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June 15, 2010

**VIA ELECTRONIC FILING**

The Honorable Kimberly D. Bose, Secretary  
The Honorable Nathaniel J. Davis, Sr., Deputy Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

**Re: Vermont Electric Power Company, Inc., Docket No. ER10-1347-000**

Dear Secretary Bose and Deputy Secretary Davis:

Attached for electronic filing in the above-referenced docket is the *Motion to Intervene and Comments in Opposition to VELCO's Waiver Request*. A copy of the foregoing has been served upon all parties included on the Commission's service list.

If you have any questions regarding this filing, please feel free to contact me. Thank you for your assistance in this matter.

Respectfully submitted,

/s/ Sherry A. Quirk  
Sherry A. Quirk, Esq.

Counsel for ISO New England Inc.

Attachment

cc: Official Service List

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

**Vermont Electric Power Company, Inc. )**

**Docket No. ER10-1347-000**

**MOTION TO INTERVENE AND COMMENTS IN OPPOSITION TO VELCO'S  
WAIVER REQUEST**

Pursuant to Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),<sup>1</sup> ISO New England Inc. (the "ISO")<sup>2</sup> moves to intervene and file comments in opposition to "VELCO's Request For Limited Waiver of the Minimum ICAP Import Commitment Duration Under ISO New England Market Rule 1" filed on May 27, 2010 by Vermont Electric Power Company, Inc. ("VELCO") on behalf of the Vermont Joint Owners ("VJOs") in the above-captioned proceeding ("Waiver Request").

**I. COMMUNICATIONS**

Correspondence and communications regarding this filing should be addressed to the undersigned as follows:

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<sup>1</sup> 18 C.F.R. §§ 385.212 and 385.214 (2009).

<sup>2</sup> Capitalized terms used but not defined are intended to have the same meaning given to such terms in the ISO's Transmission, Markets and Services Tariff (FERC Electric Tariff No. 3) (the "Tariff").

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## **II. IDENTITY OF THE ISO**

The ISO is a private, non-profit entity that serves as the regional transmission organization (“RTO”) for New England. The ISO administers the New England energy markets and operates the New England bulk power system pursuant to the ISO’s Tariff and the Transmission Operating Agreement with the New England Transmission Owners. In its capacity as the RTO for New England, the ISO has the responsibility to protect the short term reliability of the control area as well as to provide oversight and fair administration of the New England markets.

## **III. INTRODUCTION**

VELCO files its Waiver Request on behalf of the VJOs, including Central Vermont Public Service Corporation (“CVPS”), Green Mountain Power Corporation (“GMP”), and several municipal utilities.<sup>3</sup> In essence, VELCO acts on its own behalf and on behalf of the VJOs, all of whom schedule a portion of their contracts with Hydro-Quebec on the Highgate facilities, and some of whom (CVPS, GMP, and Vermont Electric Cooperative, Inc.) have

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<sup>3</sup> The VJOs include: CVPS, GMP, VEC, Barton Village, Inc., Village of Enosburg Falls Electric Light Department, Hardwick Electric Department, Village of Jacksonville Electric Company, Village of Hyde Park, Village of Johnson Electric Department, Ludlow Electric Light Department, Lyndonville Electric Department, Morrisville Water & Light Department, Town of Northfield, Village of Orleans, Swanton Village Electric Department, Washington Electric Cooperative, Vermont Marble, and Stowe Electric Department.

entitlements to a portion of the Phase I/II HVDC transmission facilities for purchases under a long-term power purchase contract with Hydro-Quebec that extend through the year 2020.<sup>4</sup>

The Forward Capacity Market (“FCM”) Settlement Agreement was filed on March 6, 2006<sup>5</sup> and approved by the Commission on June 16, 2006.<sup>6</sup> Among other things, the FCM Settlement Agreement established an Installed Capacity (“ICAP”) Transition Period, during which Market Participants could qualify and receive ICAP Payments prior to the beginning of the first FCM Commitment Period on June 1, 2010. The FCM Settlement Agreement provisions addressing the Transition Period cannot be changed unless required by the “public interest” standard as set forth in *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (the “Mobile-Sierra” doctrine).<sup>7</sup> In accordance with Section 3.A of the FCM Settlement Agreement,

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<sup>4</sup> Waiver Request at n.1.

<sup>5</sup> Explanatory Statement in Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues, *Devon Power LLC et al.*, Docket Nos. ER03-563, *et al.* (filed March 6, 2006).

<sup>6</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 (2006), *order on reh’g*, 117 FERC ¶ 61,133 (2006).

<sup>7</sup> See Section 4 C of the FCM Settlement Agreement. Under the “public interest” standard, the “sole concern of the Commission is whether the challenged rate adversely affects the public interest and the Commission can exercise its authority to modify contracts only where the public interest demands such action.” *Public Utilities Commission of the State of California v. Sellers of Long Term Contracts to the California Dept. of Water Resources et al.*, 105 FERC ¶ 61,182 at P 33(2003). While certain parties in New England have challenged the applicability of the “public interest” standard to non-signatories to the Settlement Agreement, *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 130 S. Ct. 693 (2010), at least one of the VJOs (CVPS) was a signatory to the Settlement and is required under the terms of the FCM Settlement Agreement to meet the “public interest” standard. While VELCO itself was not a signatory to the Settlement Agreement, neither VELCO, nor any of the VJOs protested either the FCM Settlement Agreement or the Transition Period rules. Additionally, pursuant to *NRG Power Marketing*, VELCO and the non-party VJOs are required under *Mobile-Sierra* to make a showing that the contested provisions in the FCM Settlement Agreement adversely affect the public interest to the extent that the Settlement Agreement is found to qualify for application of the *Mobile-Sierra* standard. The extent to which the Settlement Agreement qualifies for *Mobile-Sierra* treatment is currently before the D.C. Circuit, and the Commission has taken the position on brief that it does. Supplemental Brief for Respondent FERC at 5, 9-15, *Maine Public Utilities Commission, et al. v. FERC* (Nos. 06-1403, 06-1427 and 07-1193) (D.C. Cir. 2010), on remand from the U.S. Supreme Court, *NRG Power Marketing, LLC v.*

the ICAP Transition provisions of the FCM Settlement Agreement were implemented in a new Section III.8 of the Tariff in a September 1, 2006 filing,<sup>8</sup> which was approved by the Commission on October 31, 2006.<sup>9</sup>

The ICAP Transition Period started on December 1, 2006 and ended with the commencement of the first FCM Capacity Commitment Period on June 1, 2010.<sup>10</sup> As pertinent to this filing, Section III.8.3.7.1 of the Tariff sets forth the requirements for ICAP Import Contracts to receive ICAP Payments during the Transition Period. Section III.8.3.7.1 explicitly requires that ICAP Import Contracts “must be at least two consecutive months in duration, with both months within the same ICAP Commitment Period.”<sup>11</sup> The Tariff also established two ICAP Commitment Periods each year: a summer period from May through October and a winter period from November through April.<sup>12</sup>

Due to the commencement of the Capacity Commitment Period on June 1, 2010, an ICAP Import Contract for May 2010 cannot satisfy the two-month duration Tariff requirement. Therefore, in accordance with the Tariff, the ISO denied ICAP Import Contracts for May 2010, including the VJOs’ contracts with Hydro-Quebec.

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*Maine Public Utilities Commission*, 130 S. Ct. 693 (2010). Oral argument on this issue is scheduled for September 20, 2010.

<sup>8</sup> Filing Implementing the Transition Provisions of the FCM Settlement Agreement, Docket No. ER06-1465-000 (filed Sept. 1, 2006).

<sup>9</sup> *ISO New England Inc. and New England Power Pool*, Order Accepting Tariff Sheets, 117 FERC ¶ 61,132 (2006).

<sup>10</sup> With the commencement of the first Capacity Commitment Period on June 1, 2010, the large majority of Section III.8 became inapplicable and was removed from the Tariff. *See ISO New England Inc. and New England Power Pool*, FCM Conforming Changes to Market Rule 1, Docket No. ER10-995-000 (filed April 1, 2010), approved by the Commission in a Letter Order issued on April 30, 2010. Although the ISO refers to the Tariff provisions in Section III.8 in the present tense, these provisions are no longer in effect.

<sup>11</sup> *See also* Tariff Section III.8.2.

<sup>12</sup> Tariff Section III.8.2.

On May 27, 2010, VELCO filed the Waiver Request with the Commission. According to the Waiver Request, VELCO enters the ICAP Commitments into the ISO system on behalf of the VJOs.<sup>13</sup> VELCO requests that the Commission grant a waiver of the two consecutive month requirement for ICAP Import Contracts under the Tariff so that the VJOs may receive payment for the month of May 2010. As discussed in more detail below, the ISO opposes VELCO's Waiver Request. Although styled as a "waiver," because VELCO seeks to modify a Commission-approved Tariff provision the request is actually an improper Section 206 complaint, which does not meet the public interest standard under the FCM Settlement Agreement. Further, even if the request is construed as a waiver, it does not meet the Commission's standards for granting waiver requests.<sup>14</sup>

#### **IV. REQUEST TO INTERVENE**

Because the ISO has an interest that may be directly affected by the outcome of this proceeding, the Commission should grant the ISO's motion to intervene. Specifically, VELCO's Waiver Request directly affects the ISO's interests in operating the FCM market.

#### **V. COMMENTS IN OPPOSITION TO VELCO'S WAIVER REQUEST**

##### **A. VELCO'S Waiver Request Does Not Meet The Public Interest Standard For Modifications To The ICAP Provisions Of The FCM Settlement Agreement**

Although VELCO's pleading is styled as a "waiver" and VELCO claims that it does not seek a modification to the Settlement or Tariff,<sup>15</sup> VELCO's pleading is essentially a request under Section 206 of the Federal Power Act ("FPA") that urges the Commission to find that the ISO Tariff is unjust and unreasonable as applied to VELCO. As such, VELCO's pleading fails

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<sup>13</sup> VELCO Waiver Request at 5.

<sup>14</sup> See, e.g., *Pittsfield Generating Co., L.P. et al.*, 130 FERC ¶ 61,182 at P 9 (2010).

<sup>15</sup> VELCO Waiver Request at 3-4.

on procedural grounds because it does not comply with the requirements of Section 206 of the FPA as provided under the Commission’s Rules of Practice and Procedure.<sup>16</sup> Further, even if the request did satisfy the procedural rules for Section 206 complaints, VELCO’s request should be reviewed not under the just and reasonable standard, but as explained below, under the heightened public interest standard in the FCM Settlement Agreement – a standard that the request clearly does not meet.

The FCM Settlement Agreement requires that ICAP Import Contracts be at least two consecutive months in duration, with both months within the same ICAP Period.<sup>17</sup> Specifically, Section 11, Part VIII.H of the FCM Settlement Agreement states that “[i]mports qualify with a minimum 2-month commitment (consecutive months in the same season).” Granting VELCO’s request for a waiver of the two-month duration requirement would violate this provision of the FCM Settlement Agreement and would result in a change to the Transition provisions of the FCM Settlement Agreement.

Pursuant to Section 4.C of the FCM Settlement Agreement the Transition provisions, including the two-month ICAP Import Contract requirement, cannot be changed unless required by the “public interest” standard as set forth in the *Mobile-Sierra* doctrine.<sup>18</sup> Because it does not meet the heightened requirements of *Mobile-Sierra*, the Commission should deny VELCO’s Waiver Request.

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<sup>16</sup> 18 C.F.R. § 385.206 (2009).

<sup>17</sup> See FCM Settlement Agreement at Section 11, Part VIII.H and Tariff Sections III.8.1 and III.8.3.7.1.

<sup>18</sup> Under the *Mobile-Sierra* doctrine, proponents of a unilateral change to a *Mobile-Sierra* contract have the burden to show that the public interest requires the change. See *Public Utilities Commission of the State of California v. Sellers of Long Term Contracts to the California Dept. of Water Resources et al.*, 105 FERC ¶ 61,182 at P 95 (2003).

VELCO argues that the settlement process did not contemplate the denial of the VJOs' import contract.<sup>19</sup> The Commission should give no weight to VELCO's "understanding" of the intent behind a settlement that was negotiated over four years ago. Under Rule 602 of the Commission's Rules of Practice and Procedure, discussions relating to a settlement are confidential.<sup>20</sup> Also, Section 8 of the FCM Settlement Agreement states that "[d]iscussions among the parties leading up to this Settlement Agreement...are privileged and confidential...."

### **B. VELCO'S Interpretation Of The Tariff Is Unsupported**

VELCO claims that the language in Section III.8.1 of the Tariff justifies an ICAP Payment for May 2010. Specifically, VELCO argues that the language in Section III.8.1 that "each ICAP resource shall . . . receive an ICAP Payment for each month..." requires an ICAP Payment for the VJOs' May 2010 import contract.<sup>21</sup> VELCO's reliance on selected language from Section III.8.1 is unsupported by the Tariff and should be rejected.

VELCO ignores the rest of Section III.8.1, which provides that "[a]n ICAP Resource *not meeting the requirements* applicable to the type of ICAP Resource as described in this Section III.8 *will not receive ICAP Payments.*"<sup>22</sup> The requirements for ICAP Import Contracts are set forth in Section III.8.3.7.1 of the Tariff. An explicit requirement under Section III.8.3.7.1 is that the "ICAP Import Contract must be at least two consecutive months in duration, with both months within the same ICAP Commitment Period." Under VELCO's argument, import contracts would receive ICAP Payments regardless of whether the contracts satisfy the Tariff requirements for ICAP Import Contracts. Such an interpretation renders the "requirement"

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<sup>19</sup> VELCO Waiver Request, Affidavit of Laurie A. McMahon ("McMahon Affidavit") at 3.

<sup>20</sup> 18 C.F.R. § 385.602 (2009).

<sup>21</sup> VELCO Waiver Request at 7-8.

<sup>22</sup> Tariff Section III.8.1 (emphasis added).

language in Section III.8.1 meaningless and is an unreasonable and unsupported reading of the Tariff.

Moreover, VELCO's argument is directly contradicted by Section III.8.2 of the Tariff, which provides: “[t]o be eligible to receive ICAP Payments...an ICAP Resource must be listed as an ICAP Resource for the entire duration of the relevant ICAP Commitment Period, *except for ICAP Import Contracts, which must be at least two consecutive months in duration, with both months within the same ICAP Commitment Period.*”<sup>23</sup>

Finally, VELCO's argument that Section III.8 of the Tariff was not intended to deny ICAP Payments for contracts for May 2010<sup>24</sup> is irrelevant. It is well established that in construing disputed contract language, the Commission will interpret the language based on the “four corners” of the settlement agreement and tariff.<sup>25</sup> The plain and unambiguous language of the Tariff requires a two-month duration period for ICAP Import Contracts and there is no reason for the Commission to consider additional interpretations.

### **C. If Construed As A Waiver, VELCO's Pleading Does Not Meet The Commission's Requirements**

In the past, the Commission has granted waivers for parties that failed to follow proper procedures in the FCM market when the requests have met certain requirements.<sup>26</sup> The Commission has granted waivers when: (1) the underlying error was made in good faith; (2) the

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<sup>23</sup> Tariff Section III.8.2 (emphasis added).

<sup>24</sup> VELCO Waiver Request, McMahon Affidavit at 3-4.

<sup>25</sup> In *Southwest Power Pool*, 90 FERC ¶ 61,038 (2000), the Commission held that the starting point for interpretation of a tariff is whether the relevant tariff language is ambiguous. If ambiguity exists, “extrinsic evidence of interpretation or intent *may* be relevant.” 90 FERC ¶ 61,038 at 61,186 (emphasis added). However, where there is no ambiguity, the Commission must ascertain the meaning of the contract from its language without resort to parole or extrinsic evidence. *Id.* The Commission further stated that “[a] contract is not ambiguous because the parties disagree on its interpretation.” *Id.*

<sup>26</sup> *Pittsfield Generating Co., L.P. et al.*, 130 FERC ¶ 61,182 at P 9 (2010).

waiver was of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties.<sup>27</sup> As explained below, VELCO's Waiver Request does not meet the Commission's requirements for waivers and should be denied.

First, there is no underlying error to correct. VELCO did not inadvertently fail to follow proper procedures as in the waiver requests previously granted by the Commission.<sup>28</sup> Rather, the "error" alleged in the Waiver Request is the two-month requirement in the FCM Settlement Agreement and implementing Tariff provisions. The Commission should not grant a waiver simply because a party no longer agrees with a requirement in a FERC-approved settlement and implementing Tariff provisions. Alternatively, VELCO's pleading asserts that the ISO committed an error by not paying VELCO for capacity during May 2010. As explained above, the ISO did not commit an error in this regard; it simply applied the Commission-approved Tariff as it was written.

Second, the requested waiver is not of limited scope. In accordance with the Tariff, other ICAP Import Contracts for May 2010 were denied for failure to meet the two-month duration requirement. Granting VELCO's Waiver Request would result in favorable treatment for the VJOs and would be discriminatory to the other ICAP Import Contracts. Third, there is no concrete problem to be remedied. As explained above, the only alleged problem is the VJOs' desire to receive ICAP Payments for May 2010, even though such payment is not allowed under the Tariff. Finally, VELCO cannot claim that the waiver will not have undesirable

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<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., *Pittsfield Generating Co., L.P. et al.*, 130 FERC ¶ 61,182 at P 9 (2010); *ISO New England Inc.*, 127 FERC ¶ 61,242 (2009); *ISO New England Inc.-EnerNOC, Inc.* 122 FERC ¶ 61,297 (2008); *Cent. Vermont Pub. Serv. Corp.*, 121 FERC ¶ 61,225 (2007); *Univ. of New Hampshire*, 121 FERC ¶ 61,185 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007); and *Acushnet Co.*, 122 FERC ¶ 61,045 (2008).

consequences, such as harming third parties. If granted, the Waiver Request will allow the VJOs to collect ICAP Payments for the month of May 2010, even though other similarly-situated ICAP Import Contracts will not receive ICAP Payments.

The Commission has held that it “will not automatically grant waivers that do not meet” the Commission’s requirements.<sup>29</sup> The VELCO Waiver Request does not meet the Commission’s requirements for granting waivers. Therefore, the ISO respectfully requests that the Commission deny VELCO’s Waiver Request.

## VI. CONCLUSION

Wherefore, for the foregoing reasons, the ISO respectfully requests that it be permitted to intervene in, and be made a party to, the subject proceeding, with all the rights thereto. In addition, the ISO respectfully requests that the Commission accept and consider its comments as discussed above.

Respectfully submitted,

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<sup>29</sup> *Ampersand Energy Partners, LLC*, Order Denying Waiver, 130 FERC ¶ 61,176 (2010) at P 13.

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.2010 (2009), upon each person designated on the official service list in this proceeding as compiled by the Secretary of the Federal Energy Regulatory Commission.

Dated at Washington, D.C., this 15<sup>th</sup> day of June 2010.

/s/ Sherry A. Quirk  
Sherry A. Quirk