjecting self-supplied resources to a minimum offer requirement that could prevent them from clearing does not exceed the Commission's jurisdiction, the use of an "irrelevant" economic criterion to disqualify self-supplied resources from the FCM is arbitrary and capricious.[94] They state that "[t]he characteristics relevant to assessing whether self-supplied resources can provide capacity to the system and support reliability are technical and locational, not economic."[95] Public Systems state that the imposition of criteria unrelated to the objectives of an underlying rule is arbitrary and capricious, and also unduly discriminatory because the distinction between resources that do and do not meet this economic test is not reasonably related to the objectives of the FCM.

69. Public Systems and EMCOS argue that LSEs have little or no reason to pursue suppression of capacity prices. Public Systems argue that while procuring self-supplied resources outside of FCM *can* constitute an effort to suppress prices, the decision of an LSE to self-supply is more likely the result of a legitimate business decision to provide a hedge against market volatility or rising prices, or to comply with a renewable-portfolio standard.[96] EMCOS similarly argues that the value of self-supply to municipal utilities lies in price certainty. EMCOS refers to member utilities who own on-system generation at or in excess of their capacity requirements or who have long-term capacity bilaterals and argues that the economic interests of their consumer owners would be harmed, rather than advanced, by artificial suppression of capacity prices. Public Systems note the risk incurred, and time and expense invested by, a member utility to develop a new generating asset and observes that the notion that this member utility would incur such risk and expense in the hope of suppressing FCM prices, particularly when other entities would receive the same benefits without incurring that expense or risk, is unrealistic. EMCOS

[93] Public Systems Rehearing Request at 15, *citing* sections 202(a) and 207 of the FPA, 16 U.S.C. §§ 824a(b) and 824f.

[94] Public Systems Rehearing Request at 16.

[95] *Id.*

[96] *Id.* at 18-19. Public Systems note that governments might also subsidize generation capacity to promote early technology development or as part of a broad policy of economic recovery. Public Systems Rehearing Request at 9, footnote 15, *citing* Statement of William W. Hogan, Ph.D. at 9:7-15, Ex.7 to P3 Answer to Motions to Dismiss, Docket No. ER11-2875-000 (Mar. 18, 2011). State sponsored projects are discussed in the next section.

argues that, in fact, it is price supports, not price suppression, that have caused the persistent surplus and suppression of prices in New England, and that benchmark pricing will only exacerbate this surplus. EMCOS requests that the Commission grant rehearing to exempt capacity self-supplied by vertically-integrated load-serving utilities from the offer floor, in accordance with the intent of the FCM settlement.

c. Commission Determination

70. We deny rehearing with respect to self-supply and reaffirm the Commission's finding in the April 13 Order that a blanket, across-the-board offer floor mitigation exemption for new resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment. However, as the Commission has recently recognized, there are certain advantages associated with long-standing and well-recognized business models that should not be deemed automatically suspect (or summarily barred) when determining whether a particular sell offer accurately reflects a resource's net costs.[97] As will be discussed further below, some of these advantages are taken into consideration in the internal market monitor's offer review process, by which a party may offer below its benchmark if it can demonstrate that its actual costs are below its asset specific benchmark. If stakeholders nevertheless conclude that this existing tariff process is not sufficient to mitigate the concerns that the application of offer floor mitigation to self-supplied resources will be particularly burdensome for municipal, cooperative and traditionally regulated investor-owned-utilities, ISO-NE and its stakeholders should work within the stakeholder process to develop a mechanism that further addresses these concerns.

71. EMCOS observes that in the April 13 Order, the Commission describes a hypothetical self-supplied resource as offering at a "zero-price," when, in fact, the FCM rules provide that self-supplied resources are to be treated as "price takers." EMCOS implies that this "misunderstanding" of the treatment of self-supply under the FCM rules undermines the Commission's rationale for not exempting self-supplied resources from offer floor mitigation. EMCOS misconstrues the Commission's statements in the April 13 Order. There, the Commission stated in the paragraph following the hypothetical example cited by EMCOS that, "new self-supply has the same *price effect* as offering the new resource at a price of zero."[98] In an auction in which all resources receive the market clearing price, agreeing to take whatever that price may be is equivalent to agreeing to a price of zero. The explanatory power of the Commission's example is not

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[97] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 205 (2011) (PJM MOPR Rehearing Order).

[98] April 13 Order, 135 FERC ¶ 61,029 at P 232 (emphasis added).

undermined by its use of the phrase "offer a price of zero" rather than the phrase "offer as a price taker."

72. EMCOS further argues that, because under the market rules self-supplied resources and their associated load are mutually offsetting, there can be no price suppression from self-supply. The Commission rejected this argument in the April 13 Order, and we again do so here. The following example demonstrates how self-supply often results in lower FCM prices. Assume the FCM clearing price would be $6 if no resources were self-supplied. Assume also that an LSE would like to self-supply resources whose going forward costs (and whose offer price in the FCM auction) are $8 (in other words, higher than the FCM clearing price). This latter resource would not be accepted in an auction with no self-supply, since its offer price would be higher than the clearing price. However, if the LSE had self-supplied the $8 resource, the resource would have acted as a price taker (and thus, would have been willing to stay in the auction at any price above $0).[99] Thus, the self-supplied resource would have been accepted in the auction, and would have displaced the $6 resource that set the clearing price in the original auction with no self-supply, resulting in a resource with a potentially lower offer price to set the clearing price. Thus, the self-supply would affect the clearing price – it would result in a lower clearing price.

73. A number of parties argue that the Commission's April 13 Order, exemplified by the Commission's action on self-supply, has fundamentally undermined the FCM settlement and the purpose of the FCM in an unlawful manner. These parties argue that the FCM was and is intended as a supplement to traditional means of procuring capacity such as self-supply through owned or contracted generation; they argue that the April 13 Order transforms this voluntary arrangement into a mandated purchase through a centralized structure while transforming a narrowly drafted market power mitigation measure into an administratively determined supply curve. These arguments are not persuasive. As the Commission noted in the April 13 Order, parties raising general concerns over administrative pricing have not offered any support for failing to employ a full price correction to uneconomic offers.[100] In the absence of such support, the Commission properly found the preexisting "narrowly drafted" market power mitigation

[99] Under the Commission approved FCM rules, all capacity resources, including self-supplied resources, must clear through the FCA. Under the ISO-NE Tariff, the full amount of the installed capacity requirement is procured through the FCA. In order for a resource to acquire a capacity obligation for a commitment period, the resource (including a self-supplied resource) must satisfy the Forward Capacity Auction qualification process set forth in the Tariff and participate in an FCM auction for the applicable commitment period. *See* ISO-NE Tariff, § III.13.2.2 and § III.13.1.6.1.

[100] April 13 Order, 135 FERC ¶ 61,029 at P 62.

measure, which failed to correct for below-market entry and which furthermore had never triggered, unjust and unreasonable.[101] For similar reasons, we reject EMCOS' assertion that it is "price supports" that have caused the persistent capacity surplus in New England, which "administered" benchmark pricing will therefore only exacerbate.[102] Moreover, while the FCM settlement incorporated "traditional" means of capacity procurement, permitting load to self-supply either through bilateral agreements or through owned generation, these self-supplied resources were to be offered into the FCM auctions.[103] The Commission recognized that new self-supply had the potential to depress FCM prices, and, in accepting the FCM settlement, noted the importance of the then-existing mitigation regime (APR) in preventing such an outcome. Specifically, the Commission stated that, "in the absence of the [APR], the price in the FCA could be depressed below the price needed to elicit entry if enough new capacity is self-supplied. … That is because self-supplied new capacity may not have an incentive to submit bids that reflect their true cost of new entry."[104] The April 13 Order retained the right for load to self-supply, but precluded the suppression of capacity market clearing prices in a Commission jurisdictional market, something that would otherwise affect FCM participants in a multi-state region.[105] We therefore reaffirm that it is appropriate and necessary that new self-supply be mitigated under APR's replacement, the offer floor construct.

74. Certain parties argue that self-supply is as much a bedrock principle of the FCM as limiting capacity to the installed capacity requirement, and that by announcing for first time that self-supplied resources cannot clear unless they are bid in compliance with economic benchmarks, the Commission has fundamentally altered the FCM. It is true

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[101] *Id.* at P 62.

[102] In making this assertion, EMCOS relies on an excerpt from the *2010 ISO/RTO Metrics Report*. *See* EMCOS Rehearing Request at 8. This excerpt, however, fails to establish a causal link between so-called "price supports" (in this case, the price floor) and the capacity surplus.

[103] *See* FCM settlement at Part II.F ("Prior to each FCA, a Resource or a portion of a Resource may be designated by a Load Serving Entity pursuant to Market Rules as a [S]elf-[S]upplied FCA Resource… If designated as a Self-Supplied FCA Resource, the Resource will clear the FCA… and offset an equal number of megawatts of the projected share of the [installed capacity requirement] in the Commitment Period for the LSE designating that Resource.")

[104] *Devon Power LLC*, 115 FERC ¶ 61,340, at P 113 (2006).

[105] *See, e.g.,* April 13 Order, 135 FERC ¶ 61,029 at P 170, 230-232.

that under the original FCM design, self-supplied resources participated in the FCM as price-takers, and therefore were guaranteed to clear the market; new self-supplied resources were also always designated as OOM capacity. However, as noted above, the Commission explicitly recognized that self-supplied resources could have a price suppressing effect on the market, and therefore the original FCM design also contained an APR that, if triggered, raised the market clearing price for all cleared resources, thereby insulating the market from the price suppressing effects of self-supply. As it turned out, and as we have explained in prior orders, the original APR was inadequate and failed to discourage the price suppressing effects of below-market entry.[106] The Commission, in the April 13 Order, therefore determined that institution of an offer floor was appropriate and necessary. The establishment of such an offer floor does not prohibit parties from self-supplying. Parties may self-supply with existing capacity, which is not subject to the economic benchmarks established by the April 13 Order. Parties may also self-supply with new capacity, provided these new resources clear the auction.

75. As the Commission explained in the April 13 Order and above, it is not possible to at once attain all three objectives of (1) allowing OOM resources, including self-supplied OOM resources, to clear, (2) preventing OOM resources from distorting the market clearing price, and (3) ensuring that total purchases do not exceed the installed capacity requirement. Parties who argue that the Commission erred in overturning the "bedrock" principle by which self-supplied resources always clear are, in essence, arguing that the Commission has made a poor balancing choice.[107] However, as we have explained, we share the view of ISO-NE and other commenters that just and reasonable market rules must achieve the second objective.[108] As to the choice between the first and third objectives, in the April 13 Order, the Commission concluded that it is more important in New England not to require purchases above the installed capacity requirement (the third objective) than it is to allow OOM capacity to clear (the first objective), especially since the FCM design does not allow for the possibility of procuring less than the installed capacity requirement. NEPGA/NextEra argue that the Commission should have provided for objectives (1) and (2) and discarded objective (3); Public Systems argue that the Commission should have provided for objectives (1) and (3) and discarded objective (2). We acknowledge varying opinions on this issue; however, after weighing all the interests and evidence before it, the Commission affirms that the appropriate course of action,

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[106] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 69-70.

[107] Public Systems, for example, assert that allowing legitimate new OOM resources to clear, with a concomitant effect on FCM prices, better balances the three objectives.

[108] *See* fn. 25, above.

which result in just and reasonable rates, is to prevent new resources from lowering the price of capacity significantly below competitive levels while sparing load the cost of acquiring capacity above the installed capacity requirement.[109] The offer floor mitigation the Commission required in the April 13 Order, applied to all OOM capacity, including new self-supply, is designed to do just that.

76. In response to parties who argue that the Commission did not establish the "special circumstances" that would permit it to alter a settlement agreement, we note that the Commission has modified provisions of settlement agreements in the past where circumstances and the record presented warranted those changes.[110] Here, ISO-NE itself, and the external market monitor, agreed with the Commission that major design issues remained with the initial APR and with the Joint Filing's APR proposal.[111] Moreover, since the conclusion of the "lockout" period during which parties waived their rights to challenge the settlement agreement or the market rules implementing the agreement,[112] the Commission has modified many rules of the FCM.[113]

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[109] Faced with competing proposals, the Commission may approve a proposal as just and reasonable; it need not be the only reasonable proposal or even the most accurate. *Oxy USA, Inc. v.* FERC, 64 F.3d 679, 691 (D.C. Cir. 1995); City *of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).

[110] *See, e.g., NRG Remand Order*, *supra*, 134 FERC ¶ 61,208 at P 25 (modifying the FCM settlement and stating that the Commission will "respond as necessary to the threat of serious harm to the public interest"); *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 36 (2009) (accepting, among other things, new CONE values to be used in PJM's MOPR); *Pepco Energy Services, Inc. v. PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,051 (2009) (finding PJM's RPM rules governing the peak-hour period availability charge for infrequently run generators to be unjust and unreasonable).

[111] *See, e.g.*, P 18, above. While certain parties argue that the Commission has not established the special circumstances required to alter the FCM settlement with respect to the ability of self-supply to clear, they at the same time ask the Commission to alter other, in our view more fundamental, aspects of the settlement agreement. Public Systems, for example, request that the Commission direct that the FCM be redesigned to permit self-supply to clear, procure no more than the installed capacity requirement, and allow the concomitant effect on FCM prices, which would result in potentially unabated suppression of the FCM clearing price.

[112] In the FCM settlement agreement, parties agreed to waive their section 206 rights to seek a change in the agreement or the market rules implementing the agreement for a period of roughly two and-one-half years (from March 6, 2006 through the earlier of September 5, 2008, or the date on which FCA 2 became final). Settlement Agreement

(continued…)

77. We similarly reject NSTAR/UI's assertion that, in modifying the APR mechanism that formed a part of the FCM settlement, the Commission has violated the *Mobile-Sierra* doctrine. As NSTAR/UI acknowledge, the FCM settlement provided that only certain aspects of FCM – the prices generated by FCAs, and provisions relating to the transition period between December 1, 2006 and May 30, 2010 – would be subject to *Mobile-Sierra* protection.[114] The changes to the APR mechanism here are changes to market rules, not to prices, and will operate only on a forward basis. Moreover, NSTAR/UI rely on an erroneous interpretation of prior Commission orders addressing the FCM settlement, including the NRG Remand Order. In those cases, the Commission accepted the provision in the FCM settlement providing for a "public interest" level of review of challenges to auction results and transition period payments. Contrary to NSTAR/UI's assertion, the NRG Remand Order did not extend that provision to apply to all challenges to the FCM settlement.[115]

78. EMCOS and Public Systems argue that LSEs, particularly cooperative and municipally owned LSEs, have little reason to pursue price suppression. EMCOS therefore requests that the Commission grant rehearing to find that self-supply by vertically integrated LSEs be exempt from the offer floor; Public Systems request that the Commission grant rehearing to allow new legitimate OOM capacity to clear while allowing its concomitant effect on FCM prices.[116] We deny these rehearing requests. For reasons explained in the April 13 Order,[117] either exemption would swallow the rule,

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Resolving All Issues under ER03-563 *et al*. filed by ISO-NE on March 6, 2006, in *Devon Power LLC*, Docket No. ER03-563-030, at Section 4.A.

[113] *E.g., ISO New England Inc.*, 134 FERC ¶ 61,128 (2011) (Commission accepted revisions to the Peak Energy Rent function of FCM) and *ISO New England Inc.*, 128 FERC ¶ 61,023 (2009) (Commission accepted revisions to rules relating to rights and obligations of resources with and without FCM capacity supply obligations).

[114] *See* fn. 83, above.

[115] *See NRG Remand Order*, 134 FERC ¶ 61,208 at P 9-17; *see also Devon Power LLC*, 115 FERC 61,340 at P 182 (2006).

[116] Public Systems' assertion that the Commission has ample tools at its disposal to detect and remedy intentional market manipulation is beside the point—we note, as we have elsewhere in this order and in prior orders, that below-market entry can suppress the market clearing price regardless of intent.

[117] April 13 Order, 135 FERC ¶ 61,029 at P 232 ("Failure to classify new self-supply as OOM would allow the mitigation mechanism to be circumvented. . . . [W]e find that any new self-supplied capacity that clears (through a zero price offer rather than

(continued…)

leading to unjust, unreasonable and unduly discriminatory capacity clearing prices. However, as noted previously, these parties may avail themselves of the internal market monitor's case-by-case cost justification process for new entry offers that are below their asset-specific benchmark, and may work through the stakeholder process to further address their concerns.

79. We also deny rehearing as to Public Systems' challenge to the Commission's jurisdiction. Public Systems misstate the nature and purpose of FCM. FCM is more than a vehicle "to ensure that each [LSE] contributes its share of . . . capacity that is needed to operate the region's electric system reliably."[118] The broader purpose of FCM is to "locate the *price* at which market incentives will be sufficient to meet [the system's] expected demand."[119] By regulating the mechanism that ultimately produces the capacity clearing price, the Commission is properly exercising its jurisdiction over rates, terms and conditions of service. As the Commission stated in the April 13 Order, buyer-side mitigation is an integral part of the regulation of capacity costs, which are a large component of wholesale rates. To the extent the offer floor construct the Commission has accepted impacts matters relating to generation, this outcome is an indirect result of a legitimate exercise of the Commission's power to regulate wholesale rates under the FPA.[120]

80. We disagree that offer floor mitigation will result in the Commission's dictating the specific FCM-selected resources LSEs are to purchase, or that offer floor mitigation will mandate duplicative purchases. It is only new self-supply that will be subject to the offer floor, and if offered in accordance with the relevant benchmark and if needed by the market, these resources will clear. Moreover, as noted previously, ISO-NE has in place a review process by which resources may demonstrate to the internal market monitor that their actual costs are below their asset-specific benchmarks. In the April 23, 2010 Order, the Commission approved changes to these rules that, among other things, explicitly instruct that the internal market monitor "will consider reductions in costs such as reduced taxes in determining expected net revenues" and that expected net revenues "shall include economic development incentives that are offered broadly by state or local

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at full net entry cost) would distort the market clearing price. Therefore, we find that new self-supply offers should be subject to offer-floor mitigation.").

[118] Public Systems Rehearing Request at 13.

[119] *CT DPUC*, 569 F.3d at 481 (emphasis added).

[120] April 13 Order, 135 FERC ¶ 61,029 at P 220.

governments and are not expressly intended to reduce prices in the FCM."[121] We encourage ISO-NE and its stakeholders to consider whether further refinement of this cost justification process will address the Commission's concern that mitigation of self-supply not automatically deem suspect long-standing and well-recognized business models.

81. Finally, we reject Public Systems' assertion that the Commission may not employ an economic criterion to disqualify new self-supplied resources proffered to fill reliability needs. As noted above, one purpose of the FCM is to ensure that the rates for capacity are just and reasonable, not simply to ensure that ISO-NE procures capacity from resources that are able to meet its technical requirements. The FCM is therefore designed to require resources to compete to provide capacity based on economic criteria – prices – as well as on technical criteria, so as to ensure that the lowest-cost set of resources are accepted in the auction. To facilitate this purpose, asset-specific benchmarks are used to make sure that resources bid their true costs into the FCM. The use of such criteria thus flows appropriately from the Commission's jurisdiction to ensure just and reasonable rates.[122] We therefore reject Public Systems' argument that economic criteria are "irrelevant" to the question of whether a resource may properly provide capacity.

7. State Projects

a. April 13 Order

82. In the April 13 Order, the Commission directed ISO-NE and its stakeholders to develop an offer floor mitigation construct in which asset-class-specific benchmark offer floors are applied to offers from new resources. The Commission recognized, however, that states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will

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[121] ISO-NE Tariff, § III.13.1.1.2.6 and § III.13.1.4.2.4(b), approved in April 23, 2010 Order, 131 FERC ¶ 61,065 at P 241-253. We expect that these tariff provisions will continue to apply to cost justification under an offer floor mitigation regime.

[122] *See CT DPUC, supra*. The Commission's use of market mechanisms to ensure just and reasonable rates, so long as these mechanisms are not rendered ineffective by the exercise of market power, has been frequently affirmed by courts. *See Montana Consumer Counsel v. FERC*, 659 F.3d 910, 919 (9th Cir. 2011) (in response to the assertion that "FERC's market-based rates policy impermissibly equates market rates with 'just and reasonable' rates in violation of the FPA . . . [and] FERC cannot outsource its regulatory duties to the 'Invisible Hand' of the market," the court stated that market mechanisms may be used to bring about just and reasonable rates, so long as those market mechanisms were not susceptible to the exercise of market power).

further specific legitimate policy goals and therefore argue that certain resources that receive payments pursuant to state programs should be exempt from price floor mitigation.[123] The Commission affirmed that nothing in the April 13 Order eliminated any rights entities may have under section 206 of the FPA to request a mitigation exemption, and explained that it would evaluate the merits of proposed exemptions based on each case's unique facts.[124]

b. Requests for Rehearing

83. NSTAR/UI assert that the April 13 Order discriminates against state-approved projects by requiring state-approved projects to consistently bid into the FCM at a price no less than the administratively determined cost for its asset class. Such a requirement, these parties argue, is economically irrational, discriminatory, and adds unneeded cost to New England consumers. NSTAR/UI assert that state-approved generation is built on the strength of long-term power purchase agreements, not in reliance on FCM revenue; therefore, an economically rational owner will tender a bid into the capacity market that is likely to be accepted on the grounds that some revenue, even if less than the resource's full long-run average costs, is better than no incremental revenue. NSTAR/UI assert that such state-approved OOM capacity is uniquely denied the opportunity to participate in the capacity market on an economically rational basis. NSTAR/UI aver that existing generators regularly submit bids into the FCM auctions that are calculated to be accepted; if this is the result of a profit-maximizing strategy in the hopes that future capacity prices will rise to more remunerative levels, then these existing resources, according to NSTAR/UI, should be considered OOM capacity and should be required to submit bids reflecting their asset-based, long-term average cost. NSTAR/UI state that to require state-approved resources to operate within a straightjacket when no anticompetitive intent is shown is to impose an unduly discriminatory burden on such resources that is not imposed on similarly situated producers.[125] NSTAR/UI believe that the Commission erred in "essentially assuming that all state-approved projects constitute an act of market manipulation and further errs in mandating discriminatory treatment be meted out to a sub-set of capacity providers."[126] NSTAR/UI argue that the Commission should embrace state initiatives that produce immediate and concrete contributions to reliability.[127]

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[123] April 13 Order, 135 FERC ¶ 61,029 at P 20, 171.

[124] *Id.*

[125] NSTAR/UI Rehearing Request at 18-19.

[126] *Id*. at 21.

[127] *Id.* at 16.

84. NSTAR/UI argue that, despite the primacy placed by the April 13 Order on consumers not paying for capacity in excess of the installed capacity requirement, discriminating against state-approved projects will ensure that outcome. This is because, according to NSTAR/UI, if a state-approved project is built on the strength of its power purchase agreement (as is customary), but is not allowed to participate in the capacity market, the capacity will still be in the market, and consumers, in at least the sponsoring state, will still have to pay for it. As a matter of fairness, assert NSTAR/UI, the installed capacity requirement that must be acquired in the auction must be adjusted downward to reflect the existence of capacity resources that are effectively not permitted to participate in the auction due to unwarranted bidding limitations.[128]

85. State Commissions and Associated Parties assert that the Commission erred if it intended that State Commissions could only seek a mitigation waiver through a section 206 complaint; the parties suggest that the Commission instead intended that a waiver provision be included in the ISO-NE Tariff that would allow mitigation waivers upon a proper showing. According to State Commissions and Associated Parties, having acknowledged that mitigation waivers may be appropriate in certain circumstances, it was arbitrary to conclude that State Commission's only option was one they already possess: to file a complaint under section 206 alleging that the tariff is unjust and unreasonable.[129] State Commissions and Associated Parties also seek guidance as to the process that state agencies should follow in seeking an exemption. They request that the Commission clarify that it will allow state agencies to seek an exemption through a request for a declaratory order before initiating the necessary state administrative process to procure new resources.

86. NSTAR/UI, State Commissions and Associated Parties, and Mass DPU assert that the Commission has not provided the standards or criteria it will consider in evaluating an exemption request for public policy initiatives. NSTAR/UI cite *West Deptford*, in which a party petitioned the Commission for an exemption under PJM's MOPR, for the proposition that, in fact, the option of a case-by-case exemption from mitigation is illusory.[130] Mass DPU and State Commissions and Associated Parties request that the

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[128] *Id*. at 19-20.

[129] State Commissions and Associated Parties Rehearing Request at 17.

[130] NSTAR/UI Rehearing Request at 19-20, *citing West Deptford Energy, LLC,* 134 FERC ¶ 61,189 (2011). NSTAR/UI assert that the Commission conditioned West Deptford's application for an exemption on the requirement that it "share its cost data with all of its competitors." According to NSTAR/UI, instead of surrendering its competitive position, West Deptford withdrew its application. (*See* Withdrawal of Request for Determination of Minimum Capacity Sell Offer of West Deptford Energy, LLC (FERC Docket No. ER11-2936) (Filed March 15, 2011).)

Commission clarify the criteria it will apply to determine whether such an exemption will be granted. Mass DPU explains that as it stands now, parties lack guidance as to what to include with their exemption request; with further clarification, states could seek to tailor their policy initiatives to meet the Commission's criteria.[131] State Commissions and Associated Parties request that the Commission specify the factors it will consider in granting an exemption to new resources developed to achieve state policy objectives to, in particular, develop capacity resources that use innovative new technologies; meet a particular reliability need; or comply with a renewable portfolio standard (RPS) or energy-efficiency goal (if the market rules do not include a categorical exemption for such projects). State Commissions and Associated Parties add that the Commission should refrain from establishing criteria that work at cross-purposes with states' efforts to develop a wide array of new renewable resources.[132]

87. State Commissions and Associated Parties also request that the Commission clarify that ISO-NE, stakeholders, and state regulators may develop a categorical exemption from minimum offer requirements for renewable resources that qualify to meet RPS objectives, or as state-sponsored, cost-effective energy efficiency. These parties argue that a categorical exemption in the tariff would avoid the need to seek case-by-case waivers of the tariff rules, which would, in turn, reduce litigation risks; decrease costs; and limit the strain on developers', the Commission's and state agencies' administrative resources. Furthermore, State Commissions and Associated Parties assert, a categorical exemption would remove the likelihood that customers of LSEs must pay for more capacity than they need.[133] State Commissions and Associated Parties assert that the Commission should clarify that it is just and reasonable in New England's capacity market to categorically exempt from minimum offer price mitigation RPS-qualifying resources and cost-effective energy efficiency resources, thus clearing the way for stakeholders to develop such an approach.[134] State Commissions and Associated Parties argue that because the Commission has accepted a categorical exemption for renewable resources in PJM, an exemption in this case is necessary to ensure that renewable and cost-effective energy efficiency resources in New England receive the same treatment as those in the Mid-Atlantic states; they further argue that the Commission's failure to address, in the April 13 Order, their request for an exemption for renewable resources was arbitrary.

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[131] Mass DPU Rehearing Request at 7.

[132] State Commissions and Associated Parties Rehearing Request at 19.

[133] *Id.* at 11-12.

[134] *Id.* at 14.

c. **Commission Determination**

88. The Commission denies rehearing with respect to the treatment of state-sponsored projects. NSTAR/UI argue that the April 13 Order discriminates against state-sponsored projects because, according to these parties, state-sponsored OOM capacity is uniquely denied the opportunity to participate in the capacity market on an economically rational basis. This contention is incorrect for several reasons. First, under the April 13 Order, state-sponsored OOM capacity is treated identically to all other OOM capacity with regard to the application of the offer floor—the minimum offer rule does not distinguish among sources of out-of-market support. Second, it is only new state-sponsored resources that will be required to offer above a minimum level—existing state-sponsored resources, like all existing resources, will not be subject to an offer floor. To the extent that NSTAR/UI argue that existing resources should also be required to submit bids reflecting their asset-based, long-term average cost, that is, should also be subject to a price floor, we find the request to be outside the scope of this proceeding.

89. The Commission denies rehearing on parties' request to seek exemptions solely via petitions for declaratory order or waiver requests. We reiterate that state parties have the statutory right under section 206 to file to prospectively change a rate schedule and we reaffirm that this is the statutory vehicle available to state parties seeking an exemption for any particular state policy project. In such a filing, a state party must demonstrate that ISO-NE's offer floor mitigation tariff rules are unjust and unreasonable as applied to a particular project or projects. We clarify, as we did in the PJM MOPR Rehearing Order,[135] that nothing precludes a state party from filing a petition for declaratory order with the Commission, but the ultimate vehicle that will be required to establish that mitigation rules are unjust and unreasonable as applied to a particular project is a section 206 complaint, though state parties may of course avail themselves of the cost justification process described in the prior section. We see no merit in State Commissions and Associated Parties' argument that, having acknowledged that mitigation exemptions may be appropriate in certain circumstances, it was arbitrary to conclude that State Commission's only option was to file a complaint under section 206; we again note that section 206 is the vehicle available to parties to prospectively change a rate schedule other than their own.[136] In response to State Commissions and Associated

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[135] *PJM Interconnection, L.L.C.* 137 FERC ¶ 61,145 at P 99.

[136] While the Commission has granted waivers from compliance with certain ISO-NE Tariff provisions, such waivers have been limited to discrete circumstances, such as the one-time failure to meet a deadline due to an error made in good faith. *See ISO New England*, 135 FERC ¶ 61,147 at P 33 (2011) ("As the Commission has previously found, a waiver of a tariff provision may be granted in rare circumstances where: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) it would

(continued…)

Parties' concern about timing, we note that nothing prevents state parties from filing under section 206 prior to initiating the administrative process necessary to solicit new resources.

90. We also deny rehearing with respect to parties' request that the Commission specify evaluation criteria under section 206 on the grounds that, as we stated in the April 13 Order, the decision of whether to grant an exemption will be determined on a case-by-case basis. We disagree with NSTAR/UI's assertion that *West Deptford* demonstrates that a case-specific exemption process under section 206 is not feasible. In *West Deptford*, the Commission found that the applicant's interest in maintaining the confidentiality of sensitive commercial information could be protected through the use of a protective order, as the Commission has ordered in similar cases.[137] The applicant, however, chose not to enter into a protective agreement and withdrew its exemption application. The fact that this applicant made this particular choice does not demonstrate that the Commission's normal procedure, which permits confidential information to be disclosed to parties pursuant to a protective agreement, would not be sufficient to enable state parties to seek an exemption under section 206.

91. With respect to State Commissions and Associated Parties' request that we clarify that ISO-NE, stakeholders, and state regulators may develop in the stakeholder process a categorical exemption for renewable resources that qualify to meet RPS objectives or as state-sponsored, cost-effective energy efficiency, we grant clarification. As the Commission similarly noted in the PJM MOPR Rehearing Order,[138] the FCM has no feature to explicitly recognize, for example, environmental or technological goals, nor does it contemplate reliability concerns beyond a three-year forecast. Parties are free to introduce and develop categorical exemptions or other measures in the stakeholder process. We decline State Commissions and Associated Parties' request that we clarify beforehand that such an exemption would be just and reasonable. We are not convinced by the argument that such a finding is necessary to "clear[] the way for stakeholders to develop such an approach."[139] We are furthermore not convinced that we must do so simply because the Commission recently allowed an exemption for renewable resources

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address a concrete problem; and (4) it would not have undesirable consequences, such as harming third parties"), citations omitted.

[137] *West Deptford*, 134 FERC ¶ 61,189 at P 27, *citing Mojave Pipeline Co.*, 38 FERC ¶ 61,249 (1987); *see also Astoria Generating Company, L.P. and TC Ravenswood, LLC* v. *New York Independent System Operator, Inc.*, 136 FERC ¶ 61,155 (2011).

[138] PJM MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 90.

[139] State Commissions and Associated Parties Rehearing Request at 14.

in PJM. That exemption, unlike the request here, was proposed under section 205 of the FPA. State Commissions and Associated Parties essentially seek a declaratory ruling based on an undeveloped record for an exemption that has not yet been introduced in the stakeholder process.

8. Imports

a. April 13 Order

92. In the April 13 Order, the Commission determined that, in light of the difficulty in determining the resource or resources that support imports, it is reasonable to treat most imports like existing internal resources for mitigation purposes, and thus, reasonable not to require an offer floor for most imports. The Commission stated that there would be an exception, however, for imports where a specific new external resource is identified as the sole support for the import, and where a significant investment (such as the construction of a new transmission line to import power from an adjacent control area) is made to provide capacity to New England. The Commission found that these latter resources are new resources that would be devoted to the New England market over the long term, and should therefore be treated like new internal resources for mitigation purposes, and subject to an offer floor associated with a benchmark price related to the external resource's technology type.[140]

b. Requests for Rehearing

93. NEPGA and Joint Complainants take issue with the Commission's decision to apply mitigation to imports only where "a specific new external resource is identified as the sole support for the import, *and* where a significant investment (such as the construction of a new transmission line to import power from adjacent control area) is made to provide capacity to New England."[141] Joint Complainants and NEPGA argue that the test should be that either of these elements will suffice to require an import to be subject to an offer floor. The parties argue that applying the offer floor to only certain imports, and to a differing level of mitigation than internal resources, results in unjust, unreasonable, unduly discriminatory rates and reflects arbitrary and capricious decision-making.[142] The parties request that the Commission grant clarification or rehearing to make a one word change to the April 13 Order, replacing the word "and" in the third

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[140] April 13 Order, 135 FERC ¶ 61,029 at P 191.

[141] *Id.* (emphasis added).

[142] Joint Complainants Rehearing Request at 5.

sentence of P 191 (as noted above) with the word "or." Failure to do so, the parties argue, will create a large loophole in the market power mitigation scheme.

94. Joint Complainants state that under the current rules, only imports that are being provided under a pre-existing multi-year contract with a buyer in New England qualify as "existing" resources, and that otherwise imports are treated as "new" each and every year. Additionally, if an owner of external resources commits either its resources or the transfer capability of its new transmission line under a long-term agreement to a buyer in New England, the capacity would be considered "existing" only after it has cleared once in a capacity auction as "new." However, in order to clear that first time, it must be subject to the same mitigation that all other new resources face, that is, the offer floor mitigation directed by the Commission.[143]

c. Commission Determination

95. For the reasons below, we deny the requests for clarification and the requests for rehearing made by NEPGA and Joint Complainants.

96. The April 13 Order adopted ISO-NE's basic approach to imports: ISO-NE proposed that most imports would be treated like existing internal generators – their offer prices would not be compared to any benchmark price and they would not trigger the APR. ISO-NE stated that it is very difficult to determine what resource (or set of resources) is supporting an import, making it very difficult to determine whether the supporting resources are existing or new. ISO-NE's one exception was for imports where a specific new external resource is identified as the sole support for the import and where a significant investment (such as the construction of a new transmission line to import power from an adjacent control area) is made to provide capacity to New England. No one, including NEPGA and Joint Complainants, protested this proposal.

97. Therefore, the Commission finds that, while ISO-NE's proposal was made in the context of the APR, the principles carry over to offer floor mitigation because it is very difficult to determine what resources support an import – except when a new resource can be identified *and* a significant investment (such as the construction of a new transmission line to import power from an adjacent control area) is made to provide capacity to New England. NEPGA and Joint Complainants argue that "and" should be clarified to mean "or," arguing that a new transmission line by itself should be sufficient to trigger the offer floor. NEPGA and Joint Complainants assert that even if no new resource is identified to support the import, the offer floor should include, among other things, the annualized cost of the new transmission line or the transmission rate charged to use the transmission line.

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[143] *Id.* at 29-30.

98. The Commission further denies clarification, stating that we did not intend "and" to mean "or." The clarification NEPGA and Joint Complainants seek would be contrary to the principles of open access and non-discrimination. We believe that the proposed clarification would create disparate treatment for imported capacity by requiring a price floor for external existing resources, and by implementing a resource cost plus transmission cost formula for resources that employ the use of new transmission to set the floor price. The Commission also denies rehearing on this issue. While it is recognized that a new transmission line could be used as a means to introduce unneeded capacity into the New England market, NEPGA and Joint Complainants' proposal unduly discriminates between service over new and existing transmission facilities. The proposal would require an offer floor reflecting transmission costs for capacity imported over new transmission facilities, but not require an offer floor for capacity imported over existing transmission facilities, even though in either case the importer's incremental avoidable costs would include transmission costs.

9. Benchmarks for Demand Response

a. April 13 Order

99. In the April 13 Order, the Commission directed ISO-NE to work with its stakeholders to develop a mitigation regime relying on asset-class-specific benchmarks.[144] The Commission noted that the internal market monitor had committed to developing the benchmarking methodology in consultation with stakeholders and to include the resulting values in a Tariff filing with the Commission.[145]

b. Request for Rehearing

100. NEPGA/NextEra state that the April 13 Order might be read to foreclose stakeholder consideration of the opportunity costs to include in the demand response benchmark. The parties request that the Commission clarify, or grant rehearing to find, that the costs to be included in the demand response benchmark is a matter open for consideration in stakeholders' development of asset-class-specific benchmarks.[146] NEPGA/NextEra argue that the correct offer benchmarks for, and if necessary mitigation of, demand response resources is as vital to the creation and preservation of just and reasonable rates as the equivalent benchmarks and mitigation for other types of resources.

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[144] April 13 Order, 135 FERC ¶ 61,029 at P 165.

[145] *Id.* P 173.

[146] NEPGA/NextEra Rehearing Request at 7, 59-62.

c. Commission Determination

101. We grant clarification on this issue. In the April 13 Order the Commission noted that the internal market monitor has committed to developing the benchmarking methodology in consultation with stakeholders.[147] The Commission did not, nor did it intend to, foreclose stakeholder consideration of the costs to include in developing benchmarks for demand response resources or any other type of resources.

C. Zonal Modeling and Seller-Side Mitigation

1. Zonal Modeling

a. April 13 Order

102. In the April 13 Order, the Commission accepted ISO-NE's proposal to model all zones all the time. Specifically, ISO-NE proposed to determine the appropriate capacity zones in advance of an auction and then to continue to model those specific capacity zones for that capacity commitment period, instead of establishing a capacity zone only when the projected installed capacity in the import-constrained load zone was less than the load zone's Local Sourcing Requirement. ISO-NE proposed to use the eight energy load zones as initial capacity zones.[148] The Commission found that this proposal creates a greater likelihood that FCM pricing will reflect local constraints, thereby reducing the need for ISO-NE to reject de-list bids and rely on out-of-market solutions to address reliability needs.

103. The Commission also accepted ISO-NE's proposal to generally allow all de-list bids, mitigated as appropriate, to set zonal prices in the auction. However, the Commission agreed with ISO-NE that "[t]here may be unique, unit-specific constraints that lead to the rejection of de-list bids," and that in such cases, the rejected de-list bid should be paid its de-list bid price, and the rest of the zone would not have its price adjusted. The Commission also noted that ISO-NE had stated that it would review rejected de-list bids in the zonal development process for subsequent FCAs to determine if additional zones are needed.

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[147] April 13 Order, 135 FERC ¶ 61,029 at P 173.

[148] The eight load zones are Connecticut, Maine, New Hampshire, Rhode Island, Vermont, Northeastern Massachusetts/Boston, Southeastern Massachusetts, and Western/Central Massachusetts.

b. Requests for Rehearing

104. In their requests for rehearing, Mass DPU, EMCOS, and NSTAR/UI express concerns with modeling all zones all the time.[149] To begin with, NSTAR/UI question the Commission's finding that the Joint Filing zonal modeling proposal was not just and reasonable.[150] In particular, NSTAR/UI state that the Joint Filing zonal modeling proposal's use of the higher of the Transmission Security Analysis or the Local Resource Adequacy Requirement to determine the Local Sourcing Requirement would have virtually eliminated the need for ISO-NE to reject de-list bids for reliability reasons.

105. The parties are concerned that small zones will develop in heavily congested urban and suburban areas, and that in such locations, there will not be sufficient sites for new generation to respond to price signals. Mass DPU asserts that to impose high capacity prices on consumers in areas where the market simply cannot respond with new generating resources could result in unjust and unreasonable rates. NSTAR/UI note that, since FCM has been in place, transient capacity prices have been inadequate to incent the construction of new resources within small, urbanized areas. Mass DPU requests that the Commission clarify, or grant rehearing on this issue, and find that in such instances where the market is incapable of responding to market signals, zones will not be modeled.

106. Parties also respond to the Commission's finding that, in certain cases, it may be more efficient to reflect a binding sub-area constraint through the rejection of a de-list bid, rather than by developing a zonal configuration that captures every possible combination of constraints that may arise. Mass DPU asks that that Commission expressly state that, should a single resource cause the constraint, and explicitly modeling that resource would result in a highly concentrated zone, that the rejected de-list bid would not set the price for the zone. On the other hand, NEPGA/NextEra contend that not considering de-list bids that are rejected for reliability reasons in setting clearing prices in the same auction will unjustly and unreasonably suppress prices. While

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[149] The parties raise concerns that suppliers within smaller zones will have inappropriate market power. The market power mitigation measures accepted by the April 13 Order are discussed later in this order.

[150] In the Joint Filing zonal modeling proposal, ISO-NE and NEPOOL proposed to consider certain additional de-list bids in the modeling of capacity zones. Capacity zones would be established only when the existing internal resources for an import-constrained zone cannot satisfy the Local Sourcing Requirement, although the Joint Filing zonal modeling proposal used the higher of the Transmission Security Analysis or the Local Resource Adequacy Requirement in determining the Local Sourcing Requirement for a zone.

NEPGA/NextEra note that they support modeling the constraint in the next auction, this alone is insufficient. NEPGA/NextEra state that not considering a rejected de-list bid in the current auction has the same effect as re-pricing rejected de-list bids at zero, and thus no market signal will be sent to solve the reliability issue. NEGPA/NextEra assert that, while it had some flaws, the Joint Filing's "APR-3" mechanism would have allowed re-pricing of at least some rejected de-list bids.[151] Alternatively, NEGPA/NextEra suggest that rejected de-list bids that have passed market monitor review could be considered in setting price, or that the Commission could establish procedures for ISO-NE to submit a new proposal on this issue.

c. Commission Determination

107. As the Commission determined in the April 13 Order, we maintain that ISO-NE's proposal to model all zones all the time is appropriate, since it reduces the likelihood of rejecting de-list bids and relying on out-of-market solutions. We reject NSTAR/UI's argument that the Joint Filing zonal modeling proposal provided for sufficient modeling of zones. The record in the previous proceeding clearly established that the Joint Filing zonal modeling proposal was not adequate. The Joint Filing zonal modeling proposal only provided for the modeling of a separate zone when projected installed capacity in an import-constrained load zone was less than the load zone's Local Sourcing Requirement, and only if the determination was made in advance of the auction. Thus, if the projected installed capacity in a zone was only slightly higher than the Local Sourcing Requirement, or if a localized need developed in a reconfiguration auction, a separate zone would not be modeled. ISO-NE has asserted that, even if the Joint Filing zonal modeling proposal was in effect prior to the first FCA, zonal modeling would not have been triggered in any of the auctions to date, despite the rejection of de-list bids in the first and third FCAs.[152]

108. We are also not persuaded by arguments that modeling zones is inappropriate in instances in which small zones may develop in highly congested urban and suburban areas. We do not believe that the appropriate solution is to never model congested zones, since the resulting muted price signals are unlikely to address constraints within those zones. Rather, a higher price is more likely to encourage generation than the lower price that would otherwise result if a new zone were not created. Moreover, we note that new generation is not the only solution to a constraint. In addressing a constraint, transmission could be upgraded, additional demand response could appear, or generation

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[151] "APR-3," one of three mutually exclusive APR provisions presented in the Joint Filing, was designed to mitigate the price suppressing effect of de-list bids rejected for reliability.

[152] ISO-NE Third Brief at 67-68.

that would have otherwise retired may remain in service, and each of these alternatives is more likely to become available if higher prices are established for the constrained zone. We also note that the zones for future FCAs will not be established automatically, but will be vetted through ISO-NE's system planning stakeholder process.[153]

109. We reject the requests for clarification and rehearing of Mass DPU, and NEPGA/NextEra regarding the Commission's finding that, in certain cases, it may be more efficient to reject a de-list bid than to model a constraint caused by a single resource. Regarding Mass DPU's request, ISO-NE has already stated that, in the current auction, it will reject a de-list bid related to a unique, unit-specific constraint, and that the rejected de-list bid will not set the price for a zone.[154] If Mass DPU is requesting that this solution be applied in subsequent auctions, we find that it is inappropriate to require this. As discussed above, a higher price is more likely to encourage generation, or alternatives to generation, in a constrained zone, and thus we support the stakeholder process considering whether a new zone should be formed. Regarding NEPGA/NextEra's request, we will not require ISO-NE to change how it compensates the rest of a zone in the current auction, following the rejection of a de-list bid. Although we believe higher prices in constrained zones are more likely to encourage generation, neither of NEPGA/NextEra's suggestions (that is, allow rejected de-list bids that have passed market monitor review to be considered in setting price or implement APR-3) would be appropriate. These options may over-correct for price suppression by raising the price in the entire zone, rather than just for the constrained area. The better solution is to establish more zones. While ISO-NE has stated that it would be burdensome to model additional zones in the current auction in which a de-list bid is rejected, ISO-NE has indicated that it is amenable to developing additional zones for subsequent FCAs.

2. Seller-Side Mitigation

a. April 13 Order

110. In conjunction with its acceptance of ISO-NE's proposal to model all zones all the time, the April 13 Order accepted ISO-NE's proposed revisions to market power mitigation. Specifically, the April 13 Order found that ISO-NE's proposed threshold of $1/kW-month for dynamic de-list bids was a reasonable means of determining when internal market monitor bid review is necessary. The April 13 Order determined that the possibility of an exercise of supplier market power at offers below this proposed threshold was limited. Moreover, in response to concerns that the $1/kW-month threshold was too low, the April 13 Order noted that generators are not precluded from

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[153] April 13 Order, 135 FERC ¶ 61,029 at P 283.

[154] ISO-NE First Brief at 38.

submitting de-list bids over $1/kW-month; such de-list bids must simply be submitted as static de-list bids and reviewed by the internal market monitor. The April 13 Order also disagreed that ISO-NE's previous dynamic de-list threshold of 0.8 times CONE should be retained in order to limit the volatility of the market. The April 13 Order stated that a resource's de-list bid is not intended to serve as a price stabilizer; no assurance for cost recovery is made for participating in competitive markets, only an opportunity to do so.

111. The April 13 Order also accepted ISO-NE's proposal to assume that a seller continues to participate in the energy and ancillary services markets for purposes of internal market monitor review of static and permanent de-list bids. The April 13 Order noted that the typical generator will participate in the energy and ancillary services markets whether or not it also provides capacity. Further, the April 13 Order noted that generators that intend to withdraw from the energy and ancillary services markets may present such information to the internal market monitor and receive a higher static or permanent de-list bid. The April 13 Order also dismissed arguments that ISO-NE's proposal would drive allowed costs to levels that are too low, stating that market participants have the opportunity to suggest relevant going forward costs to the internal market monitor, as well as to contest the internal market monitor's decision regarding such costs.

b. Requests for Rehearing

112. NEPGA/NextEra and Joint Complainants object to the Commission's approval of a $1/kW-month threshold for dynamic de-list bids, asserting that this threshold is too low. NEPGA/NextEra note that this threshold is six times lower than the initial threshold for dynamic de-list bids ($6/kW-month) and over four times lower than the current threshold ($4.28).[155] NEGPA/NextEra maintain that it is not appropriate to use the lowest results to date of an annual reconfiguration auction to establish the dynamic de-list bid threshold, as this bears no relation to competitive prices in the FCA. Specifically, NEPGA/NextEra note that reconfiguration auctions have shorter forward procurement periods than the FCA, as well as a vastly reduced trading volume. NEPGA/NextEra assert that past reliability-must-run filings provide a much better basis for a mitigation threshold.

113. NEPGA/NextEra and Joint Complainants dispute the Commission's finding that dynamic de-list bids were not intended to serve a price stabilizing role. The parties assert that the Commission previously recognized that the FCM construct does not offer the

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[155] As noted, the previous thresholds for dynamic de-list bids were equal to 0.8 times CONE.

same protections against price volatility as a downwardly sloping demand curve, and that it was necessary for dynamic de-list bids to fill this role.[156]

114. NEPGA/NextEra state that to understand the intended role of dynamic de-list bidding, two characteristics of capacity markets and the FCM market must be kept in mind: (1) for any capacity market to be sustainable over the long-term, it must permit the recovery of the CONE on average and over time, and (2) under FCM, the quantity of capacity purchased is fixed at the installed capacity requirement, regardless of the prices and quantities of capacity offered. NEPGA/NextEra state that, if not corrected, these factors will result in price volatility. Prices will fall far below CONE during times of surplus, and will rise to many multiples above this level in times of shortage. While PJM and NYISO adopted "sloped" demand curves to address this issue, dynamic de-list bids were intended to stabilize prices in New England.

115. Given the FCM construct, and the large amount of capacity resources offered into each auction (including OOM capacity), NEPGA/NextEra and Joint Complainants argue that the dynamic de-list bid threshold of $1/kW-month will become the *de facto* capacity clearing price in New England for the foreseeable future.[157] The parties argue that this will result in the collapse of the New England capacity markets. Specifically, Joint Complainants refer to testimony submitted previously in this proceeding, which they contend the Commission inappropriately ignored, and which they state demonstrates that limiting dynamic de-list bids to $1/kW-month results in resources experiencing "virtually certain losses of both debt and equity."[158] Joint Complainants further state that "no rational, profit-seeking enterprise would voluntarily choose to enter such a marketplace."[159] NEPGA/NextEra assert that a number of resources will have no choice but to file for reliability-must-run agreements.

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[156] NEPGA/NextEra Rehearing Request at 38, Joint Complainants Rehearing Request at 11, *citing ISO New England Inc.*, 125 FERC ¶ 61,102, at P 77 (2008). ("A dynamic de-list bid must be at least 20 percent below CONE… Over the long run, the average price for capacity should reflect CONE, in order to attract new entry needed for reliability. The costs of an existing unit would ordinarily be below the entry cost of a new unit, and we conclude that a default level for existing resources that is at least 20 percent below the cost of a new entrant (and at least 20 percent below the likely average price of capacity over time) is reasonable.")

[157] Thus, NEPGA/NextEra assert that the dynamic de-list bid threshold must be chosen with care.

[158] Joint Complainants Rehearing Request at 12.

[159] *Id.* at 15.

116. Further, NEPGA/NextEra and Joint Complainants contend that the revised mitigation scheme will result in over-mitigation. Joint Complainants note that the courts have previously found that over-mitigation is no more acceptable than under-mitigation. NEPGA/NextEra state that the Commission has previously noted the pernicious effects of over-mitigation. However, NEPGA/NextEra state that, in this proceeding, the Commission has not shown that a tighter threshold is needed to address the exercise of market power, or that the 0.8 times CONE threshold had in any way failed to prevent the exercise of market power. NEPGA/NextEra also state that the Commission's acceptance of the new mitigation regime results in unequal mitigation, since buyer market power is barely mitigated, while stringent mitigation is applied to seller market power.

117. While the April 13 Order finds that resources can submit static de-list bids above the $1/kW-month threshold, NEPGA/NextEra and Joint Complainants contend that this process does not remedy the unjustness and unreasonableness of the threshold. The parties state that the process of submitting static de-list bids is cumbersome.[160] For example, NEPGA/NextEra note that static de-list bids need to be submitted eight months in advance of an auction and are binding at that time; thus, bidders cannot reflect changing costs or new opportunities that arise in the months preceding the auction. Additionally, NEPGA/NextEra contend that it will be difficult for market participants to prove higher costs, since there are several disputed cost categories and the internal market monitor's calculation of costs tends to be conservative. Joint Complainants note that the Commission previously found that allowing de-list bids at a reasonable level without internal market monitor review is appropriate, because of the administrative convenience this provides.

118. NEPGA/NextEra and Joint Complainants also object to the Commission's acceptance of revisions to the calculation of static and permanent de-list bids. Specifically, these revisions exclude from this calculation "all costs that would be spent by a resource continuing to participate in the energy and ancillary services markets regardless of whether the resource will in fact participate in those markets during future capacity supply obligation periods."[161] NEPGA/NextEra contend that this is too stringent, since it would reject any costs associated with participating in the energy and ancillary services markets (e.g., labor and maintenance costs), regardless of whether the resource will in fact participate in the energy and ancillary services markets in three to four years. Moreover, NEPGA/NextEra note that no other Regional Transmission Organization (RTO) mitigates this way.

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[160] Moreover, NEPGA/NextEra state that, given the revised dynamic de-list bid threshold, such bids will essentially be eliminated, and thus nearly every de-list bid will be subject to internal market monitor review.

[161] NEPGA/NextEra Rehearing Request at 52.

119. Joint Complainants also disagree with the Commission's statement that infra-marginal energy and ancillary services revenues can be used to make up revenue shortfalls, arguing that such revenues will be minimal. Joint Complainants assert that in a recent NYISO case, the Commission specifically stated that energy and ancillary services revenues are designed to recover fixed and variable operations costs, but are not going to make a meaningful contribution to fixed costs.[162]

120. In contrast, EMCOS and NSTAR/UI contend that requiring bids over $1/kW-month to be submitted as static de-list bids does not adequately address the risk of market power in small capacity zones. NSTAR/UI offer as an example a zone in which many of the capacity resources are older, high NO_x-emitting, existing resources. NSTAR/UI contend that such resources could use high environmental compliance costs as justification for static de-list bids in excess of the $1/kW-month threshold, but below the cost of new entry. NSTAR/UI state that in a zone with a concentration of such resources, it is likely that such a resource would set the clearing price for capacity. NSTAR/UI state that this problem is exacerbated by the application of offer floor mitigation to state-sponsored resources, which may preclude them from clearing. EMCOS notes that Order No. 697 generally requires market power mitigation when a seller has a market share in excess of 20 percent and the level of market concentration exceeds a Herfindahl-Hirschman Index of 2500.[163] EMCOS requests that the Commission clarify that the market-based rate thresholds of Order No. 697 apply to ISO-NE entities that meet this criteria, as well as to explain how those thresholds should be applied.

c. **<u>Commission Determination</u>**

121. The Commission denies the requests for rehearing. We find that the dynamic de-list bid threshold of $1/kW-month is a reasonable competitive default capacity bid that appropriately balances the risk of over and under mitigation. We conclude that the internal market monitor's review of bids below this level is not justified by market power concerns and that review of bids above this level is necessary in light of the zonal framework that reduces the use of rejected de-list bids as a market power mitigation tool. We conclude that the internal market monitor's unit-specific review of static de-list bids

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[162] Joint Complainants Rehearing Request at 16, *citing New York Independent System Operator, Inc.*, 133 FERC ¶ 61,030, at P 51 (2010).

[163] EMCOS Rehearing Request at 10, *citing Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities* (Order No. 697), FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g,* Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009).

appropriately protects against the exercise of market power and that measures of market concentration are unhelpful in that assessment. Finally, we do not agree that a higher dynamic de-list bid threshold is warranted as a price stabilizing or cost recovery measure.

122. We deny the EMCOS and NSTAR/UI requests for rehearing that contend that the dynamic de-list bid threshold is too high. A competitive de-list bid should reflect the minimum amount needed to induce an existing resource that intends to provide energy and ancillary services to also provide capacity, a circumstance that applies to most existing resources. A competitive capacity supplier would offer at this level because it would result in maximum profits and assure it would clear in the market whenever the market clearing price exceeded its competitive offer. We agree with the internal market monitor that a competitive offer for most existing resources would be expected to be quite low since the added costs for providing capacity in many cases is nearly zero. Moreover, as the internal market monitor notes, capacity prices at the $1/kW-month level have been determined in capacity reconfiguration auctions that have no price floor. Although these auctions have a shorter forward procurement period and lower volume than the FCAs, we are persuaded that they offer general support for a price level that might be anticipated when price floors are eliminated. For these reasons, we conclude that $1/kW-month is a reasonable dynamic de-list bid threshold below which an exercise of market power is unlikely to cause harm that would justify the added cost and complexity of internal market monitor review as required for the alternative static de-list bids. As we noted in the April 13 Order, the future level of the dynamic de-list bid threshold may be updated to account for new information and market experience, but we find no basis to reject the $1/kW-month level as too high.

123. We also deny the requests for rehearing from those who contend the dynamic de-list bid threshold is too low. We reject NEPGA/NextEra's argument that dynamic de-list bids should be higher to account for unavoidable costs associated with participating in energy and ancillary services markets. Although it may be appropriate to include such costs in a de-list bid, we conclude that the inclusion of these costs warrants internal market monitor review in a static de-list bid. This is because ISO-NE's zonal approach increases the incentive to withhold capacity that might cause a zone to separate and lead to increased prices. We also do not agree with NEPGA/NextEra that cost data in reliability-must-run filings provide a better basis for establishing a mitigation threshold. Before implementation of the FCM, reliability-must-run contracts were important stop-gap measures needed to induce resources seeking to exit ISO-NE's administered markets to remain capacity suppliers for reliability reasons. Reliability-must-run contracts were intended to provide total cost recovery for those resources, not the kind of market-based cost recovery envisioned by the FCM.

124. NEPGA/NextEra also argue that the dynamic de-list bid threshold is too low because it will not provide an opportunity for cost recovery over time without excess capacity purchases. Joint Complainants argue for a higher dynamic de-list bid threshold because the threshold level will become the *de facto* capacity clearing price and the

$1/kW-month level will have dire consequences for the market. We reject the arguments raised by NEPGA/NextEra, and Joint Complainants.

125. For reasons noted above, the expected competitive offer is *de minimis* for a majority of existing capacity resources. Maintaining a higher bid threshold of 0.8 times net CONE would support higher capacity prices because it would enable sellers with a portfolio of resources to elect to de-list a portion of their capacity and raise capacity prices for their remaining capacity portfolio. NEPGA/NextEra regard this threshold as ISO-NE's alternative to preventing price volatility that is achieved by the use of sloped demand curves in PJM and NYISO. We disagree. The higher prices resulting would not reflect competitive behavior (the incremental cost of accepting a capacity supply obligation), but the effect of withholding. Moreover, there is no assurance that less mitigation allowed by a higher dynamic de-list bid threshold would translate into efficient investment because it would permit greater cost recovery. Higher prices attributable to withholding are not a reliable indication of market need, and withheld capacity may enter the market to discourage entry if that serves the profit objectives of the seller. For these reasons, we do not agree with NEPGA/NextEra that a higher threshold level to secure a particular level of cost recovery or price stability is a reason to permit the opportunity for economic withholding.

126. We do not find that a dynamic de-list bid threshold of $1/kW-month unduly discourages competitive new entry because, as Joint Complainants warn, it will become the *de facto* capacity clearing price for the foreseeable future in New England. If a much lower clearing price develops, we agree that accelerated retirements may result. However, we cannot conclude that this outcome would be inappropriate in a region characterized by significant excess supply that may include aging facilities unable to meet environmental standards in a cost-effective manner. The prospect of new merchant entry depends on many factors including environmental requirements, transmission enhancements and upgrades and the effectiveness of buyer-side market power mitigation. We do not find that competitive new entry is unduly discouraged because existing resources are required to offer capacity on a competitive basis, the objective of the market power mitigation rules.

127. We reject rehearing requests that claim the internal market monitor's review of static de-list bids is either inadequate or overly burdensome. The static de-list bid verification process is an important aspect of market power mitigation that does not depend on a seller's market share or any other measure of market power. Market power mitigation required under Order No. 697 does not directly apply in this case because the issue in evaluating a static de-list bid is not whether the seller has market power (it may or may not), but whether the particular bid is competitive. A resource may not include significant environmental compliance costs in its static de-list bid unless the costs have been reviewed and verified by the internal market monitor. The fact that a resource in a constrained zone may incur significant environmental compliance costs that justify a higher static de-list bid that translates into a high zonal market clearing price is not an

expression of market power, even if market concentration in the zone is high. We furthermore dismiss NSTAR/UI's argument that offer floor mitigation exacerbates the potential for the exercise of market power in smaller zones. Just as static de-list bids are evaluated for the exercise of seller market power, the bids of state-sponsored resources must be evaluated for the exercise of buyer market power.

128. We do not agree that the review is overly burdensome because static de-list bids are binding, must be submitted well in advance of the auction, or may entail controversial cost elements. Verifying higher costs, such as those an existing resource may incur to meet environmental standards, is an important and reasonable requirement especially if a higher cost resource is part of a supplier's portfolio. Without internal market monitor cost review and authorization, these units could be withheld to increase capacity prices, a greater concern when eight separate zones may result in fewer competitive alternatives in each zone. Although the binding nature of static de-list bids and the timeframe involved limit flexibility to respond to some changes, we do not agree that this is a serious impediment to the participation of existing resources or unreasonable under ISO-NE's zonal proposal. Finally, we do not agree that a potential for cost disputes with the internal market monitor is a basis for rejecting ISO-NE's static de-list bid review as a reasonable alternative to a higher dynamic de-list bid threshold. As noted in the April 13 Order, we have no reason to conclude that the internal market monitor is unable to perform the cost review in a timely and professional manner or that the internal market monitor has any incentive to bias the review process to disfavor legitimate cost claims by resource owners.

D. Other

1. Commission's Acceptance of ISO-NE's July 1 Filing as a Section 206 Proposal

a. April 13 Order

129. When the Commission set this case for paper hearing in its April 23, 2010 Order, it directed the parties who had filed the section 205 Joint Filing, ISO-NE and NEPOOL, to provide additional support for specific aspects of that proposal and to "submit briefs addressing our questions, either supporting their prior proposal, or making new proposals."[164]

130. As discussed above, in its first brief ISO-NE submitted a proposal redesigning certain aspects of the Joint Filing.[165] The Commission subsequently referred to this brief

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[164] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 18, 21(a).

[165] ISO-NE First Brief at 2.

as the July 1 Proposal. To allow parties to respond to the July 1 Proposal, the Commission provided for the optional filing of one further brief in addition to the two briefs already contemplated by the April 23, 2010 Order.[166]

131. In its April 13 Order, the Commission rejected much of the Joint Filing and found that the principles set forth by the ISO-NE in the July 1 Proposal "form the basis for an effective buyer-side mitigation mechanism."[167] The Commission noted that the July 1 Proposal was not a section 205 filing,[168] and agreed with NEPOOL that it was instead a proposal under section 206 to replace rates found unjust and unreasonable. The Commission stated that it would therefore accord the July 1 Proposal "no more weight than the filing of any intervenor to the proceeding."[169] The Commission additionally noted that its actions in the April 13 Order were "also taken pursuant to complaints filed under section 206 by NEPGA and Joint Complainants, who have asserted that both the Joint Filing and additional pre-existing aspects of the FCM construct are unjust and unreasonable."[170]

b. <u>Positions of the Parties</u>

132. NSTAR/UI argue that the Commission failed to comply with section 206 in two ways. With regard to the Commission's treatment of ISO-NE's July 1 Proposal as a new section 206 filing, NSTAR/UI claim that this was an error, since ISO-NE did not submit it as such, and that, rather, the July 1 Proposal simply constitutes comments in a section 205 proceeding. NSTAR/UI argue that ISO-NE's First Brief does not meet the procedural requirements of a section 206 complaint, because it does not comply with Rule 206 of the Commission's Rules of Practice and Procedure. Rule 206(b)(1) requires

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[166] *ISO New England and New England Power Pool Participants Committee, et al.*, 132 FERC ¶ 61,122 at P 60 (2010), footnote omitted ("[i]n light of ISO-NE's suggestions, in its July 1 First Brief, that the Commission may wish to consider a broader redesign of the FCM than was originally contemplated, we now recognize that some parties may wish to file a third brief to respond to arguments made in the second briefs").

[167] April 13 Order, 135 FERC ¶ 61,029 at P 17.

[168] Under the NEPOOL Participants Agreement, absent exigent circumstances, ISO-NE cannot make a proposal to change its market design under section 205 without first taking that proposal through the NEPOOL Participants Committee, which did not happen here. *Id.* P 43, *citing* NEPOOL Participants Agreement § 11.1.

[169] April 13 Order, 135 FERC ¶ 61,029 at P 43.

[170] *Id.*

the complainant to "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements," Rule 206(b)(4) requires the complainant to "[m]ake a good faith effort to quantify the financial impact or burden … created for the complainant as a result of the action or inaction," and Rule 206(b)(9) requires a complainant to state whether it has pursued Alternative Resolution Procedures. NSTAR/UI state that ISO-NE has met none of these requirements.[171]

c. Commission Determination

133. We reject NSTAR/UI's contention that the Commission improperly considered the July 1 Proposal contained in ISO-NE's First Brief as a section 206 filing. Section 206 of the FPA provides as follows:

> Whenever the Commission, *after a hearing held upon its own motion* or upon complaint, shall find that any rate, charge, or classification … collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract....[172]

134. The Commission itself initiated the paper hearing in this case, after finding that "[o]ur preliminary analysis indicates that the remainder of the [Joint Filing] has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful,"[173] and therefore set a part of that filing for paper hearing. The Commission further consolidated the Joint Filing with the complaints filed by NEPGA and Joint Complainants,[174] and stated that "the paper hearing will be under both section 205 and section 206 of the FPA."[175]

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[171] *See generally*, Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206 (2011).

[172] Section 206(a), 16 U.S.C. § 824e(a), emphasis added.

[173] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 15.

[174] *Id*. P 17.

[175] *Id*. P 22.

135. Contrary to NSTAR/UI's assertions, the Commission did not treat ISO-NE's July 1 Proposal as a new section 206 complaint. In its April 23, 2010 Order, the Commission made clear that as it considered the Joint Filing, it would permit "new proposals" from the Filing Parties to address the matters contained therein.[176] ISO-NE did, in fact, make such a new proposal. The Commission treated ISO-NE's filing as "effectively a proposal under section 206 to replace rates found unjust and unreasonable," and stated that, therefore "we will accord it no more weight than the filing of any intervenor to the proceeding."[177] The Commission then adopted some of the proposals made in ISO-NE's July 1 Proposal (for example, rejecting the Joint Filing APR proposal), but the Commission did not adopt ISO-NE's proposed solution (two-tiered capacity pricing). Instead, the Commission used the specific proposals in ISO-NE's July 1 Proposal as a springboard for its own directives to ISO-NE and its stakeholders – namely, that the Commission supported the benchmarking method of determining the offer floor for each type of resource, but that ISO-NE should then proceed to develop a mitigation mechanism similar to the MOPR mechanism used in PJM.

136. Thus, the Commission's evaluation of ISO-NE's July 1 Proposal took place within the overall context of a proceeding in which the Commission had already found that the existing and Joint Filing APR provisions did not meet the objective of ensuring that FCM prices would reflect the market cost of new entry when new entry was needed,[178] and that the Commission sought to "encourage the development of mitigation mechanisms that result in market clearing prices that do not reflect the exercise of market power," as "[m]echanisms that fail to address OOM capacity surpluses do not provide the long term price signals that support efficient private investment."[179]

137. As to NSTAR/UI's arguments that ISO-NE's July 1 Proposal does not meet the procedural requirements of Rule 206 of the Commission's Rules of Practice and Procedure, NSTAR/UI fail to distinguish between the situation in which a party initiates a proceeding under section 206 by filing a complaint, and the situation in which the Commission itself takes action under section 206. Rule 206 speaks to the first situation. Rule 206(a) provides that "*[a]ny person may file a complaint seeking Commission action* against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over

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[176] *Id.* P 21(a).

[177] April 13 Order, 135 FERC ¶ 61,029 at P 43.

[178] April 23, 2010 Order, 131 FERC ¶ 61,065 at P 69-70.

[179] *Id*. P 87.

which the Commission may have jurisdiction."[180] The remainder of Rule 206 sets forth the procedure that such a complainant must follow. Rule 206 does not, however, govern the manner in which the Commission itself may conduct a section 206 proceeding. The Commission has broad discretion in developing procedures in a particular case,[181] and it properly exercised that discretion here.

2. Takings Issue/Ability of Generators to Recover Costs

a. April 13 Order

138. In the April 13 Order, the Commission responded to arguments made by Joint Complainants that the Commission had an obligation to ensure that capacity suppliers have a reasonable opportunity to recover their costs, plus a profit, and that because the Commission has failed to do so, it engaged in a "taking" of private property for public use without just compensation, under the Fifth and 14th Amendments to the U.S. Constitution. Joint Complainants based this argument on *Bluefield Waterworks & Imp. Co. v. Public Service Commission of W. Va.*[182] and *FPC v. Hope Natural Gas Co.*[183]

139. The Commission ruled, in response, that capacity resources in New England had no property right to be compensated at a desired level "such that an abrogation of that property right is prohibited by the Fifth Amendment."[184] We stated that, since the era of *Hope* and *Bluefield*, the "utility regulatory paradigm" had changed, and that, while in the *Hope* and *Bluefield* era, "[i]t was understood that a utility's ability to provide service to its

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[180] 18 C.F.R. § 385.206(a) (2011), emphasis added.

[181] *California Independent System Operator Corporation*, 136 FERC ¶ 61,056, at P 39 (2011), footnote omitted ("The Commission has discretion to determine the best procedures to address the issues before it"); *see also Mobil Oil Exploration v. United Distrib. Cos*., 498 U.S. 211, 230, 111 S. Ct. 615, 112 L. Ed. 2d 636 (1991) ("An agency enjoys broad discretion in determining how to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would generate more appropriate information and where the agency was addressing the question.").

[182] 262 U.S. 679, 690 (1923) (*Bluefield*) ("[r]ates which are not sufficient to yield a reasonable return on the value of property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment").

[183] 320 U.S. 591, 603 (1944) (*Hope*).

[184] April 13 Order, 135 FERC ¶ 61,029 at P 251.

customers was dependent on its financial health; [and] so as to ensure the provision of service at just and reasonable rates to the utility's customers as required by the Federal Power Act, it was necessary to require that the utility was able to recover its costs and a reasonable profit,"[185] in the era of market-based regulation, "each market entrant was aware of the possibility that at some times, it might earn substantially more than a traditional cost-based rate, but that at other times, it might earn less than its costs."[186]

140. As we emphasized, "the Commission has no obligation in a competitive marketplace to guarantee [a resource] its full traditional cost-of-service. Rather, in a competitive market, the Commission is responsible only for assuring that [the resource] is provided the *opportunity* to recover its costs."[187] We also pointed to a case involving the appropriate de-list bid for a New England capacity resource, in which the Commission made clear that no guarantees were available that parties would recover their costs through the FCM, and that resources should choose the de-list bid that was right for their business model and evaluate carefully the potential costs and benefits of each de-list bid.[188] Because a resource may choose between a de-list bid that (a) could potentially commit it to remain in the FCM, and accept the risk that it might be committed to provide capacity at a price that did not cover its costs of providing service, or (b) would enable the resource to leave the auction if it could not receive its desired price, we found that "resources are not compelled to participate in the FCM."[189] Because resources are not compelled to provide service at a price that is unacceptable to them, we found that there was no confiscation or taking of private property.[190]

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[185] *Id*. P 252, footnotes omitted.

[186] *Id*. P 252, footnotes omitted.

[187] *Bridgeport*, 113 FERC ¶ 61,311 at P 29, emphasis in original.

[188] *ISO New England Inc.*, 132 FERC ¶ 61,044, at P 28-29 (2010) (Salem Harbor Order).

[189] April 13 Order, 135 FERC ¶ 61,029 at P 255.

[190] *Id*. P 257:

> If a resource decides, after assessing its own business plan and needs, that participation in the FCM is right for it, it must accept the capacity price that results from the operation of the FCM auction, which may or may not be a price that enables a resource to cover its costs and earn a satisfactory profit. But if a resource does not wish to take that risk, nothing compels

(continued…)

b. Requests for Rehearing

141. Joint Complainants state that they submitted economic models developed by FCM expert Dr. Miles Bidwell demonstrating that the FCM construct approved by the Commission denies capacity suppliers the ability to earn just and reasonable capacity prices unless the vertical demand curve used in ISO-NE is tempered with a mechanism to stabilize prices around the levelized cost of new entry. For this reason, Joint Complainants assert that the capacity construct approved in the April 13 Order constitutes a taking of private property without compensation, in prohibition of the United States Constitution.

142. Joint Complainants state that FCM was designed to enable resources to earn their long-run average costs over time, and to enable this to happen, the market must be designed to achieve this goal. Joint Complainants state that because of the changes made to the FCM by the April 13 Order, however (in particular the removal of an effective price stabilization mechanism through dynamic de-list bids), the FCM no longer meets this standard. Joint Complainants further state that, for the FCM to be just and reasonable, the Commission must identify substantial evidence that a capacity supplier, responding to FCM price signals, would have a reasonable opportunity to earn a return of, and on, capital.

143. Joint Complainants assert that they concur with the Commission's use of competition among utilities to bring about just and reasonable rates, and that they do not seek guaranteed profits, but rather, simply a reasonable opportunity to recover their costs. They assert that the Commission's argument that FCM is voluntary because "a capacity supplier can simply leave the FCM market construct, and recover[] its costs elsewhere,"[191] mischaracterizes the New England market structure. Joint Complainants argue that the New England markets are designed to provide compensation of fixed costs primarily through the capacity market; thus, a capacity supplier that voluntarily foregoes capacity market revenues in favor of seeking to recover its fixed costs from energy and ancillary services markets (which are designed to return only variable costs) has no chance of recovering its capital investment. Joint Complainants state that if "the government . . . provide[s] capacity suppliers two value-destroying options – one slightly worse than the other – [it runs] afoul of the 5th Amendment or the FPA."[192]

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it to do so. Thus, there can be no question of confiscation under the Fifth Amendment.

[191] Joint Complainants Rehearing Request at 21.

[192] *Id*. at 22.

144. Joint Complainants further assert that it is difficult for a capacity supplier to leave the FCM market construct, unless it is willing to shut down. Joint Complainants state that the only way to be certain that a resource may leave the market is to submit a Non-Price Retirement Request, which requires the unit to leave the energy and ancillary services markets, surrender its interconnection rights, and cease to operate. Joint Complainants state that "[a]s a result, economically de-listing from the FCM and continuing to operate in the [energy and ancillary services] markets is, again, a theoretical possibility with very little practical likelihood of occurring."[193] Therefore, given this uncertainty, Joint Complainants claim that units are likely to choose the retirement path, even if they would be economical at a price level more in line with their actual fixed costs, thus imposing unnecessary costs on the region (both in direct costs for more expensive replacement capacity, and in indirect costs as a result of the lost jobs and other economic benefits of the existing generating plants). Joint Complainants further argue that, depending on which units retire, system reliability may be adversely impacted and congestion may be increased.

145. Joint Complainants further assert that the existing market rules do not expressly allow for the inclusion of new environmental capital expenditures, opportunity costs, company-specific risk premiums, or other incremental costs in static de-list bids. Joint Complainants argue that ISO-NE currently interprets "Net Risk-Adjusted Going Forward Costs" for purposes of assessing static de-list bids as precluding an estimation of likely environmental capital expenditures, which, according to Joint Complainants, is a significant risk, given "significant new environmental requirements" being finalized by the Environmental Protection Agency (EPA).[194] Joint Complainants claim that allowing dynamic de-list bids at 0.8 times CONE gave resources some protection against being required to either retire prematurely, or accept a clearing price below its actual costs of providing capacity, and point out that Dominion Resources Services, Inc. (Dominion), the owner of the Salem Harbor units, has been forced to shut down those units rather than taking the risk that its de-list bids would be mitigated to a level at which Dominion could not recover its costs.[195] Joint Complainants state that, given the uncertainty regarding potential EPA regulations that could impose environmental costs on generators, "it is not reasonable to require a unit to place a bid to provide capacity nearly four years forward without being able to include a reasonable estimate of its fixed costs, including

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[193] *Id*. at 22-23.

[194] *Id*. at 23.

[195] *Id*., *citing* Motion to Intervene and Comments of Dominion Resources Services, Inc., filed March 23, 2011 in ISO New England, Inc., Docket No. ER11-3034-000.

incremental capital expenditures resulting from mandatory environmental rules, in its bid."[196]

c. Commission Determination

146. We deny Joint Complainants' request for rehearing. Joint Complainants' arguments are based, in essence, on the premise that a capacity resource has a right to participate in the FCM, and that the market rules must allow a resource – any resource – to recover its costs. Under a market-based regulatory mechanism, however, this is not the case. Under the FCM market rules, in each FCA, sufficient capacity clears the auction to meet the capacity target that ISO-NE has determined is required to ensure reliability. If a particular resource does not clear the auction, that means that ISO-NE has been able to obtain sufficient capacity to meet its target at a price that is lower than that resource is willing or able to accept.[197] The purpose of the FCM is, in part, to enable the capacity price to signal when new entry is needed; in order for this process to work, prices must also be allowed to signal when new entry is not needed, and when, in fact, high-cost existing capacity should retire. Joint Complainants state that they merely seek a reasonable opportunity for a resource to recover its costs, and not guaranteed profit; however, we do not construe the phrase "reasonable opportunity" to include situations in which a resource seeks to remain in the market even when the market price is signaling that it is not needed.

147. The Commission has previously rejected the argument that, in a market context, a resource has a right to be compensated for all of its costs. In *Bridgeport*,[198] a resource that had submitted a request for a reliability-must-run contract asserted that "for it to remain available in a competitive market, it must receive energy revenues equivalent to a full cost-of-service, including depreciation and a return of and on capital."[199] The Commission stated that, in ruling on Bridgeport's application for a reliability-must-run contract, it would focus on the costs that Bridgeport would incur to remain available, but that Bridgeport did not have a right to recover all of its costs of service, including a return on capital, at all times. The Commission noted that "Bridgeport's participation as a

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[196] Joint Complainants Rehearing Request at 23-24.

[197] In some cases, ISO-NE must retain a specific resource or resources for locational or other reasons even though that resource's de-list bid did not clear the auction. In those circumstances, ISO-NE may make a separate arrangement to compensate that resource outside of the market.

[198] *Bridgeport,* 113 FERC ¶ 61,311.

[199] *Id.* P 29.

generator in the competitive New England market makes Bridgeport subject to . . . the inherent risk associated with cost recovery in a competitive market, where returns are not guaranteed," and concluded that "in a competitive market, the Commission is responsible only for assuring that Bridgeport is provided the *opportunity* to recover its costs."[200] The Commission followed similar principles in a case arising out of the qualification process for the FCA 4, and in that case has already addressed many of the points that Joint Complainants raise here.[201]

148. To the extent Joint Complainants contend that ISO-NE does not allow the inclusion of environmental capital expenditures and opportunity costs in its review of de-list bids, this contention is not accurate. The FCM rules define Net Risk-Adjusted Going Forward Costs as "costs that might otherwise be avoided or not incurred if the resource were not subject to the obligations of a listed capacity resource during the Capacity Commitment Period"[202] and expressly allow for the consideration of opportunity costs.[203] The internal market monitor does consider environmental capital expenditures in its review of static-delist bids, and its determinations are reviewable by the Commission.[204] To the extent Joint Complainants argue that the market rules should expressly allow for the inclusion of other, less certain future costs in static de-list bid calculations, such a request is outside the scope of this proceeding.

149. If a generator chooses to submit a permanent de-list bid or Non-Price Retirement Request but ISO-NE determines that the unit is needed for reliability, it is eligible to either be compensated at its de-list bid or seek compensation covering its cost-of-service for the period when the resource is needed for reliability, but gives up the opportunity to return to the market.[205] In a later case involving Dominion's Salem Harbor units, the

[200] *Id.* P 28-29, emphasis in original.

[201] *See* Salem Harbor Order, discussed below.

[202] ISO-NE Tariff, § III.13.1.2.3.2.1.2.

[203] ISO-NE Tariff, § III.13.1.2.3.2.1.3 ("The ISO will consider evidence of opportunity costs . . . and if the ISO determines that the opportunity costs justify a de-list bid or export bid above the threshold described in Section III.13.1.2.3.1, the bid will be entered into the Forward Capacity Auction . . . .").

[204] *See, e.g.*, Salem Harbor Order, 132 FERC ¶ 61,044 at P 6, 25-30.

[205] *Id.*

Commission again stressed that a resource must make its own choices and take the risks that it judges to be appropriate for its business model.[206]

150. Joint Complainants argue that the changes to FCM that will result from the April 13 Order will make it impossible for some resources to recover all their costs of providing service through the FCM, because resources will be required to accept a choice between retiring permanently from the FCM or from ISO-NE altogether, or seeking to recover costs through the energy and ancillary services markets, and that the FCM changes are therefore unjust and unreasonable. They argue that their expert has examined a variety of potential market scenarios and found that, by eliminating the "primary market price stabilizer, the [0.8 times CONE] dynamic de-list bid [threshold]," the April 13 Order has precluded capacity suppliers from earning an acceptable return.[207] From this, Joint Complainants arrive at the conclusion that "the opportunity to recover a return of and on equity is illusory under the existing market."[208] We disagree. As we stated previously, nothing precludes resources from including legitimate costs of providing service in their de-list bids, and thus potentially receiving higher payments in the capacity market; however, such costs must be included in static de-list bids and reviewed by the internal market monitor. As to "mandating" the use of net risk-adjusted going forward bids,[209] this question is outside the scope of this proceeding. The FCM market rules provide for fair treatment of resources, because they do not require a resource to provide capacity at an unacceptable price. Joint Complainants would have us grant resources an actual property right to continue providing capacity even when that would not be the most economic solution for customers. Such a ruling would go beyond the intent of the FCM and place an unacceptable burden on customers, and we therefore reject their argument.

151. Finally, as to Joint Complainants' taking arguments, we note that, because no resource has a property right to remain in the FCM, there can be no "taking without compensation" of that property right. The Commission has previously found that a change to the rules of a Commission-regulated market does not constitute a taking of property.[210] We therefore reject Joint Complainants' arguments on this point.

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[206] *ISO New England Inc.*, 135 FERC ¶ 61,147, at P 46 (2010).

[207] Joint Complainants Rehearing Request at 2, 20-21.

[208] *Id.* at 21.

[209] *Id*. at 7

[210] *PJM Interconnection, L.L.C.*, 136 FERC ¶ 61,190, at P 80 (2011), footnote omitted ("[w]e reject Financial Marketers' allegation that, if approved, the Tariff would

(continued…)

3. Performance Measures

a. Request for Rehearing

152. Mass DPU asks the Commission to order ISO-NE to develop a set of performance measures to determine on a going-forward basis how well the capacity market is attracting new resources when and where needed and retaining existing resources to the extent they remain economic. Mass DPU asserts that the Commission and ISO-NE stakeholders must be able to understand whether the FCM is fulfilling its purposes in light of changes to the electricity industry, including but not limited to long-term contracts for renewable resources and other public policy initiatives. Mass DPU would like these performance measures to address whether the capacity market is (1) providing the correct price signals for new generation and/or demand resources to enter the market; (2) meeting reliability needs in the most cost-effective manner; (3) providing price signals to existing resources to continue to operate while economic but to retire when operation is uneconomic; (4) providing price signals about the proper size of zones; and (5) properly responding to the evolution of the electricity industry, including the development of public policy-based and environmentally-based new resources.[211] Mass DPU is concerned that there is not sufficient publicly-available information to enable parties to discern if capacity markets are meeting their ultimate purposes and providing the benefits envisioned, and whether the FCM is just and reasonable.

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constitute an unlawful taking of private property under the Fifth Amendment because the regulatory action disqualifies entities from participating in the PJM market after investing resources to participate in the market. All participants in Commission-regulated markets are subject to just and reasonable changes in rates and market rules"); *ISO New England Inc*., 130 FERC ¶ 61,089, at P 34 (2010) (addressing market rule change to require a three-year forward commitment under FCM, Commission states that "because the resource knows prior to making its de-list bid what the potential consequences of that decision are (both in terms of how long it must stay in service, and what compensation it will receive) . . . this market rule does not constitute an unlawful taking of property without compensation") and *Southern Company Services*, 65 FERC ¶ 61,239, at 62,178-79 (1993) ("Southern claims that the Commission's action, by denying recovery of the associated operating companies' costs, is an unconstitutional taking of property. . . . We do not agree. There has been and will be no denial of recovery of costs. Moreover, the Commission's action in this proceeding – ensuring that ratepayers are not charged an excessive, unjust and unreasonable rate – is not an unconstitutional taking even though it may produce a rate less than the rate Southern would like to charge").

[211] Mass DPU Rehearing Request at 8.

b. Commission Determination

153. We deny Mass DPU's request. We agree that adequate information is critical for ISO-NE stakeholders and for the Commission to be able to determine, going-forward, whether FCM is meeting its goal of ensuring sufficient reliability for ISO-NE under just and reasonable rates, terms and conditions. We do not believe, however, that at this juncture, a directive from the Commission is the best way to ensure that this information becomes publicly available in timely fashion. We encourage Mass DPU and other stakeholders to work through ISO-NE's existing processes to develop New-England specific performance measures and metrics that can be based on objective criteria, and submit a filing to the Commission, for notice and comment, bearing upon the justness and reasonableness of the FCM going forward.

III. Discussion of Compliance Filing and Request for Technical Conference

154. In the April 13 Order, the Commission directed ISO-NE to file, within 30 days of the order's issuance, a proposed schedule for filing market rules in accordance with the order. The Commission stated that the filing should address the timeframe for consideration of the two issues that the April 13 Order directed ISO-NE to further examine with stakeholders: (1) the development of market rules to implement an offer floor mitigation construct, and (2) the proper offer floor price for long-lead-time resources.[212] On May 13, 2011, ISO-NE submitted a compliance filing providing a plan to have revised rules in effect for FCA 8, but stated that it would continue to analyze whether earlier implementation was possible. ISO-NE did so, and on August 22, 2011, submitted an update providing for a two-stage approach in which the first stage would be implemented in time for FCA 7 and would include implementation of the offer floor mechanism, the modeling of four capacity zones "all the time" and the elimination of the price floor. ISO-NE states that in stage two it will work with NEPOOL technical committees to review the existing eight energy zones and identify the appropriate zones for capacity purposes; implementation of the appropriate zonal configuration will follow.

155. On June 3, 2011, Public Systems, NEPGA, and State Commissions and Associated Parties submitted comments on ISO-NE's compliance filing. NEPGA notes that ISO-NE's compliance filing says nothing about the mitigation that will apply to interim OOM capacity after the new mitigation rules are approved; NEPGA states that it is essential that such resources be mitigated under the new rules. State Commissions and Associated Parties request that ISO-NE carefully consider the New England state regulators' interest and advice throughout the stakeholder process.

[212] April 13 Order, 135 FERC ¶ 61,029 at P 368.

156. We accept the May 13, 2011 compliance filing and the August 22, 2011 compliance update. Regarding NEPGA's comments, we note that the issue of the appropriate mitigation for interim OOM capacity has been clarified on rehearing. Regarding the comments of State Commissions and Associated Parties, we expect that all interested parties, including state regulators, will have the opportunity to participate in the ISO-NE stakeholder process.

157. On July 1, 2011, Public Systems and EMCOS jointly submitted a request that the Commission convene a technical conference in this docket to address issues regarding the application of minimum offer bid requirements to self-supplied resources. The parties note that on June 29, 2011, the Commission announced its intention to convene a technical conference in the PJM capacity market proceeding in order to "fully explore the issues raised on rehearing regarding the applicability of PJM's MOPR to self-supply."[213] The parties assert that the issues to be addressed in the PJM technical conference are similar to issues that must be addressed in New England, as demonstrated by their requests for rehearing of the April 13 Order.

158. We reject the request for a technical conference on self-supply issues. We find that, unlike the record in the above-referenced PJM proceeding, the record before us contains sufficient information to rule on these questions, as we have done. We decline to exercise our discretion to convene a technical conference at this time.

The Commission orders:

(A) The Commission denies rehearing in part and grants rehearing in part, and grants clarification, of its April 13 Order, as discussed in the body of this order.

(B) The Commission accepts ISO-NE's compliance filing, as updated, establishing a timeframe for submitting tariff revisions to comply with the April 13 Order, as discussed in the body of this order.

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[213] *PJM Interconnection, L.L.C.,* 135 FERC ¶ 61,228, at P 6 (2011).

(C) The Commission denies the request for a technical conference on the application of minimum offer bid requirements to self-supplied resources, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Request for Rehearing and/or Clarification	Abbreviation
New England Power Generators Association	NEPGA
New England Power Generators Association and NextEra Energy Resources, LLC	NEPGA/NextEra
PSEG Companies (PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC); and the NRG Companies (NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC)	Joint Complainants
NSTAR Electric Company and the United Illuminating Company	NSTAR/UI
Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc.	Public Systems
Eastern Massachusetts Consumer-Owned Systems (Braintree Electric Light Department, Concord Municipal Light Plant, Hingham Municipal Lighting Plant, Reading Municipal Light Department and Taunton Municipal Light Plant)	EMCOS
New England Conference of Public Utilities Commissioners, Inc., Connecticut Department of Public Utility Control, the Connecticut Office of Consumer Counsel, the Vermont Department of Public Service, the Vermont Public Service Board, Maine Public Utilities Commission, the New Hampshire Public Utilities Commission, Martha Coakley, Attorney General for the Commonwealth of Massachusetts and The Northeast Utilities Companies (the Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire)	State Commissions and Associated Parties
Massachusetts Department of Public Utilities	Mass DPU
Answers	
H.Q. Energy Services (U.S.) Inc.	HQ-US
State Commissions and Associated Parties	
New England Power Pool Participants Committee	NEPOOL
NEPGA	