

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

)

Docket No. ER09-1282-000

*MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE
NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.*

The New England Power Generators Association, Inc. (“NEPGA”)¹ moves for leave to answer the State PUCs’ request for mediation of potential reforms to the Forward Capacity Market.² Among other things, the State PUCs argue that their mediation proposal “will . . . avoid a protracted ISO-NE/NEPOOL stakeholder process.”³ NEPGA respectfully submits that good cause exists to accept this answer. It identifies and addresses some of the key issues raised by the State PUCs’ comments, and underscores the need for Commission-imposed time boundaries to develop the necessary market reforms in the substantive areas recommended by the Internal Market Monitoring Unit.

NEPGA agrees with the States that it is essential to “avoid a protracted process” as stakeholders consider reforms to the Forward Capacity Market (“FCM”) and develop tariff changes needed to implement those reforms. The key issue arising out of ISO-NE’s informational filing is how to get the reforms implemented in time for the fourth Forward Capacity Auction. The State PUCs assert that a mediation process will be more expedient than

¹ NEPGA represents approximately 27,000 megawatts (or 85 percent) of the generation in New England. Its 18 members are BG North America, Boston Generating, Brick Power Holdings, Brookfield Renewable Power, Competitive Power Ventures, Dominion Resources, Dynegy, Entergy, Exelon, FirstLight Power Resources, Granite Ridge Energy, International Power America, Mirant Corporation, North American Energy Alliance, NextEra Energy Resources, NRG Energy, PPL EnergyPlus, and PSEG Power. The comments contained in this filing represent NEPGA’s position as an organization, but not necessarily the position of any particular member(s) with respect to any statement, concept, issue or position expressed herein.

² See Comments of the New England Conference of Public Utilities Commissioners, the Connecticut Department of Public Utility Control, the Maine Public Utilities Commission, and the Massachusetts Department of Public Utilities (filed June 26, 2009) (“State PUCs’ Comments”) at 2-3, 7-10.

³ *Id.* at 9.

the normal stakeholder process defined in the tariff. The State PUCs, however, also take the position that FCM is working just fine and that no reforms are necessary. The market monitor and NEPGA, as well as others, take the contrary view that FCM requires prompt reform. It is not apparent that mediation would truly be more efficient and timely than the normal stakeholder process defined in the tariff.

NEPGA respectfully submits that the most important thing is for the Commission to ensure that ISO-NE files tariff changes by no later than February 20, 2010, so that FCM reforms may be implemented in time for the fourth Forward Capacity Auction. That is the best way to avoid a “protracted process,” as the State PUCs desire.

NEPGA highlights the following additional, important considerations in response to the State PUCs’ comments. *First*, a mediation process could easily become even more protracted than NEPOOL’s normal stakeholder process as defined in the ISO-NE tariff. The States are silent about a timeline for when any mediation will begin and conclude. Yet even selecting a “mutually agreeable mediator”⁴ can often take months, and without structure and deadlines, the mediation process will simply become a de facto, *ad hoc* surrogate for the sort of protracted stakeholder process that the State PUCs hope to avoid.

If there is going to be any mediation, NEPGA recommends consideration of the Commission’s Dispute Resolution Service to quickly find a mediator and to facilitate a prompt process. Another alternative would be for the Commission to appoint one of its senior staff to serve as a mediator. Most importantly, any mediation should have the same firm deadline as the stakeholder process—an ISO-NE tariff filing of needed FCM reforms by February 20, 2010, in time for rule changes to be implemented for the fourth Forward Capacity Auction.

⁴ See *id.* at 2.

Second, much of the actual work done by the NEPOOL stakeholders is performed in NEPOOL’s technical committees, and this is an irreplaceable part of the process. It is in these committees that the nuts and bolts of the market rules are prepped and fine tuned. It is clear that the forthcoming ISO-NE reforms filing will require detailed consideration of the specific tariff changes necessary to improve the market. Some of these details require actual engineering expertise, as opposed to legal or economic expertise, and in many instances are complex and inter-related with other facets of ISO-NE’s Market Rule 1.⁵ The technical committees have a well-honed, formal process for dealing with all of these details. Indeed, their work has already started on several of the important issues raised in the market monitor’s report.

The finely-tuned technical committee process cannot be replaced in an *ad hoc* mediation. It is not as simple as having the “technical people” “show up” at a mediation. The work of the technical committees is far more intricate and important than that. The details of market design take time, and the most efficient way to achieve timely reforms to the currently flawed markets is unlikely to be by reinventing the wheel in a mediation process created on the fly.

Third, the States apparently are concerned that they may only have a minimal role in the deliberation of potential reforms to FCM. The State PUCs often argue that they are shut out of the stakeholder process.⁶ This is incorrect. NEPOOL and ISO-NE have been very receptive to

⁵ For example, NEPOOL’s Reliability Committee (“RC”) has been, for several months now, working to establish engineering-based criteria for establishing zonal capacity requirements and review of delist bids. In addition, pursuant to prior FERC orders, the RC is reviewing issues related to tie benefits and calculation of the Installed Capacity Requirement. These efforts are intended to produce a set of engineering-based data that can then be fed to the Markets Committee, which would then decide how those requirements get reflected and/or implemented in market designs. Because the RC’s efforts are intended to capture reliability and operational realities of the system, they are not suited to a mediation-based process that may compromise away from those values. As such, NEPGA believes that the RC’s efforts should proceed undisturbed.

⁶ See, e.g., State PUCs’ Comments at 8 (“state regulators have no vote” in the stakeholder process); see also The Connecticut Representatives’ Response to Answers and Motions to Dismiss, June 29, 2009 (Docket Nos. EL09-47-000, EL09-48-000) at 25 (“As mere guests in the NEPOOL stakeholder meetings, [state commissions] have no right to introduce their own issues, offer their own amendments, or have a significant voice in the discussions about changes . . . within that process. Any votes by the NEPOOL Participants Committee are not required to reflect the

State involvement, and State representatives are routinely and actively involved in the stakeholder process. Several states have representatives at virtually every NEPOOL technical committee meeting (and, again, this is where the nuts and bolts of the market rules are most often discussed). In addition, the NEPOOL stakeholder process is the tariff-required process for ISO-NE to seek input on proposed changes to the ISO-NE tariff. Stakeholders ultimately are only advisory to ISO-NE, but these tariff provisions have been approved by the Commission and work well to provide open discussion of rule change proposals. State PUCs have every opportunity to participate and should not seek to bypass the regular stakeholder process.

Finally, one area where NEPGA fundamentally disagrees with the State PUCs is on the performance of FCM to date. The States claim that “New England’s Forward Capacity Market . . . has been a resounding success by virtually every measure”⁷ and that “[t]hus far, the FCM Settlement has demonstrably achieved the Commission’s objectives and should be considered a singular success.”⁸ These statements strongly suggest that the State PUCs likely do not believe significant reforms to FCM are necessary.

NEPGA strongly disagrees. As the market monitor’s report and Robert Stoddard’s response demonstrate, several significant reforms to FCM are in fact necessary and critical.⁹ This includes reforms—at a minimum—in the following substantive areas:

- the criteria for modeling capacity zones;

views of the . . . state regulators. Thus, no stakeholder forum exists in which the Connecticut Representatives can meaningfully present their concerns.”). “The Connecticut Representatives” include the Connecticut Department of Public Utility Control.

⁷ State PUCs’ Comments at 2.

⁸ *Id.* at 4.

⁹ See Motion to Intervene and Comments of the New England Power Generators Association, Inc., at 2-4; see also *id.*, Attachment A, Report on ISO New England Internal Market Monitoring Unit Review of the Forward Capacity Market Auction Results and Design Elements (filed June 26, 2009) (“Stoddard Response”) at 33-35.

- the Alternative Price Rule and capacity price setting when “out of market” resources enter;
- pricing mechanics, including price collars and the use and level of the Cost of New Entry; and
- role and obligations of demand resources.¹⁰

The first two Forward Capacity Auctions cleared at the mandated price floor, which expires after the third Forward Capacity Auction. Reforms are urgently needed in these areas in time to be implemented for the fourth Forward Capacity Auction, to remedy the serious flaws in the current market.

The State PUCs argue that the “parties should be mindful of the bargain struck in the FCM Settlement and approved by the Commission and should not make changes that will disturb that painstaking balance.”¹¹ They further assert that in a mediation “accommodations in one area will be balanced by commensurate concessions in another.”¹² NEPGA disagrees that the Commission should require any such balancing. The currently flawed market design is producing prices at the floor that are not reflective of the value of the services purchased. The floor expires after the next (third) Forward Capacity Auction. Without reform, the capacity markets could very soon be back to routinely clearing at zero, where they commonly cleared in the several years leading up to the FCM Settlement (reminiscent of the old vertical demand curve problem that the FCM Settlement was intended to solve).¹³ The objective of reforms should be to produce a viable FCM design, with relatively stable capacity pricing established by the cost of

¹⁰ There are other substantive areas of FCM also in need of reform, in addition to those identified in the market monitor’s report. *See* Stoddard Response at 2. Consideration of these issues should not be excluded.

¹¹ State PUCs’ Comments at 14.

¹² *Id.* at 9.

¹³ *See, e.g., Devon Power LLC*, 117 FERC ¶ 61,133 at PP 96, 99-100 (2006).

the marginal new generation entrant and comparable treatment of all resources providing the capacity product. The objective of reform should not be to rigidly maintain the original “balance” of agreements that produced the currently flawed design.

CONCLUSION

NEPGA respectfully requests that the Commission grant this motion for leave to answer and issue an order requiring ISO-NE to submit a filing with proposed market reforms by no later than February 20, 2010, to be implemented in time for the fourth Forward Capacity Auction in August, 2010. Given the problems highlighted by, and the recommendations of, the Internal Market Monitoring Unit and Mr. Stoddard, the justness and reasonableness of the fourth Forward Capacity Auction will be called into question if reforms are not in place by then.

If reforms cannot be in place in time for the fourth Forward Capacity Auction, then at the very least the Commission should extend the current price floor through that Auction.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John N. Estes III', followed by a vertical line.

Angela O'Connor
President
New England Power Generators
Association, Inc.
141 Tremont Street, Sixth Floor
Boston, MA 02111
617-902-2354
aoconnor@nepga.org

John N. Estes III
Paul F. Wight
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
202-371-7232
Paul.Wight@skadden.com

Representing the New England Power Generators Association, Inc.

July 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served copies of the foregoing document upon each person designated on the official service list as compiled by the Office of the Secretary in the captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.2010.

Dated at Washington, D.C., this 1st day of July, 2009.

A handwritten signature in dark ink, reading "Claire Wack". The signature is written in a cursive, flowing style.

Claire Wack
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
202-371-7485