

DICKSTEINSHAPIRO_{LLP}

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

June 20, 2008

NEPOOL Review Board
74 Bedford Street
Lexington, MA 02420

David T. Doot,
Secretary, NEPOOL Participants Committee
Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103-1212

Re: Notice Of Intention To Intervene In NEPOOL Review Board Docket No. 01-NE-BD-2008 (NRG)

Dear Sirs:

Pursuant to Section 11.7(b) of the Second Restated NEPOOL Agreement and the NEPOOL Board of Review Rules of Procedure, FirstLight Power Resources Management LLC (“FirstLight”), hereby submits this notice of intervention in support of the appeal filed by NRG Energy, Inc. (“NRG”) on June 13, 2008 in the above-referenced matter. For the reasons set forth herein, FirstLight joins NRG in requesting that the NEPOOL Board of Review (“Review Board”) recommend to the NEPOOL Participants Committee (“Participants Committee”) that it reconsider its June 6 Decision to adopt ISO-NE’s proposed Rejected De-List Bid Compensation Rule and, instead, adopt NRG’s proposal to use local reconfiguration auctions to determine a market-based form of compensation to be paid to Capacity Resources that are prevented from de-listing in the Forward Capacity Auction because of local reliability requirements (hereinafter, “NRG Amendment #1”).

I. Notices and Inquiries

FirstLight respectfully requests that all pleadings, correspondence and other communications concerning this matter be directed to the following persons, and their names and addresses be placed on the official service list for this docket:

James A. Ginnetti
Vice President-External Affairs
FirstLight Power Resources, Inc.
20 Church Street
Hartford, CT 06103-3290
Phone: (860) 895-6918
Fax: (860) 895-6483
jginnetti@firstlightpower.com

Michael J. Wentworth
Donald J. Gelinis
Dickstein Shapiro LLP
1825 Eye Street NW
Washington, DC 2006-5403
Phone: (202) 420-2200
Fax: (202) 420-2201
wentworthm@dicksteinshapiro.com
gelinasd@dicksteinshapiro.com

Sara Graziano
Director, Strategies & Analysis
FirstLight Power Resources, Inc.
20 Church Street
Hartford, CT 06103-3290
Phone: (860) 895-6970
Fax: (860) 895-6483
sgraziano@firstlightpower.com

Tom Kaslow
Sigma Consultants, Inc.
20 Main Street
Acton, MA 01720
Phone: (978) 266-0220
tkaslow@sigmaconsult.com

II. Background

On September 20, 2002, the Federal Energy Regulatory Commission (“FERC”) accepted the new Standard Market Design for New England which replaced the New England Power Pool’s (“NEPOOL”) former market rules with Market Rule 1.¹ Under Market Rule 1, ISO-NE may designate resources needed for reliability as Reliability Must-Run (“RMR”) Resources and enter into cost-of-service agreements to ensure they are available when needed.²

In 2003, FERC found that the absence of a location-specific capacity or deliverability requirement in New England “may not allow suppliers in [Designated Congestion Areas] an adequate opportunity to recover their costs and that a location-specific capacity requirement must be in place,” and that “Market Rule 1 created an unjust and unreasonable result, requiring a revision in the rule to solve these problems.”³ FERC directed ISO-NE to develop a solution to provide just and reasonable compensation to suppliers providing reliability service.⁴

On March 1, 2004, in response to FERC’s directive, ISO-NE filed a proposed Locational Installed Capacity (“LICAP”) market for implementation by June 1, 2004.⁵ FERC agreed with the broad concepts in ISO-NE’s LICAP proposal, found that additional revisions were necessary prior to its implementation and set specific elements of the LICAP proposal for hearing.⁶ In the interim, FERC began authorizing a number of generators to enter into RMR cost-of-service

¹ [New England Power Pool and ISO New England Inc., 100 FERC ¶ 61,287, order on reh’g, 100 FERC ¶ 61,344 \(2002\).](#)

² [ISO New England Inc. FERC Electric Tariff No. 3, Section III, Appendix A, § 2.3.1.\(a\) at 3rd Revised Sheet No. 7461 \(“Appendix A”\).](#)

³ [Devon Power LLC, 103 FERC ¶ 61,082 at P 31 \(2003\).](#)

⁴ [Devon Power LLC, 104 FERC ¶ 61,123 at P 33 \(2003\).](#)

⁵ [Compliance Filing of ISO New England Inc. in Devon Power LLC, Docket No. ER03-563-030 \(Mar. 1, 2004\).](#)

⁶ [Devon Power LLC, 107 FERC ¶ 61,240 at PP 1-2, 45, order on reh’g and clarification, 109 FERC ¶ 61,154 \(2004\), order on reh’g, 110 FERC ¶ 61,315 \(2005\).](#)

agreements until the LICAP proposal could be implemented.⁷ On June 15, 2005, the Presiding Judge issued an Initial Decision on the issues set for hearing.⁸ Following oral argument, FERC issued an order giving the parties an additional opportunity to pursue a settlement on an alternative to the LICAP mechanism.⁹ On June 16, 2006, FERC accepted a contested settlement under which ISO-NE establish a Forward Capacity Market (“FCM”) in lieu of the LICAP mechanism (“FCM Settlement”).¹⁰

Under the FCM Settlement,¹¹ ISO-NE procures capacity for New England’s load through an annual descending clock Forward Capacity Auction (“FCA”). The auctions are held three-plus years ahead of the commitment period in order to provide for a planning period for new entry and thereby allow new capacity to compete in the auctions.¹² The commitment period is a year-long period that corresponds to the ISO-NE power year. The first commitment period during which Capacity Resources will begin receiving payments pursuant to the FCA auction mechanism begins on June 1, 2010.

Existing generation Capacity Resources are required to participate in the FCA as price-takers. An existing Capacity Resource is paid the clearing price (subject to certain adjustments provided for by the FCM Settlement and ISO-NE market rules) and is obligated to make its capacity available for the Commitment Period, and to offer its capacity into the Day-Ahead and Real-Time energy markets.¹³ An existing Capacity Resource can seek to avoid these obligations by submitting a bid in the FCA to de-list (“De-List Bid”).¹⁴ If the Capacity Clearing Price in the FCA falls below the level of a De-List Bid, the owner of that existing Capacity Resource is allowed to de-list all or a portion of the Resource, unless the absence of that Resource would produce reliability problems.¹⁵

⁷ [Id. at P 4.](#)

⁸ [Devon Power LLC, 111 FERC ¶ 61,063 \(2005\).](#)

⁹ [Devon Power LLC, 113 FERC ¶ 61,075 \(2006\).](#)

¹⁰ [Devon Power LLC, 115 FERC ¶ 61,340, order on reh’g and clarification, 117 FERC ¶ 61,133 \(2006\), aff’d in part and rev’d in part, Maine Pub. Util. Comm’n v. FERC, 520 F.3d 464 \(D.C. Cir. 2008\)](#) (affirming settlement except for the provision applying the *Mobile-Sierra* public interest standard of review to complaints filed by non-signatories to the FCM Settlement Agreement seeking modification of its terms).

¹¹ [Settlement Agreement Resolving all Issues, filed in Devon Power LLC, Docket Nos. ER03-563-030, et al. \(March 6, 2006\) \(“FCM Settlement”\).](#)

¹² [Devon Power LLC, 115 FERC ¶ 61,340](#)

¹³ [FCM Settlement at § 11, Part IV.A1.](#)

¹⁴ [FCM Settlement at § 11, Part III.D.5. See also ISO New England Inc., 119 FERC ¶ 61,045, at P 32 \(2007\)](#)

¹⁵ [ISO New England Inc., 119 FERC ¶ 61,045 at P 54 \(2007\)](#)

There are four types of de-list bids -- Permanent De-List Bids, Static De-List Bids, Export Bids, and Administrative Export De-List Bids – which must be submitted to ISO-NE during the qualification process in advance of the FCA, and a fifth type (“Dynamic De-List Bids”) may be submitted during the FCA.¹⁶

The ISO-NE’s Market Monitor reviews each Static De-List Bid and Export Bid above 0.8 times the Cost of New Entry (“CONE”), and each Permanent De-List Bid above 1.25 times CONE, submitted by existing generating capacity resources.¹⁷ The Market Monitor reviews such De-list Bids to determine whether the bid is consistent with the resource’s net risk-adjusted going forward and opportunity costs.¹⁸ If the Market Monitor determines that the De-list Bid is inconsistent with the resource’s going forward and opportunity costs, that De-list Bid will be rejected and the resource will be entered into the FCA as a price taker.¹⁹ Dynamic De-List Bids below 0.8 times CONE may be submitted in any FCA round.²⁰

Where ISO-NE determines that some or all of the capacity associated with a De-List Bid is needed for reliability reasons, then that capacity will not clear in the FCA, and the De-list Bid will neither be accepted nor set the Capacity Clearing Price.²¹ The FCM Settlement expressly provides that, when a De-list Bid is not accepted, “the ISO shall attempt to procure replacement capacity at each FCA and annual reconfiguration auctions in order to release the capacity Resource to delist.”²²

However, if the reliability concern that prompted ISO-NE to reject the De-list Bid has not been addressed following the last reconfiguration auction, then the capacity Resource will become a listed Resource for the Commitment Period.²³ In such circumstance, the Settlement

¹⁶ [ISO New England Inc., 119 FERC ¶ 61,045 at P 19 and n.20 \(2007\)](#) (“FCM Settlement Order”). See also [ISO-NE FERC Electric Tariff No. 3, Section III \(“Market Rule 1”\) at § 13.1.2.3.1.1.](#)

¹⁷ [Market Rule 1 at § 13.1.2.3.2.](#)

¹⁸ [Id.](#)

¹⁹ [Id.](#)

²⁰ [Market Rule 1 at § 13.2.3.2\(d\).](#)

²¹ [Market Rule 1 at § 13.2.5.2.5.](#)

²² [FCM Settlement at § 11, Part III.K.](#)

²³ [FCM Settlement Order at P 57](#) (citing at [Market Rule 1 at § 13.2.5.2.5\(b\)](#)). As part of the ISO-NE Proposal, the Participants Committee approved changes to Market Rule 1 that would result in a capacity Resource with a rejected De-list Bid becoming a listed Resource for the Commitment Period if ISO-NE does not notify the Resource that it is no longer needed for reliability by midnight on June 1 of the year preceding the Commitment Period for which the De-list Bid was rejected. See Proposed Amendment to Market Rule 1, § 13.2.4.2.4.1(2)(ii).

Agreement requires that the Resource will be entitled to just and reasonable compensation.²⁴ The current ISO-NE rules at present do not address the method for determining a just and reasonable rate, the form of any reliability agreement or the process for obtaining a reliability agreement.²⁵

On June 6, 2008, the Participants Committee voted to adopt ISO-NE's proposed De-list Bid Compensation Rule. The ISO-NE's rule provides that the payment to resources whose static and dynamic de-list bids are rejected for reliability reasons will be made on the basis of the rejected de-list bid. In doing so, the Participants Committee rejected NRG Amendment #1, which would have used local reconfiguration auctions to determine whether there are other qualified Capacity Resources to replace the Capacity Resource whose De-list Bid was rejected for reliability or, alternatively, determine the price at which the Resource with the rejected De-list bid will be compensated.²⁶

On June 13, 2008, NRG filed the instant appeal of the Participants Committee's June 6, 2008 decisions to: (i) adopt ISO-NE's proposed revisions to Market Rule 1 ("Rejected De-list Bid Compensation Rule" or "ISO-NE Proposal") regarding compensation for units needed for reliability under Forward Capacity Market ("FCM"); and (ii) reject NRG's proposed amendment ("Amendment #1").

On June 13, 2008, NRG filed its notice of appeal with the Review Board of these two actions taken by the Participants Committee at its June 6, 2008 meeting.

III. Statement of Position

FirstLight supports the NRG appeal and joins NRG in urging the Review Board to recommend to the Participants Committee that it reconsider its June 6 Decision to adopt ISO-NE's Rejected De-List Bid Compensation Rule, and instead, adopt NRG Amendment #1. The Participants Committee erred in adopting the ISO-NE Proposal because it will result in an unjust and unreasonable outcome. Resources will be unable to de-list because they are needed to provide local reliability service, but their compensation will be limited to either their net risk adjusted going forward and opportunity costs (which exclude many of the costs of providing service and provide no return of or on capital), or to the arbitrary Dynamic De-list bid cap of 0.8 times CONE.

²⁴ *Id.* at P 57 (citing [Market Rule 1 at § 13.2.5.2.5\(b\)](#)).

²⁵ *Id.* at P 71.

²⁶ See [Pete Fuller, NRG, memo to NEPOOL Markets Committee \(May 9, 2008\)](#) (submitted as part of NRG's appeal) ("NRG May 9, 2008 Memo").

FERC has recognized that, in a competitive market, generators must have a reasonable opportunity to recover their full costs, including return on investment.²⁷ However, an existing capacity Resource that wants to delist from the FCM because it does not expect to be able to recover its full costs as a price taker must submit either a Static De-list Bid that is limited to its net risk-adjusted going forward costs, or a Dynamic De-list Bid that is less than 80 percent of CONE. As NRG explains in its appeal, either type of De-List Bid will result in compensation that is less than the Resource's full cost of service because the limits imposed on Static and Dynamic Delist Bids under the ISO-NE market rules were designed as a form of market mitigation that intentionally exclude many of a seller's costs. In sum, under ISO-NE's Proposal, a Resource unable to de-list because of reliability will have no reasonable opportunity to recover its costs if it is paid only its Static or Dynamic Delist Bid.

Such an unjust and unreasonable outcome is not simply hypothetical. In 2007, NRG's affiliate, Norwalk Power LLC ("Norwalk") filed an RMR Agreement with an Annual Fixed Revenue Requirement of \$37,664,400 per year for the 336 MW facility, or \$9.34/kW-month.²⁸ The first FCA was held February 4-6, 2008, and Norwalk Units 1-2 and submitted Dynamic De-list Bids of \$5.999/kW-month, *i.e.* less than 80 percent of the administratively-determined \$7.50 CONE for the first FCA.²⁹ While the FCA cleared at \$4.50/kW-month,³⁰ Norwalk's Dynamic De-list Bids, were nevertheless rejected by ISO-NE because of reliability concerns.³¹ Under the ISO-NE Proposal, Norwalk would be paid nearly \$3.35/kW-month less than its cost of service. Because Norwalk Units 1 and 2 are 1960s vintage, oil-fired generators, they are likely to run

²⁷ See [New York Indep. Sys. Operator, Inc., 122 FERC ¶ 61,211 at P 105 \(2008\)](#) ("properly constructed capacity markets can also encourage reliable and efficient levels of investment only if market participants can expect prices that provide a reasonable opportunity to recover the costs of needed investment."); [Devon Power LLC, 110 FERC ¶ 61,315 at P 44 \(2005\)](#) (holding that in a locational capacity market "generating units providing capacity, regardless of their level of depreciation, will still be entitled to the opportunity to recover their fixed costs plus a rate of return. This is an ongoing process in both a cost-based and auction-based market regime.") (emphasis added).

²⁸ See [Cost of Service Agreement Between Norwalk Power LLC, NRG Power Marketing Inc. and ISO New England Inc., filed in Norwalk Power LLC, Docket Nos. EL07-61-001 and ER07-799-001 \(Apr. 26, 2007\); Compliance Filing, filed in Norwalk Power LLC, Docket Nos. EL07-61-002 and ER07-799-003 \(Aug. 15, 2008\)](#). See also [Norwalk Power LLC, 120 FERC ¶ 61,048 \(2007\)](#) (accepting the RMR Agreement for filing, subject to refund, and setting eligibility and cost-of-service issues for settlement and, if necessary, evidentiary hearing procedures), *reh'g denied*, [Norwalk Power LLC, 122 FERC ¶ 61,273 \(2008\)](#).

²⁹ [NRG May 9, 2008 Memo at 2 n.3.](#)

³⁰ [Forward Capacity Auction Results, filed in ISO New England Inc., Docket No. ER08-633-000, at 2 \(Mar. 3, 2003\)](#) ("Auction Results").

³¹ Auction Results at 11-12.

infrequently and only for reliability, and will not have a reasonable opportunity to recover the balance of their costs from margins earned in the energy markets. As a result, ISO-NE's Rejected De-List Bid Compensation Rule is confiscatory and, as such, violates the Federal Power Act ("FPA") under which sellers have a right to just and reasonable compensation.

NRG Amendment #1 is a clearly superior alternative to the ISO-NE Proposal because it would both satisfy the FPA's and the FCM Settlement's requirements for just and reasonable compensation and would fulfill ISO-NE's obligation under the FCM Settlement to procure replacement capacity at each annual reconfiguration auction in order to release the capacity Resource to delist.³² For the reasons given by NRG and FirstLight, the ISO-NE Proposal will not accomplish either of these objectives and therefore is contrary to the terms of the FCM Settlement and, in violation of the FPA.³³

Using local configuration auctions as described in NRG Amendment #1 will result in market-driven valuation of the reliability service being provided.³⁴ It will also ensure that cost-

³² [NRG May 9, 2008 Memo at 2.](#)

³³ The thrust of the ISO-NE Proposal is also inconsistent with the Review Board's 2005 decision recommending design and implementation of a Forward Ten-Minute Spinning Reserve ("TMSR") Market to, *inter alia*, provide sufficient economic incentives for generation owners to maintain, upgrade, or build facilities capable of providing this ancillary service. The Review Board specifically noted that synchronized spinning reserve is the highest quality reserve and the most desired for operation reliability. See [NEPOOL Review Board Decision On Appeal In the Matter of NRG Energy, Inc., Case No. 01-NE-BD-2005 \(Nov. 25, 2005\)](#) ("2005 Decision"). To date, ISO-NE and NEPOOL have failed to act on the Review Board's recommendation and there is no indication that they intend to do so in the foreseeable future. See [Fourth Compliance Report ISO New England Inc. Regarding Performance of Reserve Markets, and Motion to Discontinue Semi-Annual Report, filed in ISO New England Inc. and New England Power Pool, Docket No. ER06-613-005 \(Apr. 1, 2008\)](#). FirstLight is concerned that Resources providing high quality services such as TMSR may have their De-list bids rejected by ISO-NE precisely because of the fact that they have the ability to provide such services. In such event, ISO-NE's Proposal fails not only to compensate Resources for their full cost of service, but also for the extra value of the very characteristics relied upon by ISO-NE that might result in rejecting the De-list bid.

³⁴ However, NRG Amendment #1 is only part of the solution. While it addresses compensation issues for rejected De-list Bids and provides a market-driven mechanism for procuring replacement capacity for Resources submitting rejected De-list Bids, it does not address the price-depressing effect of including the Resource whose De-list Bid was rejected as a price taker in the FCA. See Peter Cramton and David LaPlante, Memo To NECPUC and NEPOOL Markets Committee on *De-List Bids Rejected for Reliability – Application of Alternative Price Rule*, at 2 (Apr. 18, 2007) [Peter Cramton and David LaPlante, Memo to NECPUC and NEPOOL Markets Committee on Delist-Bids Rejected for Reliability –](#)

effective and feasible transmission solutions are fully vetted in time to implement them prior to the relevant Commitment Period.

IV. Conclusion

For the reasons set forth above, FirstLight requests that the Review Board recommend to the Participants Committee that it reconsider its June 6, 2008 decisions to adopt the ISO-NE Proposal and, instead, adopt NRG Amendment #1.

Respectfully submitted,

/s/ Larry F. Eisenstat

Donald J. Gelinis
Energy Industry Consultant
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006
Tel. (202) 420-2200
Fax (202) 420-2201

Larry F. Eisenstat, Esq.
Michael J. Wentworth, Esq.
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006
Tel: (202) 420-2200
Fax: (202) 420-2201

*Counsel for FirstLight Power Resources
Management LLC*

[Application of Alternative Price Rule, at 2 \(Apr. 18, 2007\)](#) (the rules currently providing that De-list Bids rejected for reliability are treated a price taker in the FCA “has an adverse effect on the efficiency of the market by artificially lowering the FCA clearing price. The market is distorted because, absent the rejection for reliability, the unit would have left the market, increasing the demand for new capacity, and likely increasing the clearing price.”)

Certificate of Service

FirstLight Power Resources Management LLC hereby certifies that copies of this notice of intervention have been served electronically on the NEPOOL Review Board, the Secretary of the NEPOOL Participants Committee, NRG Energy Inc., ISO New England Inc and PSEG Energy Resources & Trade LLC.

/s/ Michael J. Wentworth _____

Michael J. Wentworth
Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, DC 20006-1543