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May 26, 2009

Honorable Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

**Re: Docket No. ER09-1051-000**  
***ISO New England Inc. and New England Power Pool***

Dear Secretary Bose:

Enclosed for electronic filing in the above-captioned proceeding is the Notice of Intervention and Comments of the Connecticut Department of Public Utility Control.

Please contact Kimberly Frank at telephone number (202) 682-3578 if you have any questions about this filing.

Respectfully submitted,

/s/  
Randall L. Speck

Enclosure

cc: Service List

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

<i>ISO New England Inc. and New England Power Pool</i>	) ) ) )	<b>Docket No. ER09-1051-000</b>
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**NOTICE OF INTERVENTION  
AND COMMENTS OF THE CONNECTICUT  
DEPARTMENT OF PUBLIC UTILITY CONTROL**

Pursuant to Rules 213 and 214 of the Federal Energy Regulatory Commission’s (“Commission’s”) Rules of Practice and Procedure<sup>1</sup> and the Commission’s Notice of Filing,<sup>2</sup> the Connecticut Department of Public Utility Control (“CT DPUC”) notices its intervention in this proceeding and files these comments opposing the market monitoring restructuring and the revised mission statement that ISO New England Inc. (“ISO-NE”) and the New England Power Pool (“NEPOOL”) (collectively, “Joint Filing Parties”) propose in their April 28, 2009 compliance filing.<sup>3</sup> As proposed, ISO-NE’s hybrid market monitoring structure cannot meaningfully support the market monitoring obligations that are an essential prerequisite for market-based rates. The Commission

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<sup>1</sup> 18 C.F.R. §§ 385.213, 385.214 (2008).

<sup>2</sup> Combined Notice of Filings #1 (May 1, 2009) (setting May 26, 2009 comment date).

<sup>3</sup> Filing of ISO New England Inc. and New England Power Pool in Response to Order No. 719, *ISO New England Inc., et al.*, Docket No. ER09-1051-000 (filed Apr. 28, 2009) (“Compliance Filing”).

should establish hearing procedures as requested in the CT DPUC's pending complaint<sup>4</sup> to determine necessary reforms to assure customers and regulators that ISO-NE's market monitoring function will effectively protect New England's competitive markets. ISO-NE must also modify its mission statement to include the most fundamental element of just and reasonable rates – a commitment to provide its services at the lowest reasonable cost consistent with operation of a reliable electric system.

## **I. COMMUNICATIONS**

All correspondence and communications to the CT DPUC in this docket should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary in connection with these proceedings:

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## **II. BASIS FOR THE CT DPUC'S INTERVENTION**

Pursuant to Rule 214 of the Commission's Rules, the CT DPUC notices its intervention in this proceeding. The CT DPUC is the state commission charged with regulating electric companies and setting retail electricity rates for all electricity used within Connecticut. The CT DPUC, like the Commission, must balance the interests of

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<sup>4</sup> The Connecticut Representatives' Consolidated Amended Complaint Seeking An Investigation, Hearing, Disgorgement, and Penalties, *Blumenthal. v. ISO New England Inc., et al.* Docket No. EL09-47-000 and *Connecticut Dept. of Pub. Util. Control, et al. v. ISO New England, et al.*, Docket No. EL09-48-000 (filed May 22, 2009) ("The Connecticut Representatives' Consolidated Amended Complaint").

utilities providing electricity services with ratepayers who must pay a fair price – but no more – for those services. The CT DPUC is authorized by the General Statutes of Connecticut (CONN. GEN. STAT.) § 16-6a to participate in proceedings before federal agencies and courts on matters affecting utility services rendered or to be rendered in Connecticut. The Attorney General’s Office represents the CT DPUC in legal proceedings. CONN. GEN. STAT. § 3-125 (2008). The CT DPUC intervenes here on behalf of Connecticut’s retail customers and electric companies because the mission statement and market monitoring function of ISO-NE, as reorganized by the Joint Filing Parties, does not comply with the Commission’s expectations in Order No. 719 and will not assure just and reasonable rates.

### **III. COMMENTS**

#### **A. ISO-NE’s Proposed Market Monitoring Structure Will Not Assure Just And Reasonable Rates.**

Historically, the Commission has not required Independent Service Operators (“ISOs”) or Regional Transmission Organizations (“RTOs”) administering regional wholesale markets to conform their market monitoring functions to any standardized structure. Consistent with its interest in maintaining regional preferences and variances,<sup>5</sup> Order No. 719 permits three different types of market monitoring structures: (1) an internal market monitoring structure organized as a department of the company; (2) an external market monitor that is legally and organizationally separate from the RTO; and (3) variations of a “hybrid” market monitoring structure that relies on two separate units,

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<sup>5</sup> Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶ 61,071 (Oct. 17, 2008) (“Order No. 719”) at P 326.

an internal department of the company and an external market monitoring unit.<sup>6</sup> In theory, all are equally capable of carrying out the functions that the Commission expects from market monitors.

The external structure places all monitoring responsibilities except mitigation unequivocally beyond the RTO's control. By contrast, under the hybrid structure, the RTO allocates responsibilities between the internal and external market monitors, which may blur lines of responsibility. In order to protect against undue RTO influence in such a hybrid model, the Commission ordered built-in redundancies. Where RTOs use hybrid models that assign the internal market monitor the most important functions and minimize the external market monitor's involvement in day-to-day market monitoring, however, they may put at risk key prerequisites for effective, proactive market monitoring – independence and transparency. As proposed and implemented, ISO-NE's version of a hybrid market monitoring structure will not function to assure just, reasonable, and competitive wholesale rates, and the Commission should require modifications to strengthen the role of the external market monitor.

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<sup>6</sup> For example, Midwest Independent System Operator uses an external market monitor and the New York Independent System Operator ("NYISO") uses a hybrid structure. ANOPR, *Wholesale Competition in Regions with Organized Electric Markets*, 119 FERC ¶ 61,306 (June 22, 2007) ("ANOPR") at P 109. The Commission's recent audit of NYISO's hybrid market monitoring structure finds that its internal market monitoring function is not independent of NYISO management. *New York Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,120 (May 6, 2009) at P 6. PJM Interconnection L.L.C. previously utilized an internal market monitoring structure, but agreed by settlement to transfer all monitoring functions to an external market monitor after evidence surfaced that its substantial interference was preventing market monitoring from carrying out its functions. *Allegheny Elec. Coop., Inc., et al. v. PJM Interconnection, L.L.C.; Organization of PJM States, Inc., et al. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,257 (Mar. 21, 2008).

# **1. ISO-NE's "Hybrid" Market Monitoring System Places Primary Responsibility With The Internal Market Monitor.**

ISO-NE has long used a "hybrid" market monitoring structure that relies on two separate market monitoring units, an internal department of ISO-NE and an external contractor, Potomac Economics, Ltd.<sup>7</sup> Under ISO-NE's current organizational structure, the internal market monitor is the primary contact with the Commission, state regulators, and market participants.<sup>8</sup> The internal market monitor is also responsible for day-to-day monitoring of market participants' conduct and implementing automatic mitigation procedures pursuant to the tariff.<sup>9</sup> The internal market monitor may consult with the external market monitor, as needed, before implementing mitigation procedures and may refer market concerns to the external market monitor and/or the ISO-NE Board.<sup>10</sup> The internal market monitor also investigates market participants' behavior that may not be explicitly excluded by the tariff, but may be anticompetitive, and it may refer anticompetitive conduct to FERC enforcement for further action.<sup>11</sup> Additionally, the internal market monitor may conduct *ad hoc* analyses and prepare weekly, quarterly, and

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<sup>7</sup> Section 9.4 of NEPOOL Participants Agreement currently sets out the organizational structure and the division of monitoring responsibilities between the two units. *See generally* NEPOOL Participants Agreement among ISO New England Inc. and the New England Power Pool ("Participants Agreement"), available at [http://www.iso-ne.com/regulatory/part\\_agree/participants\\_agreement.pdf](http://www.iso-ne.com/regulatory/part_agree/participants_agreement.pdf).

<sup>8</sup> *Id.*, § 9.4.4(h).

<sup>9</sup> *See generally* Comments of ISO New England Inc., *Wholesale Competition in Regions with Organized Electricity Markets*, Docket Nos. RM07-19-000, AD07-7-000 (filed Sept. 14, 2007) ("ANOPR Comments") at 2-4.; *see also* Participants Agreement, § 9.4.4(b).

<sup>10</sup> *See* Participants Agreement, §§ 9.4.4(c),(d). ISO-NE explains on its website, however, that the internal market monitoring unit will "generally mitigate without contacting the [external market monitor]." ISO New England Inc. Internal Market Monitoring Unit, Procedures for Contacting the Independent Market Monitoring Unit, § A.1 (Oct. 3, 2006), available at [http://www.iso-ne.com/markets/mktmonmit/ind\\_mkt\\_advsr/procedures\\_contacting\\_market\\_advisor.doc](http://www.iso-ne.com/markets/mktmonmit/ind_mkt_advsr/procedures_contacting_market_advisor.doc) (last visited May 23, 2009). Thus, the policies described in the Participants Agreement appear to be inconsistent with the internal market monitor's day-to-day practice.

<sup>11</sup> *See* ANOPR Comments at 3.

annual reports on existing market rules and operating procedures as well as new market design proposals to assess whether these modifications promote reliable and efficient operation of the wholesale markets administered by ISO-NE.<sup>12</sup>

As ISO-NE explained in an earlier filing, the external market monitor's responsibilities under the current structure include responsibility for "[r]eviewing and discussing with [internal market monitoring] staff any decision to mitigate bids prior to the imposition of the mitigation."<sup>13</sup> Because mitigation decisions require immediate action, the external market monitor must always be available and on-call for consultations.<sup>14</sup> The external market monitor may propose specific mitigation actions to the internal market monitor, including tariff modifications that may require a Section 205 filing.<sup>15</sup>

The external market monitor is also charged with reviewing the competitiveness of ISO-NE administered markets, assessing the expected impact of market rules or changes to market rules on the markets, and analyzing how ISO-NE's actions affect the market.<sup>16</sup> When the external market monitor uncovers a problem with the market, it must promptly inform the Commission, ISO-NE Board, state public utility commissions, and the market participants of its findings.<sup>17</sup> The external market monitor may also perform independent evaluations and annually assess the markets' competitiveness and

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<sup>12</sup> See Participants Agreement, §§ 9.4.4(g),(e); ANOPR Comments at 3.

<sup>13</sup> See ANOPR Comments at 6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See generally *id.* at 4-6.

<sup>17</sup> See Participants Agreement, § 9.4.3(a).

efficiency.<sup>18</sup> The external market monitor may undertake other *ad hoc* assessments and evaluations at its discretion or pursuant to a request by ISO-NE, state public utility commissions, or market participants.<sup>19</sup> The external market monitor provides information for monthly market updates distributed at stakeholder meetings and may make recommendations to the ISO-NE Board and governance participants to improve market efficiency.<sup>20</sup> The external market monitor may comment on filings developed in the stakeholder process, review ISO-NE's filings with the Commission, and at its discretion, may file comments on the proposed filing's effect on competitiveness and efficiency.<sup>21</sup> In fact, however, the CT DPUC has found only two instances in which ISO-NE's external market monitor filed separate comments in a Commission proceeding, and in both instances the external market monitor supported ISO-NE management's position.<sup>22</sup>

The external market monitor may assess the impact of market rule changes across control areas and may participate in a regional market monitoring committee, if it is ever established.<sup>23</sup> The external market monitor may also "address interregional market monitoring efforts with NYISO," "recommend[] market rule reforms[,] and issu[e]

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<sup>18</sup> *Id.*, § 9.4.3(b).

<sup>19</sup> *Id.*, §§ 9.4.3(b)(c); ANOPR Comments at 4.

<sup>20</sup> Participants Agreement, § 9.4.3(g).

<sup>21</sup> Participants Agreement, § 9.4.3(f); ANOPR Comments at 5.

<sup>22</sup> See Comments by the IMM for the ISO-NE on Issues for Order 719, *ISO New England, et. al*, Docket No. ER09-1051-000 (filed Apr. 28, 2009), Report on Shortage Pricing at 12 (agreeing that ISO-NE's reserve demand curves "should comply with the requirements of Order No. 719") and Report on Demand Response at 14-17 (describing ISO-NE's consideration of changes to the demand response program); Comments of Potomac Economics, Ltd., *Devon Power LLC*, Docket No. ER03-563-030 (filed Mar. 22, 2004) at 2 ("fully support[ing] the overall reforms" that ISO-NE proposed for a locational installed capacity mechanism, including its use of a demand curve).

<sup>23</sup> Participants Agreement, § 9.4.3(h).



periodic reports to the Boards and market participants in both regions,” including “market rules, policies, practices and procedures that affect inter-control area transactions” and actions to “address the potential for abuse of market power.”<sup>24</sup>

The Joint Filers’ compliance filing retains much of the existing hybrid market monitoring structure. The internal market monitor will remain the primary contact with the Commission, state regulators, and market participants<sup>25</sup> and will “maintain” the market monitoring provisions of the tariff, including identifying “[a]ny amendments deemed to be necessary.”<sup>26</sup> The internal market monitor will continue to perform the day-to-day, real time review of market behavior and will continue to consult with the external market monitor, “as needed,” to implement the mitigation provisions of the tariff.<sup>27</sup> The internal market monitor will continue to monitor market participants’ conduct – individually or in collusion – that materially affects prices or other market payments, such as economic withholding, uneconomic production, anti-competitive increment/decrement bids, anticompetitive demand bids, or other types of conduct.<sup>28</sup> As it “deems necessary,” the internal market monitor will evaluate anti-competitive gaming of ICAP resources, conduct and market outcomes inconsistent with competition, flaws in market design and software, inconsistencies in ISO-NE’s implementation of market rules, conduct in one market affecting another market, market rules or behavior creating

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<sup>24</sup> ANOPR Comments at 6.

<sup>25</sup> Attachment 8 to Compliance Filing, FERC Elec. Tariff No. 3 (Appendix A) (“Appendix A to Tariff”), § III.A.2.3(i) at 1st Rev Sheet No. 7410.

<sup>26</sup> *Id.*, § III.A.2.3(a) at 2nd Rev Sheet No. 7409.

<sup>27</sup> *Id.*, §§ III.A.2.3(b),(c) at 2nd Rev Sheet No. 7409.

<sup>28</sup> *Id.*, § III.A.2.3(j) at 1st Rev Sheet Nos. 7410 – 2nd Rev Sheet. No 7411.

barriers to entry, other actions that may prevent competitive market results,<sup>29</sup> and physical withholding of supply.<sup>30</sup> The internal market monitor may notify the Commission's Enforcement Division of suspected violations of the tariff, Commission rules or regulations, market manipulations, and other unusual practices.<sup>31</sup>

As in the past, the internal market monitor will be assigned to review the competitiveness of ISO-NE administered markets, the expected impact of market rules or changes to market rules on the markets, and how ISO-NE's actions affect the market.<sup>32</sup> When the internal market monitor uncovers a problem with the market, it is charged with promptly informing the Commission, ISO-NE Board, state public utility commissions, and the market participants of its findings – unless it believes disclosure “could lead to exploitation.”<sup>33</sup> The internal market monitor may propose to ISO-NE and market participants mitigation measures and rules changes addressing noncompetitive conduct that has a significant effect on rates or market payments.<sup>34</sup>

The internal market monitor may assist the ISO-NE Board and the external market monitor consistent with its functions,<sup>35</sup> and may prepare annual and quarterly market reports on market performance and trends.<sup>36</sup> Internal market monitoring staff will

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<sup>29</sup> *Id.*, § III.A.2.3(k) at 2nd Rev Sheet Nos. 7411-12.

<sup>30</sup> *Id.*, § III.A.2.3(m) at 2nd Rev Sheet No. 7412.

<sup>31</sup> *Id.*, § III.A.2.3(d) at 2nd Rev Sheet No. 7409.

<sup>32</sup> *Id.*, § III.A.2.3(e) at 2nd Rev Sheet No. 7409.

<sup>33</sup> *Id.*, § III.A.2.3(e) at 2nd Rev Sheet No. 7409. ISO-NE's tariff includes protocols on referrals to the Commission that also permit it to withhold information from the Commission if it believes dissemination could lead to exploitation. *See id.*, § III.A.15(A) at Original Sheet No. 7448E.

<sup>34</sup> *Id.*, § III.A.2.3(l) at 2nd Rev Sheet No. 7412.

<sup>35</sup> *Id.*, § III.A.2.3(f) at 1st Rev Sheet No. 7410.

<sup>36</sup> *Id.*, § III.A.2.3(g) at 1st Rev Sheet No. 7410.

be available for conference calls or monthly market participant meetings to review market data and analyses.<sup>37</sup> If established, the internal market monitor will participate in a regional committee of market monitors.<sup>38</sup>

ISO-NE proposes to modify the external market monitor’s relationship with the internal market monitor. The external market monitor will now be limited to “monitor[ing] and review[ing] the quality and appropriateness of the mitigation conducted by the Internal Market Monitor,”<sup>39</sup> as Order No. 719 instructs for hybrid market monitoring structures.<sup>40</sup> If the external market monitor identifies problems with mitigation, it will promptly inform the Commission, ISO Board, state regulators, and market participants – unless it believes disclosure “could lead to exploitation.”<sup>41</sup> The tariff retains most of the other current functions for the external market monitor.

## **2. Recent Experience With ISO-NE’s Hybrid Market Monitoring System Highlights Material Flaws.**

Despite contrary assurances in its Compliance Filing, recent events have demonstrated to state regulators and New England customers that ISO-NE’s market monitoring function is not independent, transparent, accountable, or effective and that it will not provide the Commission, state regulators, and market participants with timely, accurate, objective analysis of New England markets. ISO-NE recently disclosed that

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<sup>37</sup> *Id.*, § III.A.2.3(h) at 1st Rev Sheet No. 7410.

<sup>38</sup> *Id.*, § III.A.2.3(n) at 2nd Rev Sheet No. 7412.

<sup>39</sup> *Id.*, § III.A.2.2(d) at 2nd Rev Sheet No. 7408A.

<sup>40</sup> Order No. 719 at P 374.

<sup>41</sup> Appendix A to Tariff, § III.A.2.2(d) at Original Sheet No. 7408A; *see also id.*, § III.A.2.2(a) at Original Sheet No. 7408A (providing market monitor option to limit distribution of competitive market reviews if “broader dissemination could lead to exploitation”); *id.*, § III.A.2.1(a) at 2nd Rev Sheet No. 7408 (similar).

since the beginning of the Forward Capacity Market (“FCM”) transition period in December 2006, a group of market participants holding import capacity contracts over the Northern New York AC interface<sup>42</sup> has manipulated New England energy markets with a high-price offer scheme.<sup>43</sup> During this time, these market participants collected more than \$50.9 million in capacity payments.<sup>44</sup> Although it waited for more than two years to disclose this market failure,<sup>45</sup> ISO-NE’s internal market monitor concluded that the market rules for the FCM transition period “do[] not establish a meaningful obligation to competitively offer and deliver energy.”<sup>46</sup> In sworn testimony, the market monitor explained how certain market participants had “routinely submitt[ed] high-priced energy” – *i.e.*, offering energy at the \$1,000/MWh offer cap “during most of the months” – and that these capacity imports are “so high priced that they are seldom called upon to deliver

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<sup>42</sup> These market participants are believed to be Brookfield Energy Marketing Inc., H.Q. Energy Services (U.S.) Inc., Constellation Energy Commodities Group, and perhaps others.

<sup>43</sup> See *Tariff Revisions Regarding Competitive Offer Requirement for Capacity Imports, ISO New England Inc. and New England Power Pool*, Docket No. ER09-873-000 (filed Mar. 20, 2009) (“Tariff Revisions Filing”) at 4-5, *corrected* ISO New England Inc. Corrections to March 20, 2009 Filing, *ISO New England Inc. and New England Power Pool*, Docket No. ER09-873-000 (filed May 6, 2009) (“Corrected Filing Package”), *corrected* Additional Correction by ISO New England Inc., *ISO New England Inc. and New England Power Pool*, Docket No. ER09-873-000 (filed May 20, 2009) (“ISO-NE Additional Correction”). This filing is a proposal to modify market rules to impose competitive offer requirements on energy transactions associated with ICAP Import Contracts and to tighten penalty provisions for non-performance affecting capacity market payments.

<sup>44</sup> ISO-NE Additional Correction at 3 n.10.

<sup>45</sup> If the external market monitor was aware of the problem, it was required to disclose it. “In the event that the [external market monitor] uncovers problems with the New England Electricity market, the [external market monitor] shall promptly inform the Commission, ISO-NE Board, state public utility commissions for each of the six New England states, and the Governance Participants of its findings . . . .” *Informational Filing of Contract between ISO New England Inc. and Potomac Economics, Ltd., ISO New England Inc.*, Docket No. ER09-192-000 (filed Oct. 31, 2008) (“Informational Filing”), Attachment 1, [External Market Monitor] Services Agreement at Exhibit A, Scope of Work, § B(i); *see also* Participants Agreement, § 9.4.3(a) (same). It appears, however, that the internal market monitor only notified the external market monitor when it advised the ISO-NE Board of the problem.

<sup>46</sup> Attachment 3 to Tariff Revisions Filing, Joint Testimony of David LaPlante and John P. O’Connor (“LaPlante/O’Connor Testimony”) at 4:12-13.

energy.”<sup>47</sup> Nevertheless, ISO-NE’s market monitor permitted these market participants’ high-offer bidding scheme to continue unabated without notifying the Commission or state regulators so that they could effectuate a remedy.

The internal market monitor also testified that although these capacity imports are “so high priced that they are seldom called upon to deliver energy,” they had failed to perform 108 times when they were called to deliver energy.<sup>48</sup> ISO-NE later recanted this portion of the market monitor’s testimony, claiming that its findings concerning market participants’ failure to perform were “erroneous.”<sup>49</sup> According to ISO-NE, the market monitor conducted its analysis of the market participants’ performance utilizing a data set that they did not fully understand. The internal market monitor could have compared this data set with other available information, requested clarification from ISO-NE dispatchers, required additional data from the import capacity resources, or consulted with the external market monitor, but it apparently did not.<sup>50</sup> Although the external market monitor has authority to initiate its own inquiries,<sup>51</sup> it took no action whatsoever.

Furthermore, ISO-NE confirms that neither it nor the market monitor has investigated these market participants’ bidding practices and that “the ISO does not have

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<sup>47</sup> *Id.* at 10:13-15, 12:3-5, 9:23-24.

<sup>48</sup> *Id.* at 9:23-24, 13:4-10.

<sup>49</sup> Corrected Filing Package at 1, 2; Answer of ISO New England Inc., *Blumenthal v. ISO New England Inc., et al.*, Docket No. EL09-47-000; *Conn. Dep’t of Pub. Util. Control, et al. v. ISO New England Inc., et al.*, Docket No. EL09-48-000 (filed May 6, 2009) (“ISO-NE Answer”) at 4, 9, 15, 16 n.32, 17 n.33, 20, 31.

<sup>50</sup> *See* ISO-NE Answer at 15, 21-22.

<sup>51</sup> Participants Agreement, §§ 9.4.3(b)(iii),(c); Informational Filing, Attachment 1, [External Market Monitor] Services Agreement, Exhibit A, Scope of Work, §§ B(ii),(iii).

information to provide answers” to any allegations of market manipulation.<sup>52</sup> Despite the absence of crucial facts and without seeking necessary data, ISO-NE and the internal market monitor concluded that these market participants complied with market rules<sup>53</sup> and – without analyzing the price impact consequences of high-offer bids – asserted that these strategies “did not impede energy dispatch between New York and New England.”<sup>54</sup>

### **3. ISO-NE’s Proposed Market Monitoring Structure Will Not Assure Just And Reasonable Rates.**

#### **(a) A Robust Market Monitor Is Essential To Assure Just And Reasonable Market-Based Rates.**

Market monitoring is at least as “essential” today as when the Commission issued Order No. 2000.<sup>55</sup> In order to “protect against anticompetitive effects in electricity markets,” the Commission still needs market monitoring as “an important tool for ensuring that markets within the region covered by an RTO do not result in wholesale transactions or operations that are unduly discriminatory or preferential or provide opportunity for the exercise of market power.”<sup>56</sup> Although the Commission has long permitted a “flexible approach” to market monitoring, it has insisted on a core set of principles.

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<sup>52</sup> ISO-NE Answer at 6 (ISO-NE “does not have the information” pertaining to the bidding strategies used by the capacity importers).

<sup>53</sup> *Id.* ISO-NE’s Internal Market Monitor acknowledged that he could change his conclusion that the Import Capacity Resources followed the existing market rules based on new information about the energy supply offers used to export power from New York to New England. *See infra* n.63.

<sup>54</sup> ISO-NE Answer at 15.

<sup>55</sup> *See Regional Transmission Organizations*, 89 FERC ¶ 61,285 (1999) (“Order No. 2000”) at 466; Order No. 719 at P 314 (“[s]ince the inception of organized markets, the Commission has required RTOs and ISOs to employ a market monitoring function”); *see also* ANOPR at PP 98-99 (summarizing Commission actions on market monitoring since Order No. 2000).

<sup>56</sup> Order No. 2000 at 461-62.

The monitoring plan must be designed to ensure that there is objective information about the markets that the RTO operates or administers and a vehicle to propose appropriate action regarding any opportunities for efficiency improvement, market design flaws, or market power identified by that information. The monitoring plan also must evaluate the behavior of market participants, including transmission owners, if any, in the region to determine whether their behavior adversely affects the ability of the RTO to provide reliable, efficient and nondiscriminatory transmission service. . . . [T]he monitoring plan should examine the structure of the market, compliance with market rules, behavior of individual market participants and the market as a whole, and market power and market power abuses.<sup>57</sup>

Finally, market monitoring is “a useful tool to provide information that can be used to assess market performance,” including by “state commissions that protect the interests of retail consumers. . . .”<sup>58</sup>

The Commission recently reiterated that it expects the RTO’s market monitoring function to be “vigilant” in evaluating participants’ behavior and detecting problems<sup>59</sup> and that the market monitor must “work *proactively* in identifying market design flaws”<sup>60</sup> and “consistently and impartially evaluate” market rules.<sup>61</sup> The Commission tailored Order No. 719’s “reforms to enhance the market monitoring function and thereby improve the performance and transparency of organized RTO . . . markets.”<sup>62</sup> Although

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<sup>57</sup> *Id.* at 463-64; see 18 C.F.R. § 35.34(k)(6) (2008); *Market Monitoring Units in Regional Transmission Organizations and Independent System Operators*, 111 FERC ¶ 61,267 (May 27, 2005) (“Policy Statement”) at P 2 (establishing market monitoring functions); see also Order No. 719 at P 314 (market monitoring units “have consistently played a vital role in reporting on the state of the markets and ferreting out wrongdoing by market participants”).

<sup>58</sup> Order No. 2000 at 464.

<sup>59</sup> Order No. 719 at P 356; see also Policy Statement at P 5 (expecting market monitors to “vigilantly monitor participant behavior”).

<sup>60</sup> Policy Statement at P 4 (emphasis added); see also *id.* at P 7 (“In all instances, the [market monitor] should be proactive in recommending changes to the ISO/RTO”); Order No. 719 at P 357-558.

<sup>61</sup> Policy Statement at P 3.

<sup>62</sup> Order No. 719 at P 310.

the Commission continued to pursue a flexible approach, it emphasized the importance of the market monitor's independence in form and in fact.<sup>63</sup>

**(b) The Performance Of ISO-NE's Market Monitors  
Demonstrates The Need For More Comprehensive  
Revisions.**

Recent incidents make clear that ISO-NE's market monitoring function requires far more comprehensive revisions to meet the Commission's objectives in Order No. 719. The Joint Filing Parties have proposed only limited changes to ISO-NE's tariff – "*i.e.*, nothing beyond [Order No. 719] compliance with as few changes as possible."<sup>64</sup> By focusing on the minimal requirements for technical compliance instead of implementing the Commission's intent in adopting the Order No. 719 reforms, ISO-NE has actually weakened its market monitoring function by creating less independence and transparency than before. The CT DPUC does not oppose retaining a hybrid structure, but the internal market monitor's role should be confined to nondiscretionary tasks – *i.e.*, administration of automatic mitigation procedures – and the external market monitor's role must be strengthened considerably and revitalized to act as an independent, aggressive advocate for fair and competitive markets.

The particular form of hybrid market monitoring that ISO-NE proposes does not provide the level of independence necessary to assure "protection of both consumers and market participants"<sup>65</sup> or even the level of "appropriate independence" that ISO-NE

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<sup>63</sup> *Id.* at P 317.

<sup>64</sup> Minutes of the NEPOOL Markets Committee Meeting (Mar. 10, 2009) at 4, *available at* [http://www.iso-ne.com/committees/comm\\_wkgrps/mrkt/mrkt/comm/mrkt/minutes/2009/mc\\_minutes\\_090310.doc](http://www.iso-ne.com/committees/comm_wkgrps/mrkt/mrkt/comm/mrkt/minutes/2009/mc_minutes_090310.doc); *id.* at 5 ("we do not think we can make these non-compliance changes in this filing").

<sup>65</sup> Order No. 719 at P 392.



posits.<sup>66</sup> *First*, ISO-NE designates its own business unit as primarily responsible for the major functions established by Order No. 719, as well as responsible for subjective determinations in the first instance whether market participants are acting competitively.<sup>67</sup> In effect, the internal market monitor is the gatekeeper, and if it does not promptly identify and correct anti-competitive behavior, that conduct will likely go unnoticed and uncorrected. The internal market monitor – which necessarily depends on the ISO-NE organization for its sustenance, support, and access to information – has nothing to gain and much to lose if it opposes ISO-NE’s management or challenges ISO-NE’s entrenched rules and procedures. It was clear from the internal market monitor’s recent reliance on misinformation and its misunderstanding of historical data – requiring repeated corrections of acknowledged errors – that it either did not have access to necessary information or did not take steps to ensure that it received accurate, complete data.<sup>68</sup> So long as the internal market monitor performs largely administrative mitigation and data gathering functions, it can make a valuable contribution. It is reckless, however, to give the internal market monitor comprehensive responsibility for policing the same organization to which it belongs and is beholden. Without a largely redundant external market monitor to track every substantive decision the internal market monitor makes, the Commission and stakeholders will have no assurance that the markets are competitive.

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<sup>66</sup> Compliance Filing at 64.

<sup>67</sup> Appendix A to Tariff, §§ III.A.2.3(b) at 2nd Rev Sheet No. 7409, III.A.2.3(j) at 1st Rev Sheet No. 7411 (designating internal market monitor as responsible to monitor for anticompetitive conduct by market participants), III.A.2.3(k) at 2nd Rev Sheet No. 7411 (catch all monitoring), III.A.2.3(m) at 2nd Rev Sheet No. 7412 (evaluate physical withholding of supply offers).

<sup>68</sup> *See supra* Section III.A.2 at 10-13.

*Second*, recent experience shows that the internal market monitor permitted market participants' unlawful bidding strategies affecting capacity and energy markets to persist unchecked for more than two years. Not surprisingly given ISO-NE's version of the hybrid structure, the external market monitor did not respond to this inaction and was apparently was not informed of any concerns about market participants' behavior until the internal market monitor finally briefed ISO-NE's Board. A high-priced offer strategy – with offers at or near the \$1000/WWh cap for years at a time – should have raised bright red flags for any watchful observer, but neither the internal nor external market monitor notified the Commission or state regulators or even made rudimentary inquiries to the market participants to determine whether they were blatantly violating market rules.<sup>69</sup>

These events raise legitimate concerns about the independence and capabilities of the market monitoring function that the Compliance Filing does not address. The internal market monitor muddled the facts, delayed crucial remedial actions, and displayed a remarkable lack of curiosity or vigilance. Meanwhile, the external market monitor was kept out of the loop and was conspicuous by its absence. This hybrid structure that ISO-NE proposes to retain essentially unchanged does not assure independence from ISO-NE, and continued failures of transparency and disclosure like those recently experienced are inevitable if the Commission accepts this proposal.

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<sup>69</sup> See ISO-NE Answer, Attachment 1, Joint Testimony of David LaPlante and John P. O'Connor at 18:7-19 (internal market monitor acknowledging that it “do[es] not have any information about the price of the energy export supply offers submitted by capacity importers in the New York market” although this information could change its conclusion about whether the “Market Participants with capacity imports followed the existing market rules”).

**(c) ISO-NE's Proposed Market Monitoring Function Does Not Achieve The Commission's Objectives In Order No. 719.**

ISO-NE proposes to continue business as usual, but that level of performance will not protect customers from unjust and unreasonable rates. ISO-NE explains that because it already complies in practice with Order No. 719's requirements, the changes to the market monitoring section of its tariff are primarily intended to "clarify" current practices.<sup>70</sup> Unlike the express delegation of responsibilities that the Participants Agreement currently establishes, however, ISO-NE proposes to assign most responsibilities and the most significant functions to its internal market monitor and to minimize the external market monitor's already diminished role. This particular hybrid market monitoring structure – heavily skewed to keep all key duties, data collection, and information control in-house at ISO-NE – will not foster independence, transparency, vigilance, and accountability that would be expected from a truly autonomous market monitoring organization. ISO-NE's delegation of such substantial decision-making to its own internal business unit does not serve the Commission's obligations to assure customers that New England's markets are competitive and produce just and reasonable rates.

Because it assigns oversight for most functions to the internal market monitor, ISO-NE will be vulnerable to conflicts of interest between its internal market monitoring

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<sup>70</sup> Compliance Filing at 62 ("ISO-NE believes that its current practices comply with Order No. 719's requirements . . . several revisions are being made . . . to more completely capture these requirements"), 64 ("new Section III.A.1.2 . . . is being added to document this structure and to clarify the oversight requirements"), 68 ("ISO believes that the Internal Market Monitor and External Market Monitor together perform the core [market monitoring] functions delineated in Order No. 719"), 91 ("the reporting performed by the Internal Market Monitor and External Market Monitor satisfy the requirements of Order No. 719").

function and its interest in maintaining a perception that it administers efficiently operating, well-designed markets. The internal market monitor remains part of ISO-NE and is inseparable from the large organization that creates, administers, and has a stake in defending the same rules that it is also charged with policing.<sup>71</sup> Because the internal market monitor reports to ISO-NE and not to the external market monitor, the internal market monitor is more likely to be co-opted by ISO-NE's institutional interests. Moreover, the external market monitor has no ability to ensure the internal market monitor is performing independently from ISO-NE, as ISO-NE posits.<sup>72</sup>

The internal market monitor is also still vulnerable to conflicts of interest with the stakeholders that it is charged with monitoring. For example, because the internal market monitoring staff are employees of ISO-NE, their compensation is tied to customer satisfaction through an annual bonus program that is based, in part, on an annual customer survey.<sup>73</sup> No market monitoring employees' salaries should be dependant on the opinions of the market participants they monitor – yet this is exactly what happens.

While it is not clear that the external market monitor has ever been meaningfully involved in daily operations,<sup>74</sup> ISO-NE's proposal removes the external market monitor even further from day-to-day involvement. The external market monitor's responsibility will be limited to a review of the "quality and appropriateness of the mitigation

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<sup>71</sup> Indeed, ISO-NE's current Internal Market Monitor, David LaPlante, was previously its Vice President, Wholesale Market Strategy and was responsible for developing the same markets and market rules that he now monitors. It would be unrealistic to expect a market's creator to monitor that same market's performance with the requisite skepticism and assertiveness.

<sup>72</sup> *Id.* at 64.

<sup>73</sup> *Id.* at 107.

<sup>74</sup> *See supra* n.10. The internal market monitor's procedures provide for contact with the external market monitor prior to mitigation only when believes clarification of the market rules is needed.

conducted by the Internal Market Monitor. . . .”<sup>75</sup> Because the internal market monitor has no direct reporting requirement to the external market monitor and the external market monitor has been removed from day-to-day operations, the external market monitor cannot provide the oversight necessary for a critical review of the internal market monitor’s work. The external market monitor is expected to notify the Commission of market violations by a market participant or ISO-NE,<sup>76</sup> but it is highly unlikely that the internal market monitor would identify behavior that it does not believe to violate market rules but would nevertheless report that incident to the external market monitor.

ISO-NE contends that the external market monitor will act as a “check” on the internal market monitor’s independence.<sup>77</sup> In reality, the level of redundancy that ISO-NE’s hybrid model would require for the external market monitor to prevent the internal market monitor from being co-opted would impose excessive, unnecessary costs on ratepayers with little prospect of success. Moreover, the contract between ISO-NE and the external market monitor does not assure that the external market monitor can act independently.<sup>78</sup> For example, the proposed tariff language does not prohibit management involvement in the external market monitor selection process.<sup>79</sup> Furthermore, because ISO-NE may terminate its agreement with the external market

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<sup>75</sup> Appendix A to Tariff, § III.A.2.2(d) at Original Sheet No. 7408A.

<sup>76</sup> *Id.*, § III.A.2.1(c) at 2nd Rev Sheet No. 7408.

<sup>77</sup> Compliance Filing at 64.

<sup>78</sup> ISO-NE’s filing does not indicate whether it will seek to modify its contract with the external market monitor even though it is not in compliance with Order No. 719. However, ISO-NE represents that “[i]t is the parties’ belief that their relationship is fully compliant with the requirements of Order No. 719.” Transmittal Letter to Informational Filing at 3.

<sup>79</sup> Appendix A to Tariff, § III.A.1.2 at 2nd Rev Sheet No. 7407 (“The ISO shall enter into a contract with the External Market Monitor . . .”).

monitor for any reason with 30 days written notice,<sup>80</sup> the market monitor has no meaningful protections from the requirement that the Commission approve the termination of its contract. Principles of independence demand, at a minimum, that the external market monitor only be terminated for cause.

Contrary to its claims,<sup>81</sup> ISO-NE's proposed market monitor reporting does not satisfy Order No. 719's requirements. *First*, the internal market monitor is primarily responsible for most information dissemination,<sup>82</sup> but its analyses and reports do not reflect the type of candid, independent market performance assessments that would be useful to the Commission, state regulators, and stakeholders. For example, the most recently published internal market monitor's annual report concluded that its energy markets were competitive and made no mention at all of the Northern New York capacity importers' high-offer bidding strategy that affected energy market prices throughout this period.<sup>83</sup> By contrast, the PJM external market monitor's State of the Market Report is more informative than any of the materials currently produced by ISO-NE's market monitors. Unlike ISO-NE's market monitoring reports PJM's market monitor provides comprehensive analyses of its markets at a level of detail useful to state regulators and other stakeholders, and its detailed, candid evaluations cogently explain the basis for its conclusions about the market's competitiveness.<sup>84</sup>

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<sup>80</sup> Informational Filing, Attachment 1, [External Market Monitor] Services Agreement, §§ 7.2(b),(e) at 10.

<sup>81</sup> See Compliance Filing at 91.

<sup>82</sup> Appendix A to Tariff, §§ III.A.2.3(e),(g),(h),(i),(l) at 1st Rev Sheet No. 7410, 2nd Rev Sheet No. 7412.

<sup>83</sup> See ISO New England Inc., 2007 Annual Markets Report at 10, 37-38, *available at* [http://www.iso-ne.com/markets/mkt\\_anlys\\_rpts/annl\\_mkt\\_rpts/2007/amr07\\_final\\_20080606.pdf](http://www.iso-ne.com/markets/mkt_anlys_rpts/annl_mkt_rpts/2007/amr07_final_20080606.pdf).

<sup>84</sup> “[Q]uality rather than quantity is crucial.” Order No. 719 at P 418. The PJM market monitor's reports are responsive to the Commission's Policy Statement, requiring for example, that reporting focus “in-

*Second*, although Order No. 719 permits RTOs to review the drafts of reports prepared by a market monitor, they “may not alter the reports . . . or dictate the [market monitor’s] conclusions”<sup>85</sup> and the market monitor is “free to disregard any suggestions [by the RTO] with which it disagrees.”<sup>86</sup> Consistent with this provision, ISO-NE should not be able to prevent the internal or external market monitor from presenting its recommendations.<sup>87</sup> ISO-NE’s tariff should include broad protections expressly incorporating Order No. 719’s prohibition on interference with the market monitor’s work product, including not only periodic reports and market rule evaluations but also testimony and comments filed with the Commission.

*Third*, ISO-NE’s proposal does not require the market monitor to consider state regulators’ views on what should be included in the reports. Order No. 719 leaves to stakeholders “[t]he details of what should be included in [market monitoring] reports,” and the Commission cautioned that market monitors should ensure that “the data they include . . . meets the anticipated needs of the extended community that will make use of them.”<sup>88</sup> ISO-NE neglected to address this requirement and failed to include tariff

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depth” on market prices to “specifically determine” whether prices reflect competitive or noncompetitive outcomes. Policy Statement at P 7.

<sup>85</sup> Order No. 719 at P 360.

<sup>86</sup> *Id.*

<sup>87</sup> For example, the external market monitor is required to submit to ISO-NE’s Office of General Counsel copies of its presentations to be presented to the Markets Committee meetings eight days prior to each meeting. Informational Filing, Attachment 1, [External Market Monitor] Services Agreement, Exhibit A, Scope of Work, § A. Because such advance notice may be a vehicle to control the content of the presentation, the tariff should make clear that no ISO-NE employee or officer may influence the content of the external market monitor’s presentations.

<sup>88</sup> Order No. 719 at P 418. The Commission’s policy requires market monitors to report on market performance within the region and instructs the market monitor to “focus on how efficiently the markets are responding to customers’ needs for reliability electricity supply at the lowest long run cost to customers” “[s]ince these markets ultimately exist for the benefit of customers.” Policy Statement at P 7.

provisions that require the market monitor to consider to state regulators’ requests that it report on particular issues.

*Fourth*, the internal market monitor and the external market monitor have not made their reports regularly available. If materials are published, they are not published on the same webpage. For example, the materials published on ISO-NE’s “Independent Market Advisor” webpage<sup>89</sup> are not the same as the materials published on Potomac Economics’ website,<sup>90</sup> and neither website is up to date. ISO-NE’s Market Monitoring and Reports webpage is incomplete and out of date as well. The tariff should include a publishing provision that ensures all materials produced – *e.g.*, *ad hoc* and regularly published reports and analyses, materials prepared for the ISO-NE Board (redacted as necessary), evaluations for state regulators, presentations to stakeholders and state regulators, and testimony, comments, or other filings with the Commission – are regularly and timely published on a dedicated page of ISO-NE’s website.

*Fifth*, the tariff does not require the external market monitor to make available “sufficient data to enable users of their reports to reasonably test the validity of their conclusions,” as Order No. 791 requires.<sup>91</sup> ISO-NE’s tariff should include a provision that expressly gives state regulators access to this data.

*Finally*, ISO-NE’s proposal also does not assure that the external market monitor retains *exclusive* control over data it creates, as Order No. 719 requires.<sup>92</sup> Currently, the

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<sup>89</sup> Available at [http://www.iso-ne.com/markets/mktmonmit/ind\\_mkt\\_advstr/index.html](http://www.iso-ne.com/markets/mktmonmit/ind_mkt_advstr/index.html).

<sup>90</sup> Available at <http://www.potomaceconomics.com/documents/C8>.

<sup>91</sup> Order No. 719 at P 415.

<sup>92</sup> *Id.* at P 328 (RTO tariffs must adopt tariff provisions “granting MMUs exclusive control over any MMU-created data”).



external market monitor's contract deems all work that the market monitor creates as a "work made for hire" and the sole property of ISO-NE.<sup>93</sup> ISO-NE's proposal that the internal and external market monitor share "exclusive control"<sup>94</sup> could be workable, but only with substantial reforms that strengthen the role of the external market monitor. The lack of independence in the market monitoring structure does not assure that the external market monitor will be able to maintain exclusive control over the data it creates, even if its contract were modified to comply with Order No. 719.

As the Commission warned, ISO-NE's proposed allocation of the most important discretionary functions to the internal market monitor while leaving the external market monitor a much weaker role "result[s] in the rule being swallowed by the exception."<sup>95</sup> ISO-NE's reforms do not provide the safeguards that are essential to assure that market monitoring decision-making is independent from ISO-NE, and the external market monitor is so isolated from day-to-day market operations that it cannot competently fulfill even its limited duties.

**(d) ISO-NE Must Implement More Comprehensive Reforms In Order To Comply With The Commission's Market Monitoring Principles.**

The principles underlying Order No. 719 require that ISO-NE take more resolute steps to address recent failures that highlight its market monitoring function's inadequacies. An external market monitoring structure like the model used by PJM

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<sup>93</sup> Informational Filing, Attachment 1, [External Market Monitor] Services Agreement, § 5.1 at 5 (rights to work product).

<sup>94</sup> Appendix A to Tariff, § III.A.1.3 at Original Sheet No. 7407A ("Internal Market Monitor and External Market Monitor . . . shall have exclusive control over any data created by the Internal Market Monitor or External Market Monitor").

<sup>95</sup> Order No. 719 at P 340.

Interconnection L.L.C.<sup>96</sup> would assure greater independence, transparency, and effectiveness than ISO-NE's hybrid model. This structure has been far more successful in identifying market manipulation and evaluating existing and proposed market rules and market designs.<sup>97</sup> The CT DPUC does not oppose a hybrid structure in New England, but the entity with the primary decision-making responsibilities must remain separate from ISO-NE, and neither ISO-NE's Board nor its management can interfere with that independent evaluation. Accordingly, the internal market monitor's responsibilities must be limited to nondiscretionary tasks, and the external market monitor's responsibilities must be expanded considerably.

*First*, the external market monitoring function must have principle authority and must be fully independent from ISO-NE. Although ISO-NE may retain the internal market monitor, only an external market monitoring body – organized as a separate legal entity with an appropriate contractual relationship with the ISO-NE – will be sufficiently autonomous to act forcefully to protect market integrity. By keeping the significant market monitoring functions separate from ISO-NE's business operations – *i.e.*, with its own budget, employees, compensation plan, equipment, and data – the Commission can assure the necessary independence for the market watchdog.

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<sup>96</sup> See Settlement Agreement and Explanatory Statement of the Settling Parties, *Allegheny Elec. Coop., Inc., et al. v. PJM Interconnection, L.L.C.*, Docket Nos. EL07-56-000, et al., EL07-58-000, et al. (filed Dec. 19, 2007) ("PJM Settlement").

<sup>97</sup> For example, the PJM Market Monitor identified the Edison Mission's bidding strategy that eventually lead to a \$7 million civil penalty. Edison Mission had been bidding its capacity resources into the Day-Ahead energy market at prices near the \$1,000 per MWH bid cap to avoid being committed day-ahead and to be free to offer in real-time at higher than competitive prices. Report of the Electricity Regulation and Compliance Committee, 30 ENERGY L.J. 201, 204 n.29 (2009). By contrast, ISO-NE's market monitoring function took more than two years to alert the Commission to a similar problem but never ever sought Commission enforcement action or any remedy that would require disgorgement or penalties. See The Connecticut Representatives' Consolidated Amended Complaint.

*Second*, the role of the internal market monitor should be limited to administrative mitigation and other data collection and reporting functions. To establish clear lines of accountability, the internal market monitor should report directly to the external market monitor, not the ISO-NE Board.<sup>98</sup> The compensation program for internal market monitoring staff should be modified from current practice and be only a function of performance – not the perceptions of the same market participants that the department monitors.

*Third*, the Commission should substantially curtail the ISO-NE Board’s current ability to control the market monitoring function. In order to assure responsiveness and independence, the ISO-NE Board should vet its proposed choice of an external market monitor with state regulators, and state regulators should periodically review the external market monitor’s performance and make recommendations about any reappointment. The external market monitor should report to an independent committee of the Board, whose oversight should be limited to (1) reviewing the budget of the external market monitoring contractor and requests for additional expenditures, (2) requesting Commission approval to modify the external market monitor’s scope of work, terminating the external market monitor for cause, renewing the external market monitoring contract for another term, or replacing the external market monitor with

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<sup>98</sup> The Commission requires that if the internal market monitor is responsible for carrying out any of the three core market monitoring functions, it should report to the Board of Directors. Order No. 719 at P 341. In practice, however, ISO-NE’s internal market monitoring function is neither independent nor transparent, and recent events demonstrate that it is not capable of carrying out these core monitoring functions. For these reasons, the CT DPUC proposes modifications that will transfer responsibility for carrying out these functions to the external market monitor.

another contractor,<sup>99</sup> and (3) reviewing the reports of the external market monitor. The external market monitor's views should not be subject to the direction or control of the Board or any of its members. The Board should not interfere with the external market monitor's independent participation – including representation by independent counsel – in Commission proceedings.

*Fourth*, the external market monitor should have exclusive control over the analyses and conclusions it reports, as well as the data it creates. Although Order No. 719 dictates that an RTO “may not alter the reports generated by the MMU or dictate the MMU’s conclusions,”<sup>100</sup> ISO-NE’s clarifications to its tariff do not provide this assurance to its market monitoring function. Rather than having to clear every PowerPoint presentation through the Office of the General Counsel in advance,<sup>101</sup> no member of the ISO-NE Board, management, or counsel should have the right to review, screen, alter, delete, or exercise editorial control over any external market monitoring actions or investigations or the findings, conclusions, and recommendations that are developed by the external market monitor.<sup>102</sup>

*Fifth*, the external market monitor should provide independent advice and opinions in Commission and NEPOOL forums. In addition to participating in the NEPOOL stakeholder process as appropriate, the external market monitor should chair a

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<sup>99</sup> See, e.g., PJM Settlement, Attachment 1, Explanatory Statement at 7, and Attachment 2, Attachment A to Settlement Agreement, Tariff Revisions at Fourth Revised Sheet No. 448, Original Sheet Nos. 448.02-.04 (standards and process for proposed termination and replacement).

<sup>100</sup> Order No 719 at P 360.

<sup>101</sup> Informational Filing, Attachment 1, [External Market Monitor] Services Agreement, Exhibit A, Scope of Work, § A.

<sup>102</sup> See, e.g., PJM Settlement, Attachment 2, Attachment A to Settlement Agreement, Tariff Revisions at Fourth Revised Sheet No. 448.

Market Monitoring Advisory Committee to enhance communications between the external market monitor and interested parties.<sup>103</sup> This committee should meet regularly to discuss any matters relating to the external market monitoring function and should be open to all stakeholders, representatives of state regulatory agencies, and other authorized government representatives.

*Sixth*, the external market monitor should meet regularly and otherwise as necessary with the New England Conference of Public Utilities Commissioners (“NECPUC”) to discuss market monitoring, to report on the functioning of New England wholesale markets, to provide opinions on the functionality and design of New England wholesale markets, and to provide requested information or analysis.<sup>104</sup> Contrary to the Order No. 719’s instructions, ISO-NE’s proposal frequently excludes state regulators from its internal market monitor’s reporting obligations about the state of the market.<sup>105</sup>

Upon the request of NECPUC or individual state commissions, the external market monitor should provide studies or reports on wholesale market issues relevant to their jurisdiction, including wholesale market transactions occurring under a state-administered auction process in the New England area.<sup>106</sup> Any request and any market

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<sup>103</sup> The Market Monitoring Advisory Committee should not have authority to direct, supervise, review, or otherwise interfere with market monitoring functions. *See, e.g., Id.*, Attachment 2, Attachment A to Settlement Agreement, Tariff Revisions at Original Sheet No. 448.04.

<sup>104</sup> *Id.*

<sup>105</sup> Appendix A to Tariff, §§ III.A.1.1(2) at 2nd Rev Sheet No. 7406 (mission statement requires the market monitor to make recommendations of proposed rule and tariff changes only to “the ISO”), III.A.2.2(e) at Original Sheet No. 7408B, (“[p]repare recommendations to the ISO Board of Directors and the Market Participants”), III.A.2.2(f) at Original Sheet No. 7408B (“[r]ecommend actions to the ISO Board of Directors and the Market Participants”).

<sup>106</sup> Tariff Section III.A.2.2(c) permits the external market monitor to “[c]onduct evaluations and prepare reports on its own initiative or at the request of others,” but it is not clear whether this provision is still intended to include states’ requests for wholesale market analyses. *Id.*, § III.A.2.2(c) at Original Sheet No. 7408A.

monitor's study or report should be made publicly available, subject only to protection of confidential information. If the external market monitor discovers evidence of misconduct by market participants that the external market monitor reasonably believes to be within a state commission's jurisdiction, the external market monitor should promptly report such information to the state commission.

*Seventh*, the external market monitor should improve the quality of the market analyses and reports it produces and ensure all materials (redacted if necessary) that it produces are timely published on its website or a dedicated page of ISO-NE's website. Only accurate, thorough, accessible reports will permit state regulators and other stakeholders to identify market deficiencies and initiate or support corrective action.

**B. ISO-NE's Proposed Mission Statement Should Include Provision Of Reliable Electric Service At The Lowest Reasonable Cost.**

ISO-NE's current statement of objectives – negotiated as part of the creation of the RTO<sup>107</sup> – includes oblique references to creating markets that are “economically efficient” and allocating costs equitably.<sup>108</sup> Nevertheless, ISO-NE has historically focused principally on reliability concerns and eschewed any responsibility for negotiating or proposing tariff provisions that will lower rates.<sup>109</sup> Rather, ISO-NE has largely assumed that the markets it administers will maintain reasonable costs.<sup>110</sup>

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<sup>107</sup> Compliance Filing at 116.

<sup>108</sup> *Id.*, Attachment 14, FERC Elec. Tariff No. 3, § I.1.3 at 1st Rev Sheet No. 7.

<sup>109</sup> *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 803 (D.C. Cir. 2007) (finding with regard to ISO-NE that “[a]lthough the system operator plainly has an incentive to ensure that system-critical power is available to ensure grid stability and reliability, FERC neither in its decisions nor at oral argument was able to identify incentives driving [the system operator] to bargain for low prices”).

<sup>110</sup> *See* Order No. 719 at P 1 (“[e]ffective wholesale competition protects consumers by . . . exerting downward pressure on costs”).

Consequently, ISO-NE has proposed Reliability-Must-Run contracts with little consideration of their costs, has approved planned transmission facilities without conducting thorough cost-benefit studies, and filed tariffs that are intended to improve reliability but that create disproportionate or unwanted costs for customers.

Order No. 719 “require[s] each RTO and ISO to post on its web site a mission statement or organizational charter” and “encourages each RTO and ISO to include in its mission statement, . . . the organization’s purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services.”<sup>111</sup> The Commission expects the mission statement to “provide a statement of goals by which the RTO’s and ISO’s progress may be judged.”<sup>112</sup>

In response to these Commission directives, ISO-NE proposes to modify its objectives to include a statement that “the ISO shall strive to perform all its functions and services in a cost-effective manner, for the benefit of all those served by the ISO.”<sup>113</sup> ISO-NE explains that this sentence “is intended to express ISO-NE’s commitment to cost-effectiveness in all of its functions and services, including market design, operations and planning” and “to ensure that the broadest and most inclusive view of all of its customers was incorporated into ISO-NE’s mission statement.”<sup>114</sup> ISO-NE rejected the following proposed alternative mission statement:

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<sup>111</sup> *Id.* at P 556.

<sup>112</sup> *Id.* at P 557.

<sup>113</sup> Compliance Filing at 117.

<sup>114</sup> *Id.*

To ensure just and reasonable rates as mandated by the Federal Power Act and as determined by the Federal Energy Regulatory Commission, the ISO shall fulfill its mission at the lowest reasonable cost, consistent with the preceding principles ultimately to the benefit of all consumers who pay for electricity products and services.<sup>115</sup>

ISO-NE argued that such a mission statement would “replac[e] [ISO-NE’s] function as the operator of regional markets with a regulatory role in which it determines the alternatives that meet the region’s needs.”<sup>116</sup>

ISO-NE views its mission too narrowly and, by refusing to adopt a “lowest reasonable cost” standard,<sup>117</sup> seeks to shirk the fundamental responsibility that it necessarily assumes when making Section 205 filings. Almost all of ISO-NE’s choices relating to market design, system planning, or operation of the New England bulk power system translate into costs for the ultimate customers. When ISO-NE proposes one option over another or selects one among several potential alternatives, it implicitly creates more or fewer costs that will be passed along to retail consumers. Each of those decisions might be characterized as “cost effective” in the sense that the expected benefit exceeds the expected cost. ISO-NE is unwilling, however, to consider the relative cost effectiveness and choose only the option that will produce the lowest reasonable cost while still ensuring the required level of reliability. The Commission should require ISO-NE to conduct all of its operations with an eye toward achieving reliable electric service at the same time that it minimizes customer costs.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 118.

<sup>117</sup> The CT DPUC advocates a “lowest reasonable cost” standard – not a “least cost standard.” ISO-NE would be expected to assess relative costs and benefits and to choose the alternative that will achieve the non-cost objectives at the lowest reasonable cost considering the benefits to be produced.



ISO-NE disavows a “regulatory role” that would require it to determine the relative costs and benefits of alternatives.<sup>118</sup> In fact, however, ISO-NE makes tacit decisions about the justness and reasonableness of particular proposals whenever it makes a Section 205 filing, and effectively locks in that choice to the exclusion of all others. In almost all of its Section 205 filings, ISO-NE repeats the same refrain in describing the Commission’s standard of review.

These changes are submitted pursuant to Section 205, which gives a utility the right to file rates and terms for services rendered with its assets. Under Section 205, the Commission plays an essentially passive and reactive role whereby it can reject a filing only if it finds that the changes proposed by the public utility are not just and reasonable. The Commission limits this inquiry into whether the rates proposed by a utility are reasonable – and this inquiry does not extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs. The changes filed herein need not be the only reasonable methodology, or even the most accurate. As a result, even if an intervenor or the Commission develops an alternative proposal, the Commission must accept this Section 205 filing if it is just and reasonable.<sup>119</sup>

Effectively, ISO-NE has assumed the regulatory mantle by determining which among multiple just and reasonable alternatives it will support, thereby precluding consideration of any other just and reasonable alternative. Of course, ISO-NE is not a typical utility pursuing its own commercial interests. Rather, it is imbued with a broader public interest mission, but ISO-NE construes that mission to exclude consideration of “the relative costs and benefits of alternatives.”<sup>120</sup> The Commission should reorient ISO-NE’s perspective and insist that it focus more clearly on its overriding purpose – to assure low-cost, reliable electric service for ultimate customers.

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<sup>118</sup> Compliance Filing at 118.

<sup>119</sup> See, e.g., Tariff Revisions Filing at 4 (internal quotations omitted).

<sup>120</sup> Compliance Filing at 118.

ISO-NE pleads impossibility, *i.e.*, that it cannot evaluate costs effectively in order to assess which among reasonable alternative could be implemented at the lowest reasonable cost for customers.<sup>121</sup> The Commission should not accept this reasoning. If ISO-NE can assess “cost effectiveness” – as it acknowledges it can – it should be able to determine the *relative* cost effectiveness of different approaches and choose the one that produces the lowest reasonable consumer costs.<sup>122</sup> Any other approach – either ignoring costs altogether or deliberately opting for a higher-cost alternative – would not promote a just and reasonable result. ISO-NE cannot feign indifference. It makes choices every time it makes a Section 205 filing. The Commission should require consideration of the lowest reasonable cost as an integral part of ISO-NE’s mission.

#### **IV. CONCLUSION**

The performance by ISO-NE’s market monitoring function demonstrates a need for reform beyond the minimal changes that it proposes. The Joint Filing Parties’ proposed hybrid organizational structure shifts the weight of responsibilities almost entirely to the internal market monitor. As recent events have shown, this division of responsibility will not provide the rigorous, vigilant, and objective analysis and judgment that is an essential component of market-based rates. The CT DPUC respectfully requests that the Commission establish hearing procedures in Docket Nos. EL09-47-000 and EL09-48-000 (not consolidated) to determine what structural reforms are necessary to assure that ISO-NE’s market monitoring function effectively protects market integrity

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<sup>121</sup> *Id.*

<sup>122</sup> For example, ISO-NE’s Regional System Plan for transmission upgrades “shall be designed and implemented to . . . avoid the imposition of unreasonable costs upon any Transmission Owner, Transmission Customer or other user of a transmission facility.” FERC Electric Tariff No. 3, Section II, Attachment K § 3.4 at Original Sheet 6242.

going forward. The CT DPUC also requests that the Commission direct ISO-NE to include as part of its core mission achievement of reliable electric service at the lowest reasonable cost.

Respectfully submitted,

Date: May 26, 2009

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## **CERTIFICATE OF SERVICE**

In accordance with 18 C.F.R. § 385.2010 (2008), I hereby certify that I have this day served, via electronic mail or first class mail, the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. on this 26th day of May, 2009.

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