

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

Exelon Corporation and
Calpine Corporation.

v.

ISO New England Inc.

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Docket No. EL15-23-000

**RESPONSE OF THE
NEW ENGLAND POWER POOL PARTICIPANTS COMMITTEE**

(December 16, 2014)

Pursuant to Rule 206(f) of the Commission’s Rules of Practice and Procedure,¹ the New England Power Pool (“NEPOOL”) Participants Committee² hereby submits its response to the complaint submitted jointly by Exelon Corporation and Calpine Corporation (together the “Complainants”) on November 26, 2014 (the “Complaint”) in the above-captioned docket.³ The Complaint seeks a Commission order changing New England’s Forward Capacity Market⁴ (“FCM”) rules to address concerns with the price-suppressing effects of New Capacity

¹ 18 C.F.R. §385.206(f) (2014).

² NEPOOL is a voluntary association organized in 1971 pursuant to the New England Power Pool Agreement, and it has grown to include over 430 members. The Participants include all of the electric utilities rendering or receiving services under the ISO-NE Tariff, as well as independent power generators, marketers, load aggregators, brokers, consumer-owned utility systems, demand response providers, developers, end users and a merchant transmission provider. Pursuant to revised governance provisions accepted by the Commission in *ISO New England Inc. et al.*, 109 FERC ¶61,147 (2004), the Participants act through the NEPOOL Participants Committee. The NEPOOL Participants Committee is authorized by Section 6.1 of the Second Restated NEPOOL Agreement and Section 8.1.3(c) of the Participants Agreement to represent NEPOOL in proceedings before the Commission. NEPOOL is the principal stakeholder organization for the New England RTO.

³ NEPOOL timely moved to intervene in this docket by doc-less intervention submitted on December 12, 2014.

⁴ Capitalized terms not defined herein have the meanings ascribed thereto in the Second Restated NEPOOL Agreement, Participants Agreement, or the ISO New England Inc. (“ISO-NE”) Transmission, Markets and Services Tariff (“ISO-NE Tariff” or the “Tariff”). Section III of the Tariff is referred to as “Market Rule 1”.

Resources that clear in a Forward Capacity Auction (“FCA”) or have cleared in prior auctions, and that elect to lock-in their clearing price for multiple years.

In this Response, NEPOOL recounts the prior considerations of the issues raised in the Complaint by the Commission in contested proceedings and by NEPOOL members in the stakeholder process. Because Complainants were unsuccessful in persuading NEPOOL or ISO-NE to support the remedy they now seek, to prevail in this proceeding the Complainants must prove that the current FCM provisions are now unjust and unreasonable. The Commission as recently as May 2014 considered the provisions concerning the ability of New Capacity Resources to lock-in their capacity price for multiple years.⁵ In that case, as well as an earlier case, the Commission addressed virtually identical arguments now raised in the Complaint, albeit in different contexts than those presented in the Complaint. The most recent Commission order is still being considered on rehearing. Unless the Commission reverses course on its prior determinations though, the Commission should enforce the filed rate that the Commission most recently determined reflected a “reasonable balance between incenting new entry and protecting consumers from very high prices, all in the context of recent conditions in ISO-NE’s market.”⁶

I. THE COMMISSION HAS DETERMINED THE FILED RATE TO BE JUST AND REASONABLE

The FCM rules that are now in place for the next capacity auction in New England, the ninth Forward Capacity Auction (“FCA9”), have been previously approved by the Commission. Given that fact, the Complaint, which now seeks expedited changes to those rules, can only prevail if it satisfies the statutory burden of demonstrating that the current provisions are now

⁵ *ISO New England Inc. et al.*, 147 FERC ¶ 61,173 (2014) (“*May 30 Order*”).

⁶ *May 30 Order* at P 56.

unjust and unreasonable.⁷ In addition, as discussed further in this Response, in light of the recent Commission considerations and findings with respect to similar issues raised in the Complaint, the Complaint must show either that there have been sufficient changes in circumstances since the Commission considered and rejected similar arguments or that the arguments raised in the Complaint are sufficiently distinct from those already addressed and rejected.

The Complainants object to how the Commission-approved treatment of New Capacity Resources might impact the clearing prices for Existing Capacity Resources in FCA9 and in subsequent Auctions. The current FCM rules provide that a New Capacity Resource has the ability to lock-in its capacity price in the FCM for up to seven years. After the first year of that lock-in period, the New Capacity Resource will be treated in the auctions as an Existing Capacity Resource (i.e., it will go into the bid stack as a price taker), even though it will continue to be paid differently than other Existing Capacity Resources that clear in those auctions. Noting that they are not challenging the payments for New Capacity Resources, the Complainants argue that the seven-year price lock-in for New Capacity Resources creates unreasonable and unduly discriminatory price disparities between New and Existing Capacity Resources in the FCM. The remedy the Complainants ask the Commission to order are the rules in place currently for PJM.⁸

The Complainants' concerns are not new and have been previously considered by the Commission in other contexts. In October 2013, several months ahead of the eighth Forward Capacity Auction ("FCA8"), the New England Power Generators Association ("NEPGA") filed a complaint in Docket No. EL14-7 (the "NEPGA Complaint"), requesting that the Commission

⁷ 16 U.S.C. § 824e (2014).

⁸ Such a proposed remedy would be to adopt an approach taken by PJM under its New Entry Pricing Adjustment mechanism whereby a price-locked resource would be required to offer capacity into post-entry FCAs during the lock-in period at a price "equal to the lesser of: A) the price in such seller's [offer] for the [FCA] in which such resource qualified [for the lock-in]; or B) 0.90 times the Net CONE applicable in the first [FCA] in which . . . [it] cleared" See Complaint at 22-23.

change the FCM rules for FCA8 in part because the Capacity Carry Forward Rule in effect at that time would create unreasonable and unduly discriminatory price disparities between New and Existing Capacity Resources.⁹ NEPGA requested that the Commission adopt its recommended revisions to the FCM rules for FCA8.¹⁰ In support, NEPGA cited the Commission's rejection five years earlier, in March 2009, of a PJM proposal to modify its rules to require new capacity resources during a capacity price lock-in period to bid in future capacity auctions at either a zero price, or at the resource's avoidable cost rate (less projected energy and ancillary services revenues).¹¹

In its January 24, 2014 order on the NEPGA Complaint (the "*January Order*"),¹² the Commission reached a different determination for New England than it had for PJM. In the *January Order*, the Commission concluded that NEPGA failed to show the existing Capacity Carry Forward Rule to be unjust and unreasonable, or unduly discriminatory.¹³ In that same *January Order*, the Commission directed ISO-NE to implement a sloped demand curve in time for FCA9, which has similar features to the demand curves in place for New York and PJM.

⁹ The Capacity Carry Forward Rule is one of the FCM provisions that determines the capacity prices for new entrants and existing supply when new entry is required. *See* Market Rule 1, Section III.13.2.7.9.

¹⁰ The NEPOOL Markets Committee failed to recommend Participants Committee support for the Market Rule changes sought by NEPGA in Docket No. EL14-7, with a 37.66% Vote in favor. Subsequent to Markets Committee consideration, the Participants Committee similarly failed to support the proposal, casting votes through a show of hands that were virtually identical to the voting result at the Markets Committee. While NEPOOL did not support the NEPGA-proposed Market Rule changes, NEPOOL did not oppose those changes on procedural grounds, since the changes were fully considered within the Participant Processes.

¹¹ *See e.g., PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 112 (2009), *on reh'g*, *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157. On rehearing, the Commission made clear that the proposed changes to the price-locked resources' offer limitations were "not just and reasonable" and were "unduly discriminatory

¹² *NEPGA v. ISO New England Inc.*, 146 FERC ¶ 61,039 (2014) ("*January Order*").

¹³ *Id.* at 56-60.

In response to the Commission's directive, from January 2014 through March 2014, ISO-NE, NEPOOL and State regulators worked together through the Participant Processes to develop a package of Market Rule changes to implement a downward sloping, system-wide demand curve in the FCM. There was very broad agreement reached on a package of FCM revisions that included a proposal to extend the period by which a New Capacity Resource would be permitted to lock-in its auction clearing price from five to seven years.¹⁴ NEPOOL joined ISO-NE in an April 1, 2014 Section 205 filing proposing such FCM revisions for Commission approval (the "April Filing").

In response to the April Filing, a number of parties, including the Complainants, opposed the lock-in extension, arguing that the extension from five to seven years would perpetuate price discrimination between new and existing resources and suppress FCM prices.¹⁵ NEPGA and others again cited the 2009 PJM precedent as support for their opposition to the two year extension of the lock-in period for New Capacity Resources¹⁶, which the Commission had distinguished just two months earlier in rejecting the NEPGA Complaint. In response to those challenges, the parties supporting the April Filing explained that the lock-in extension, among other changes included in the package, was critically interrelated to the curve itself, and that if the Commission were to accept certain elements of the package but to reject others, it could "have a profound effect on the willingness and ability of stakeholders in the future to work

¹⁴ The package of demand curve changes enjoyed almost a 70% Vote of NEPOOL, with support registered across all six Sectors.

¹⁵ See e.g., *Motion to Intervene and Protest of the New England Power Generators Association, Inc. and Electric Power Supply Association*, submitted on April 22, 2014 in Docket No. ER14-1639.

¹⁶ See *id.*

together to address the interests of others at the table rather than litigate every individual point of interest or contention.”¹⁷

In an order on May 30, 2014 (the “*May 30 Order*”),¹⁸ the Commission expressly addressed and rejected the arguments in opposition and approved the price lock-in extension, finding it directly correlated with the sloped demand curve parameters. The Commission once again distinguished New England from PJM, finding that the extension, as part of the package of demand curve changes, “is a reasonable means to address the New England region’s current capacity shortage and investor perceptions regarding risk.”¹⁹ NEPGA and others have challenged the *May 30 Order* on rehearing, and the Commission has since issued a tolling order indicating that it will address the rehearing requests in the ordinary course.²⁰

II. NEPOOL HAS SINCE CONSIDERED AND REJECTED THE ISSUES RAISED BY THE COMPLAINT

Complainants were diligent but unsuccessful in pursuing their issues through the NEPOOL Participant Processes before presenting them to the Commission. Shortly following the *May 30 Order* in which the Commission approved the seven-year lock-in period, Exelon Generation Company, LLC (“Exelon”), in concert with NEPGA, promptly proposed changes to the FCM rules for stakeholder consideration (the “Exelon Proposal”). During the NEPOOL process, Exelon argued, as they do in the Complaint, that the seven-year lock-in provision will cause New Capacity Resources to offer at a lower price than they would have if the lock-in period were shorter, thereby sending inefficient price signals as a New Capacity Resource and

¹⁷ *Motion for Leave to Answer and Answer of New England Power Pool Participants Committee*, submitted on May 7, 2014 in Docket No. ER14-1639, at 7.

¹⁸ *ISO New England Inc. et al.*, 147 FERC ¶ 61,173 (2014) (“*May 30 Order*”).

¹⁹ *Id.* at P 57.

²⁰ *Order Granting Rehearing For Further Consideration*, Docket No. ER14-1639-001 (dated July 28, 2014).

suppressing prices in the FCM for the entire time that those new resources have a lock-in rate. To address these concerns, the Exelon Proposal considered in the stakeholder process would modify the FCM rules to require that ISO-NE submit a “shadow” de-list bid for the rate-locked resources in the FCAs associated with years 2-7 at the lower of: (i) their new entry bid price; or (ii) Net CONE. Under this proposal, an Existing Capacity Resource would continue to receive its rate-locked payment but the “shadow” de-list bid would be used to determine the appropriate auction clearing prices in years 2-7. This proposal, which is very similar to the PJM-modeled remedy sought by Complainants, was explored fully through the stakeholder process.

During three NEPOOL Markets Committee meetings, there was considerable discussion among the proponents, interested stakeholders and ISO-NE on the Exelon Proposal. At its July 8-10, 2014 meeting, the Markets Committee considered, but failed to approve, a resolution recommending Participants Committee support for the Exelon Proposal. There were concerns expressed ahead of that vote with the substance of the proposal and the motion ultimately failed with a 48.5% Vote in favor.²¹

The Participants Committee was asked to consider the Exelon Proposal at its August 1, 2014 meeting. The sponsoring NEPOOL members made clear that their request was to ensure that everyone had the full opportunity to discuss and be aware of the changes being proposed and that they followed the Participant Processes through to conclusion. Since there were no questions raised at the Participants Committee meeting, and no member signaled that it would vote differently than at the Markets Committee, the Participants Committee and the sponsors

²¹ The individual Sector votes at the Markets Committee were Generation (17.17% in favor, 0% opposed), Transmission (0% in favor, 17.17% opposed), Supplier (17.17% in favor, 0% opposed, 11.3 abstentions), Alternative Resources (14.17% in favor, 0% opposed, 2 abstentions), Publicly Owned Entity (0% in favor, 17.17% opposed), and End User (0% in favor, 17.17% opposed, 1 abstention).

both agreed there was no need for another vote.²² Thus, a proposed remedy to address Complainants' concerns has already been considered through the NEPOOL Participant Processes, even though ultimately, NEPOOL did not support the substance of that proposal.

III. WHILE THE COMPLAINT IS PROCEDURALLY PROPER, ABSENT A MATERIAL CHANGE IN CIRCUMSTANCES FROM PRIOR COMMISSION CONSIDERATION, THE COMPLAINT SHOULD BE REJECTED

The Complaint is an appropriate last resort for consideration of the issues raised here, but no change to the current provisions is justified unless the Complainants demonstrate that the current provisions are unjust and unreasonable or unduly discriminatory²³ (or the Commission determines on rehearing of the *May 30 Order* that those provisions must be changed). Given the history of support by the Commission, ISO-NE and the stakeholders for the relevant FCM provisions now being challenged, which is described in Sections I and II of this pleading, the Commission should reject the Complaint absent a demonstration that there has been a material changes in circumstances from prior considerations.

The Complainants do attempt to distinguish prior FCM orders. To distinguish the *January Order*, where the Commission rejected many of the same arguments now presented in the Complaint, the Complainants cite to the adoption of the downward sloping demand curve as a material change to the facts then considered by the Commission. To distinguish the Commission's rejection of similar arguments in the *May 30 Order*, the Complainants argue that they are "not challenging the New Entry Pricing Rule itself or suggesting that the Commission

²² This understanding is captured as follows in the approved meeting minutes: "(1) that everyone was given the opportunity to speak on this matter and to seek any clarifications desired; (2) that the result of a Participants Committee vote would not change from the results at the Markets Committee; and (3) that the Participant Processes were complete." See NEPOOL meeting minutes from the Aug. 1, 2014 Participants Committee meeting, at 3312-3313, available at http://www.nepool.com/uploads/Minutes_NPC_2014_0801.pdf.

²³ 16 U.S.C. § 824e (2014).

revisit its recent conclusion that extending the lock-in period ‘is an appropriate way to provide investor assurance.’”²⁴ Instead, the Complainants ask the Commission to address the “price suppressing” impact on Existing Capacity Resources of the recently approved seven-year lock-in period, which they challenge as being unjust and unreasonable or unduly discriminatory.²⁵

For the distinctions proposed by the Complaint to be meaningful, NEPOOL submits that the Commission would need to grant the pending rehearing requests of the *May 30 Order*.²⁶ That *May 30 Order* can be reasonably read to have recognized the balances struck in the adoption of a sloped demand curve for pricing capacity in future auctions. NEPOOL is quick to acknowledge, as did the Complainants, that there certainly could be many other just and reasonable demand curves and supporting rules for the determination of payments to New and Existing Capacity Resources, perhaps also including the Complainants’ proposal. But, as described above, the Commission previously considered and rejected alternative arguments and proposals, and most recently, NEPOOL has considered and rejected proposed Market Rule changes to the current FCM rules through its stakeholder process. Thus, unless the Commission decides that there has been a material change in circumstances and/or that its earlier determinations were wrong, the Complaint should be rejected.

²⁴ Complaint at 10.

²⁵ *See generally* Complaint.

²⁶ NEPOOL acknowledges that Exelon and others, including NEPGA, requested rehearing of the *May 30 Order* on the issue of the 7-year lock-in extension and that those requests remain pending.

WHEREFORE, for the foregoing reasons, NEPOOL respectfully requests that the Commission consider this Response in its evaluation of the Exelon/Calpine Complaint.

Respectfully submitted,

NEPOOL Participants Committee

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Dated: December 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing document to be served electronically upon each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission.

Dated at Hartford, Connecticut this 16th day of December 2014.



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