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June 14, 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: ISO New England Inc. and New England Power Pool
Docket Nos. ER10-787-000, EL10-50-000, and EL10-57-000 (consolidated)

Dear Secretary Bose and Deputy Secretary Davis:

Attached for electronic filing in the above-referenced, consolidated dockets is the *Answer in Opposition of ISO New England Inc.* The attached Answer in Opposition responds to the *Motion of the New England Power Generators Association for Disclosure of Evidence Held By ISO New England and Its Internal Market Monitoring Unit* filed on May 28, 2010 in Docket Nos. ER10-787-000, *et al.* A copy of the attached has been served upon all parties included in the Commission's service list.

If you have any questions or concerns 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

ISO New England Inc. and New England Power Pool	)	**Docket No. ER10-787-000**
New England Power Generators Association, Inc. v. ISO New England Inc.	)	**Docket No. EL10-50-000**
PSEG Energy Resources & Trade LLC, PSEG Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC v. ISO New England Inc.	)	**Docket No. EL10-57-000**
	)	**(consolidated)**

ANSWER IN OPPOSITION OF ISO NEW ENGLAND INC. TO NEW ENGLAND POWER GENERATORS ASSOCIATION'S MOTION FOR DISCLOSURE OF EVIDENCE

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[1] ISO New England Inc. (the "ISO") hereby submits its *Answer in Opposition* ("Answer") to the *Motion for Disclosure of Evidence* filed on May 28, 2010 by the New England Power Generators Association

[1] 18 C.F.R. § 385.213(a)(3) (2009).

("NEPGA").[2] The NEPGA Motion seeks an order requiring the ISO and its Internal Market Monitor ("IMM") to disclose evidence regarding Out-of-Market ("OOM") determinations from the first three Forward Capacity Auctions ("FCA").[3] NEPGA's Motion is predicated on a misinterpretation of the Commission's April 23, 2010 order[4] in the above-captioned dockets.

I. INTRODUCTION

The ISO strongly urges the Commission to deny the NEPGA Motion. For no defensible reason, the NEPGA Motion threatens to completely mire an already challenging proceeding. The NEPGA Motion improperly seeks data in order to look behind the past determinations that the IMM has made with respect to OOM capacity, based on the incorrect assumptions that those determinations were made under a "now concededly flawed tariff" and that such determinations "will affect the outcome of future auctions" even if the tariff is modified.[5] The NEPGA Motion, however, fails to

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[2] *ISO New England Inc. and New England Power Pool*; *New England Power Generators Association Inc. v. ISO New England Inc.*; *PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC v. ISO New England Inc.*, Motion of the New England Power Generators Association for Disclosure of Evidence Held By ISO New England and its Internal Market Monitoring Unit, Docket No. ER10-787-000, *et al.* (filed May 28, 2010) ("NEPGA Motion").

[3] Capitalized terms used but not otherwise defined in this filing have the meanings ascribed thereto in the ISO's Transmission, Markets and Services Tariff (FERC Electric Tariff No. 3) (the "Tariff"). Section III of the Tariff is Market Rule 1.

[4] Order on Forward Capacity Market Revisions and Related Complaints, 131 FERC ¶ 61,065 (2010) (April 23 Order"). The Commission issued its April 23 Order in response to filings made by the ISO and New England Power Pool. Participants Committee on February 22 and 25, 2010, collectively referred to herein as the FCM Redesign Filing. *See ISO New England Inc. and New England Power Pool*, Various Revisions to FCM Rules Related to FCM Redesign, Docket No. ER10-787-000 (filed February 22, 2010); *ISO New England Inc. and New England Power Pool*, Supplement to Filing of Various Revisions to FCM Rules Related to FCM Redesign, Docket No. ER10-787-000 (filed February 25, 2010)(enclosing page 28 which was inadvertently omitted from the initial February 22 filing).

[5] NEPGA Motion at p. 1.

recognize the following facts: (i) the April 23 Order simply sets certain issues for a paper hearing and never mentions discovery, and the resolution of the market design issues under the Commission's schedule for the paper hearing will be extremely challenging, even without opening the door to discovery;[6] (ii) none of the issues set for hearing require reopening past OOM determinations;[7] and (iii) OOM determinations for the first three FCAs were properly made under the rules then in effect. Moreover, if the NEPGA Motion is granted, it seems certain that other participants in this proceeding will have similarly broad requests for information, which the Commission will be hard-pressed to deny if the NEPGA Motion is granted. Such a free-for-all should not be countenanced, but should be stopped in its tracks.

II. ANSWER

A. The April 23 Order Did Not Contemplate Discovery And, Moreover, Granting NEPGA's Motion Would Open the Floodgates to Discovery Requests and Create a Procedural Catastrophe.

At the outset, it is critical to note what the Commission ordered and what it did not. In the April 23 Order, the Commission was very clear in its rulings regarding the paper hearing. What the Commission ordered was, in fact, a paper hearing, not a full evidentiary hearing (as NEPGA now seeks) before an administrative law judge. Further, the Commission ordered the submission of two briefs – one on July 1 and the second on September 1 – and did not provide for discovery. The April 23 Order is silent on the issue of discovery and cannot be interpreted (as NEPGA seeks to do) as providing for discovery in the paper hearing context. The Commission knows how to establish

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[6] *See* Request for Clarification or, in the Alternative, Rehearing of ISO New England Inc., Docket Nos. ER10-787-000 *et al* (filed May 5, 2010); Motion for Leave to File Answer and Answer of ISO New England Inc. in ER10-787 *et al.*, (filed June 2, 2010).

[7] April 23 Order at P 150.

discovery schedules or empower an ALJ to oversee discovery. The lack of any mention of discovery in the April 23 Order can only be read in one way – no discovery is contemplated.

It is extremely important to answer the question of what granting the NEPGA Motion would set in motion in this proceeding. NEPGA would have the Commission believe that producing data on every OOM determination that the IMM has made is a simple task for the ISO to undertake, leading to a straightforward response that NEPGA could then use to conduct its own analysis. Nothing could be further from the truth.

First, the burden of producing such information on the IMM would be considerable. The IMM would need to produce information on *approximately 300 individual resources* that it has reviewed in the first three FCAs.

Second, if NEPGA succeeds in obtaining the requested data, no one should be deceived that this will be the end of NEPGA's inquiry, or the inquiries of other parties. Once NEPGA receives information on the IMM's OOM determinations, it is only a short step from seeking further information, in the form of further data requests and deposition testimony as NEPGA fishes for support for its contentions regarding OOM capacity. In addition, it is also likely that every party will seek to understand how NEPGA has reviewed the data, and what the basis for its position is.

Just as NEPGA may seek to demonstrate that certain capacity should have been treated as OOM in past FCAs, other parties in this proceeding can be expected to contend that capacity categorized as OOM by the IMM or deemed OOM by NEPGA should not be treated as OOM. As a result, this "paper hearing" could devolve into a litigation of

each OOM determination that the IMM did or did not make and the standards that the IMM should or should not have applied.

Additionally, if the Commission grants the NEPGA Motion, it is highly unlikely that the desire to seek disclosure of information would end with NEPGA. If NEPGA is permitted discovery, other parties can be expected to tender their own discovery requests – which the Commission would seem to have little basis to deny – as parties seek to challenge each other's proposed market designs as well as the various assertions that the parties have made regarding the need for further market rule changes in the first instance. It takes little imagination to develop a list of questions that load and generation interests would ask each other and both would ask of the ISO if the door is open to discovery of the various assertions that have been made in this proceeding to date. Nor can the Commission expect that parties will stop at mere discovery. Thus, the NEPGA Motion would be only the very first step on a journey that would be both long and fruitless.

B. Assuming Arguendo That Discovery Was Permitted By the April 23 Order, the NEPGA Motion Improperly Seeks Discovery that is Beyond the Scope of the Issues Set for Paper Hearing.

NEPGA claims that in order to carry its burden of proof in this proceeding, it must "understand how each decision was made to classify resources as OOM or not" and thus seeks information from the ISO on "each Resource that sought to offer at a price below 0.75 X CONE;" "any cleared, in-market Demand Resources" that "received, or are eligible to receive, System Benefit Charges or other modifications to the retail tariff rate that the resource owner would otherwise have paid or received;" and information on any Resources that the IMM reviewed to determine whether the offers were uneconomically

low.[8] However, the Commission has already made several key determinations that require denial of the NEPGA Motion.

1. NEPGA Requests Information on Issues Not Set for Paper Hearing.

NEPGA states that it needs the requested information in order to address (i) the effect on future FCAs of past OOM capacity that NEPGA alleges was unmitigated or inadequately classified; and (ii) that past OOM capacity, "recognized by the [IMM] or not" has decreased the CONE value, with effects that are likely to continue into future FCAs. NEPGA makes a number of arguments about how the April 23 Order supports the relevance of past OOM determinations to the issues set for hearing.[9] However, the Commission did not set for hearing any issue that requires (or, indeed, allows) the re-opening and re-examination of past OOM determinations. Thus, the information requested by NEPGA (and the analysis it promises to make of that information) is irrelevant and unnecessary.

First, while it is correct that the Commission included within the paper hearing the question of whether historical OOM capacity will affect future FCAs and how that effect

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[8] NEPGA Motion at pp. 8-9.

[9] NEPGA (along with other generators) made strenuous arguments to the Commission regarding OOM that parallel the arguments in the NEPGA Motion.[9] In their protests, the generators argued that for the first three FCAs, the IMM failed to identify all capacity that was, in fact, out of market (Motion to Intervene and Protest of the New England Power Generators Association, Docket No. ER10-787-000 (filed March 15, 2010) at p. 3. *See also* Protest and Comments of the Boston Gen Companies, Docket No. ER10-787-000 (filed March 15, 2010) at p. 13); that OOM capacity would be permanently exempt from OOM mitigation under the proposed rule changes, affecting clearing prices in the future (NEPGA Motion at p. 6. *See also* Protest and Comments of the Boston Gen Companies at 2, Docket No. ER10-787-000 (filed March 15, 2010)); and that OOM capacity had affected the Capacity Clearing Prices in the first three FCAs and that the future Cost of New Entry ("CONE") needed to be adjusted because it was too low (Motion to Intervene and Protest of the New England Power Generators Association, Docket No. ER10-787-000 (filed March 15, 2010) at p. 3. *See also* Protest and Comments of the Boston Gen Companies, Docket No. ER10-787-000 (filed March 15, 2010) at pp. 1-2).

should be addressed, the April 23 Order makes clear that the information sought by NEPGA is not within the issues to be explored on brief, notwithstanding that NEPGA may wish it otherwise. Specifically, the Commission found:

> Both sides of this issue raised important arguments on the treatment of historical OOM that require further consideration. We will therefore require the Filing Parties, and other parties with a position on this issue, to submit arguments on this issue to us in their First Briefs in the paper hearing discussed above.[10]

However, the Commission's elaboration of the arguments that it seeks from the parties on the "treatment of historical OOM," set forth in the April 23 Order at Paragraphs 82-84, refutes any credible conclusion that the Commission intended for all past OOM determinations to be re-opened, re-analyzed, and re-argued. Rather, the Commission focused this proceeding on "the duration of mitigation once an OOM resource has triggered APR mitigation."[11] The April 23 Order directs the parties to address how the effects of OOM should be accounted for in the future. Significantly, the Commission noted the argument in NEPGA's protest that the Commission should "direct ISO-NE's IMM to assess the existing capacity resources in New England to determine whether they are OOM resources, as NEPGA contends that the real level of OOM supply is far greater than currently assumed,"[12] but did not include this issue in the matters to be addressed on brief. Thus, the Commission's focus, in setting the question of "treatment of historical OOM" for paper hearing, is on how capacity that the IMM has found to be out of market, and that the IMM will find in the future to be out of market, should be treated in the FCM.

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[10] April 23 Order at P 82.

[11] April 23 Order at P 80.

[12] April 23 Order at P 59.

Second, while it is also correct that the Commission set for paper hearing the issue of whether the CONE value should be re-set, re-opening past OOM determinations is equally irrelevant to addressing this issue as set forth by the Commission in its April 23 Order. In fact, in the April 23 Order, the Commission specifically examined the issue of whether past OOM capacity has tainted market clearing prices (and thus CONE values) and found that "arguments that OOM entry has triggered the current CONE value appear to be flawed."[13] The Commission also reviewed whether the IMM had properly included all OOM capacity in its analyses, and found that "to the extent that the generator parties contend that the [IMM] analysis fails to properly consider all of the OOM capacity in its analysis, we note that they have not supported such an allegation."[14] Thus, the issue of whether past OOM determinations have affected CONE is not among the questions set for paper hearing and is irrelevant to this proceeding.[15] Rather, the Commission's focus is on establishing the CONE value for the future, recognizing the relationship between APR, OOM capacity, and CONE:

> Therefore, as the CONE value is intrinsically tied to the OOM determinations that are part of the APR Issue, we will require the Filing Parties and others to address in their First Briefs in the paper hearing above, the issue of the proper CONE value.[16]

The Commission is clearly, and appropriately, focused on ensuring that the issues surrounding the use of CONE and treatment of OOM capacity in the future are properly

[13] April 23 Order at P 150. In fact, the Commission explicitly noted that it disagreed with the generators' argument that the value of CONE had been affected by OOM capacity. April 23 Order at P 151.

[14] April 23 Order at P 150.

[15] April 23 Order at P 76, n. 35: ("[i]n instances where the offer price of the displaced existing resource is below the price floor, the displaced resource would not have set the market price; rather, the price would have been set administratively at the floor. In these instances, the new OOM resource would not affect the market price.").

[16] April 23 Order at P 151.

considered. The Commission's inquiry into the proper value of CONE and treatment of historical OOM *certainly* did not include a directive or permission to re-open and re-analyze every *past* OOM determination. Accordingly, the NEPGA Motion is outside of the scope of the proceeding ordered by the Commission, and should be denied on that basis.

C. The Commission Has Accepted the IMM's Analysis of OOM Capacity in Prior Informational Filings, and NEPGA Has Not Explained How Access to the Data Will Lead to Any Analysis Relevant to this Proceeding.

The NEPGA Motion is procedurally flawed on several bases. As explained below, the NEPGA Motion should be denied on procedural grounds as well.

1. The Past OOM Determinations Were Correct, and the Commission Has Approved Them.

NEPGA's second guessing of the IMM's determinations regarding OOM capacity attempts to call into question the IMM's application of rules previously approved by the Commission, and findings submitted in informational filings preceding each FCA, which were also approved by the Commission. Thus, NEPGA argues substantive issues that are not before the Commission in this proceeding and that are wholly irrelevant to the substance of the FCM Redesign. The matters before the Commission in this proceeding are limited to the market rule revisions presented in the FCM Redesign Filing, and in particular, the matters set for paper hearing. This proceeding is not the appropriate forum to request discovery in order to challenge determinations for already-completed FCAs made under the current rules and approved by the Commission. Accordingly, NEPGA's challenges to the IMM's OOM determinations constitute a collateral attack on prior Commission orders, and its requests for discovery concerning this closed issue should be rejected.

NEPGA claims that "these past determinations were made under an FCM tariff which was not just and reasonable -- as… implicitly conceded by ISO-NE and NEPOOL in submitting the FCM Revision, and countenanced by the Commission in setting this issue for hearing…."[17] NEPGA is surely aware of the gaping flaws in this logic. Neither the filing of tariff changes pursuant to Section 205 of the FPA, nor the setting of such changes for paper hearing by the Commission renders the previous tariff provisions unjust and unreasonable. In resorting to such a weak argument, NEPGA all but concedes that the instant request for discovery is nothing more than a fishing expedition. NEPGA clearly hopes to find some support for its positions by finding any basis upon which to second-guess previous OOM determinations. In fact, those determinations were made pursuant to rules that were filed with and approved by the Commission, and the OOM determinations for each FCA were also filed with and approved by the Commission. The fact that the Filing Parties now seek to modify the FCM rules does not provide a basis for questioning the validity of past actions that were taken relying on those rules.

2. NEPGA Has Not Raised any Issues with the ISO's Methodology for Reviewing OOM Capacity.

In the NEPGA Motion, NEPGA does not substantiate its disagreement with the methodology employed by the IMM in reviewing OOM capacity. Indeed, NEPGA's entire focus appears to be on its contention that clearing prices are too low. NEPGA attempts to reverse-engineer the conclusion that clearing prices must be too low because of large amounts of allegedly unidentified or inadequately reviewed OOM capacity. However, no point is served by providing NEPGA with the information sought because

[17] NEPGA Motion at p. 3.

the Commission's focus is on a forward-looking, methodologically defensible value for CONE and appropriate treatment of capacity found to be out of market by the IMM. This proceeding should not be sidetracked into re-litigation of the rules, methodology, and analysis of each OOM resource.

The Commission has established an extremely aggressive schedule for resolving the market design issues that the Commission has set for paper hearing. The NEPGA Motion adds significant weight to the ISO's burden, for no valid reason or purpose. The NEPGA Motion has no merit and should be rejected.

III. CONCLUSION

For the foregoing reasons, the ISO respectfully requests that the Commission deny the NEPGA Motion.

Respectfully submitted,

ISO NEW ENGLAND INC.

By: *_/s/ Ray W. Hepper_*______

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Dated: June 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the parties designated on the official service list for the above-captioned dockets in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.2010 (2009).

Dated at Washington, D.C. on this the 14th day of June, 2010.

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