COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation Into the Need if Any For Additional Capacity in the NEMA/Boston Load Zone	)	**D.P.U. 12-77**

REPLY COMMENTS OF THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.

On July 28, 2013, Governor Deval Patrick signed into law An Act Relative to Competitively Priced Electricity in the Commonwealth, St. 2012, c. 209 ("Act"). Section 40 of the Act requires the Massachusetts Department of Public Utilities ("Department") to investigate the need, if any, for additional electric generating capacity in the Northeast Massachusetts ("NEMA")/Boston load zone within the next ten years. On November 27, 2012, the New England Power Generators Association, Inc., ("NEPGA") Footprint Power, LLC, ("Footprint") and five other parties[1] filed initial comments. All parties other than Footprint have asked the Department to find that there is no need for additional generation in NEMA/Boston and to decline to order the distribution companies to issue Requests for Proposals for long-term contracts. NEPGA[2] offers these reply comments in response to the opportunity provided for interested parties to file written reply comments on or before December 5, 2012, specifically in response to Footprint's initial comments ("Footprint Comments").

[1] The Massachusetts Department of Energy Resources ("DOER"), Conservation Law Foundation, National Grid, NSTAR, and New Hampshire Transmission, LLC, each filed initial comments.
[2] The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

I. Footprint Misinterprets the Act as Compelling the Department to Find That Need Has Already Been Established and to Order RFPs for Long-Term Contracts

Footprint misinterprets the Act by concluding that the need for additional generation in NEMA/Boston has already been established and that the Department is now compelled to order the distribution companies to issue Requests for Proposals ("RFPs") for long-term contracts. The Act does not compel the Department to make either finding, but instead grants the Department discretion and directs the Department to consider evidence and make findings. Footprint interprets the Act to compel the Department to find a need now because the ISO-NE's Forward Capacity Auction ("FCA") 7 preliminary Transmission Security Analysis megawatts ("MWs") exceed the preliminary qualified MWs (less rejected de-list bids).[3] Footprint further asserts that given this already established "need," the Department would "ignore its statutory mandate" if it fails to order distribution companies to enter into long-term contracts. Footprint Comments at 19. The Department should reject Footprint's interpretation of the Act and make its findings when appropriate according to its evaluation of all evidence.

A. The Act Does Not Require the Department to Make a Finding Based on Preliminary FCA 7 Information

Footprint is correct in that "[t]he Act obligates the Department to make an independent assessment" of the need for additional generation in the NEMA load zone. Footprint Comments at 2. Footprint, however, interprets the Act to deny Department independence by reading the Act to prohibit the Department from considering any evidence should preliminary, modified FCA 7

[3] According to Footprint, the Act requires the Department to find a need for new generation in NEMA/Boston if FCA 7 demonstrates a "deficiency." Footprint asserts that "[i]f FCA 7 is 'short', the Department's finding of need is mandated by Section 40." Footprint Comments at 20. Footprint asserts that the Act requires the Department to consider rejected non-price retirement bids as not available as capacity resources for purposes of determining whether FCA 7 is 'short'. Accordingly, Footprint concludes that FCA 7 is "deficient" because 184 MW of resource capacity has sought non-price retirements in FCA 7, which 184 MW exceed the 18 MW of excess capacity going into FCA 7 as reported by ISO-NE. Id. at 4. Footprint, therefore, believes that the General Court intended to compel the Department to find that this evidence conclusively demonstrates that there is a need for a 10-20 year long-term contract.

result projections prepared by Footprint show that non-price retirement bids exceed the excess supply going into FCA 7. Footprint's interpretation of the Act contradicts the General Court's delegation of rights and obligations to the Department, and the discretion vested in the Department. The Act provides that the Department shall determine whether there are sufficient resources in NEMA/Boston to satisfy the zone's reliability needs. The Act further provides that should the Department find that additional generating capacity is needed in NEMA/Boston, the Department may order distribution companies to enter into long-term contracts for the additional capacity. The Act, therefore, grants the Department discretion to determine whether additional generating capacity is needed and whether a long-term contract is necessary to achieve that goal. Footprint interprets the Act to negate Department discretion and is therefore clearly erroneous.

The Act grants the Department great discretion to determine whether there is a need for additional generation in Boston. The Department must determine how much NEMA/Boston local generation is necessary for NEMA/Boston to realize reliable service based on the Department's consideration of ISO-NE findings and its anticipation of future FCAs. Act § 40. The Department must also "account for any delist or retirement bids rejected for reliability reasons," suggesting that the Department must determine to what extent, if any, rejected delist and retirement bids affect its assessment of local generation needs. Id. According to Footprint the Department may not exercise those directives because the "demonstration [of need] has been made." Footprint Comments at 4. The Act should not be read to ignore the Department's rights and obligations.

Footprint's interpretation of the Act could lead to absurd results. An act should not be read in a way that the consequences of such construction are absurd or unreasonable. North Shore Realty Trust v. Com., 434 Mass. 109 (2001). According to Footprint, where, four months

in advance of the auction, the Local Sourcing Requirement exceeds the MW of qualified capacity less de-list bids, the Department must ignore all other evidence and find a need for new generation in the NEMA region. Footprint's interpretation of the Act would lead to unreasonable results in two respects. First, the Department would be precluded from considering the length and magnitude of a capacity shortage, if any, pending transmission projects that would significantly alter material facts, and other relevant considerations. Second, were FCA 7 to procure Capacity Supply Obligations in an amount 1 MW less that the Local Resource Requirement, the Department would be compelled to find a need for new generation under Footprint's interpretation of the Act. It would be absurd to require the Department to make such a finding under those circumstances, when the Department could reasonably find that a 1 MW capacity deficiency does not signal a need for additional generation in NEMA/Boston.

Footprint's interpretation of the Act renders other sections of the Act superfluous. A statute must be interpreted so that effect is given to all its provisions, so that no part will be inoperative or superfluous. Bankers Life and Gas Co. v. Commissioner of Ins., 427 Mass. 136 (1998). The Act provides that the Department "[i]n making its determination … shall include consideration of ISO-NE findings and of the anticipated function of the capacity market." The Act does not limit the ISO-NE findings the Department must consider to the ISO-NE's FCA 7 projections, but instead requires the Department to consider all ISO-NE findings. The Department has asked for, and the ISO-NE has provided several findings during the course of this investigation, including, *inter alia*:

- The Greater Boston Transmission Project, if needed, will increase import capacity into NEMA/Boston;
- ISO-NE has several market and operational measures it may use to supplement, as needed, generating capacity; and

- Projected load growth in NEMA/Boston has decreased.

In addition, National Grid, pursuant to a Department request after the Technical Conference, reported that it expects Greater Boston to increase import capability into NEMA/Boston by 800-1,000 MW. Exh. DPU-G-1(1). Under Footprint's interpretation of the Act the Department would be precluded from considering all of these facts in making its determination of need, rendering superfluous the General Court's directive that the Department shall consider these factors. Had the General Court intended to virtually extinguish the Department's discretion in determining need, the General Court simply and more clearly could have stated that need is established if the Transmission Security Analysis MWs exceed the qualification MWs, less non-price retirement bids. Footprint should not read into the Act a General Court directive to bind the Department to a "need formula" when the General Court did not do so.[4]

Footprint interprets the Act to significantly limit, if not extinguish Department discretion in its assessment of need, by compelling a Department finding based on Footprint's own projected, modified FCA 7 result four months in advance of the auction. Footprint's interpretation is inconsistent with the General Court's directive that the Department consider all evidence before it and render its decision on need, and the Department's inherent authority under G.L. c. 164 § 76. Footprint's interpretation could lead to absurd results and renders sections of the Act superfluous. The Department should reject Footprint's argument that the Act compels the Department to find that the need "demonstration has [already] been made," and instead make

[4] Simmons v. Clerk-Magistrate of Boston Div. of Housing Court Dept., 448 Mass 57 (2006)(a court will not add words to a specific statute that the legislature did not put there, either by inadvertent omission of by design); Dube v. Contributory Retirement Appeal Bd., 50 Mass. App. Ct. 21 (2000)(Appeals Court will not add language to a statute that the legislature had the option to, but chose not to, include).

an independent decision based on the record evidence in accordance with the General Court's directives.

B. The Act Does Not Require the Department to Order Long-Term Contracts Should the Department Find That Additional Generation is Needed in NEMA/Boston

The Act provides that if the Department finds that there is a need for additional generation in NEMA/Boston, it then may order local distribution companies to solicit long-term contracts for generation. Act § 40. The Department, therefore, must make a two-pronged decision under the Act: (1) whether there is a need for new generation; and (2) whether a long-term contract is necessary in order to meet that need. According to Footprint, the Department has already made a decision on the second prong, arguing that Department precedent establishes that the Department has concluded that "to secure necessary financing for any new generation resource" a long-term contract for "a substantial portion of the project's output is likely necessary." Footprint Comments at 20-21. Footprint asserts that the Department is not permitted to find that there is a need for new generation in NEMA/Boston and that a long-term contract is not necessary to meet that need, or, as Footprint stated, "ignore its statutory mandate, sit back, and 'let the market work.'" Id. at 19. According to Footprint, "[t]he Act directs the Department, once a determination of need within NEMA/Boston has been established, to implement a realistic and meaningful response," *i.e.*, order distribution companies to solicit long-term contracts. Id. at 15. In so asserting, Footprint misapplies Department precedent, ignores the discretion the General Court vested in the Department in this proceeding, and violates long-standing Department precedent of supporting competitive wholesale electricity markets.

The Act provides that the Department may order a long-term contract solicitation if it finds that there is a need for additional generation in NEMA/Boston, recognizing that a long-

term contract may not be the appropriate response. Act § 40. Contrary to Footprint's assertion that "[t]he entire purpose of Section 40 was to ensure that new generation would be built in NEMA/Boston if a deficiency exists,"[5] the purpose of Section 40 was to vest in the Department the decision-making authority to determine if there is a need for new generation and, if so, whether a 10-20 year contract for a new generator is necessary in order to meet NEMA/Boston's reliability needs over the next ten years.

Footprint cites to two Department orders as support for its assertion that the Department has already decided that a long-term contract is necessary to meet a need for additional generation in NEMA/Boston, if any. Specifically, Footprint cites to the two Department orders approving long-term contracts for the Cape Wind project. Footprint Comments at 19-21, citing Massachusetts Electric Company 10-54 (2011); NSTAR, DPU 12-36 (2012) (collectively, "Cape Wind Orders"). In the Cape Wind Orders, the Department exercised its discretion under Section 83 of the Green Communities Act, which requires local distribution companies to solicit proposals from renewable project developers. St. 2008, c. 169 § 83. Accordingly, the Department's consideration in the Cape Wind Orders was whether a long-term contract was necessary to finance an unprecedented, large, offshore wind energy project that would be the first of its kind in the country. Under those circumstances, the Department concluded that "a project like Cape Wind" may not be financed absent a long-term contract for its output. DPU 10-54 at 5. The Department, therefore, in the context of financing the largest proposed offshore wind development in the United States, concluded that a long-term contract was necessary to finance that project. Footprint erroneously takes the Cape Wind Orders as conclusive proof that the Department has decided that every new generation project requires a long-term contract for

[5] Footprint Comments at 6.

financing. As noted, the Department evaluated the need for long-term contracts in the Cape Wind Orders under the General Court's directive that local distribution companies solicit long-term contracts for renewable energy projects. Footprint's proposed project is not a renewable energy project. The Department did not extend its findings in the Cape Wind Order to non-Section 83 contracts, *i.e.*, to fossil fuel generation, recognizing that a large, offshore, unprecedented wind power project requires different considerations than a natural gas-fired generator, of which there is more than 13,700 MWs of capacity in New England alone.

II. Footprint's Statements to the Federal Energy Regulatory Commission Are at Odds with Their Statements Before the Department

Footprint asserts that the FCM "will not support the investment necessary to address reliability requirements for NEMA/Boston." Footprint Comments at 19. According to Footprint, should the Department not order a long-term contract and instead allow the FCM to procure any necessary resources, the Department would be "ignor[ing] its statutory mandate." Id. Footprint's assertions in this regard contrast sharply with the protest and request for waiver Footprint filed with the Federal Energy Regulatory Commission on November 21, 2012 ("Footprint Protest"), just 6 days before it filed its Comments in this proceeding. Footprint's contradictory arguments in the two proceedings raise serious questions about the validity of any of their arguments.

In its Protest, Footprint seeks to qualify the full capacity of its proposed Salem Harbor project (674 MW) in FCA 7 because clearing in the FCM without an out-of-market contract will allow Footprint to finance its proposed project. Footprint Protest at 9. According to Footprint, the FCM will facilitate its proposed project because its proposed facility "is exactly the type of

new generation resource that the FCM market is intended to encourage."[6] Id. To not allow the full capacity of the Project to qualify, according to Footprint, "would be antithetical to the goals and *raison-d'etre* of the FCM." Id. Footprint unequivocally states:

> Moreover, Footprint has not sought "Out of Market" treatment in FCA 7 that would permit it to bid below the auction floor price and therefore negatively affect the price. It will either clear in the market because the NEMA/Boston load zone requires new generating capacity – thus fulfilling the very purpose of the ISO-NE forward capacity market – or it will fail to clear because additional capacity will not be required in the NEMA/Boston load zone. Footprint Protest at 3.

Footprint clearly argues that the FCM, as designed for FCA 7 and forward, will be able to identify when additional capacity will be needed in the NEMA/Boston zone, and that whether its proposed project is needed will be determined by whether it clears in the FCM.

Footprint further states to FERC that it does not need an out-of-market contract in order to make its capacity available in the FCM, and acknowledges the negative effect an out-of-market contract has on auction prices. Footprint also states that the failure to qualify the full 674 MW of capacity for its proposed project would render the project uneconomic because "in order to secure necessary financing and to be a commercially viable project, it is critical that the Facility qualify its full capacity to participate in the capacity market." Id. at 3, 8. Conversely, Footprint states in its Comments to the Department that the FCM "simply does not support the financing of necessary generation," and that it is "neither acceptable or permissible" for the Department to consider the FCM as a source of revenue sufficient for Footprint to finance its proposed project. Footprint Comments at 19, 21. Nonetheless, Footprint's representations before the FERC that its financing depends on the full capacity of the project qualifying for FCA 7 and that it is not seeking out-of-market treatment strongly suggests to the FERC that Footprint's

[6] If the FERC grants Footprint's waiver and the full 674 MW qualify for FCA 7, NEMA/Boston's excess capacity at the commencement of FCA 7 would increase to 692 MW.

project will be economic should its 674 MW of capacity clear in FCA 7 without a long-term contract.[7]

Footprint, apparently, attempts to downplay the significance of its contradictory pleadings, stating that "[i]n directing the Department to take into consideration the 'anticipated function of the capacity market in New England' the General Court explicitly recognized the fact that remedies (i.e., long-term contracts) were necessary to ensure that capacity would actually be built in NEMA/Boston despite the fact that the relevant resource might participate in the ISO-NE Forward Capacity Market." Footprint Comments at 20. Footprint's attempt to reconcile its Comments and its Protest, however, is unpersuasive. As noted, Footprint told FERC that it is not seeking an out-of-market contract and that its project will move forward or not based on whether it clears in the FCM. Footprint Protest at 3. Footprint did not inform the FERC, as it did the Department, that Footprint believes that a long-term contract is necessary to finance its project even if the full capacity of its proposed project clears FCA 7.

It is impossible to ignore Footprint's apparent motivations in the FERC proceeding relative to its motivations in this Department proceeding in seeking to understand Footprint's contradictory assertions about the FCM. In this proceeding, to assert that the FCM is intended to and can signal the need for new investment in NEMA/Boston, and that Footprint can finance its project by clearing its full capacity in the FCM, would argue against the need for an out-of-market contract. Conversely, in the FERC proceeding, to assert that Footprint must execute a long-term contract (in addition to clearing in FCA 7) in order to finance the Project would argue against allowing Footprint a waiver to qualify the Project's full capacity in FCA 7.

[7] Footprint states that its proposed project will be in commercial operation on or before June 1, 2016, the start of the FCA 7 Capacity Commitment Period. Footprint Protest at 5.

Unfortunately, however, Footprint's conflicting motivations and statements render its arguments before the Department hollow.

Footprint asserts to the Department that the New England wholesale market, including the FCM, is a "failed" market that produces "theoretical," rather than real market outcomes. Footprint Comments at 14. Footprint cites to a brief NEPGA filed with the U.S. Court of Appeals for the D.C. Circuit as support for its assertions. Id. In so doing, Footprint implies that NEPGA similarly contends that the wholesale market is a "failed" market that cannot provide for adequate supply in NEMA/Boston. This, however, is not true. NEPGA has consistently argued that the FCM is, in some serious respects, a flawed market, that has and will continue to require modifications to better provide appropriate price signals. It is certain FCM rules, specifically the failure of monopsony power protections within the FCM, which require change, not the New England wholesale markets in their entirety. It is those specific rules that should be reformed in order to most cost-effectively provide reliable capacity in the right places in a sustainable manner.

Indeed, due to the efforts of NEPGA and other NEPOOL Market Participants, the FERC has approved or ordered several recent improvements to the FCM. For example, as NEPGA and the DOER each explained in their Initial Comments, beginning in FCA 7 ISO-NE will model the NEMA/Boston zone as a separate zone, which will better attract necessary, if any, investment in NEMA/Boston. DOER Initial Comments at 3; NEPGA Initial Comments at 11. NEPGA will continue to seek necessary changes to the FCM recognizing that market-based solutions are the most efficient means to provide continued resource adequacy. By no means should NEPGA's advocacy be interpreted as a call to abandon market-based efficiencies for out-of-market contracts or to disregard positive aspects of the FCM design.

III. Conclusion

The Department should reject Footprint's argument that a need for additional generation in NEMA/Boston has already been established, and deny Footprint's request that the Department order distribution companies to prepare Request for Proposal forms. To accept Footprint's argument and comply with its requested order would be to accept Footprint's interpretation of the Act that the Department is compelled to make a finding of need based on Footprint's projected modified FCA 7 results, and is therefore compelled to order distribution companies to solicit proposals for long-term contracts. The Department has the discretion to consider and make findings on all relevant evidence, and has acted consistent with that understanding throughout this proceeding. As NEPGA stated in its Initial Comments, the record evidence fails to establish that new generation is needed in NEMA/Boston, much less new generation justifying the award of a 10-20 year long-term out-of-market agreement. The ISO-NE, and the improving FCM, have and will ensure that NEMA/Boston maintains reliable service through 2022.

Respectfully Submitted,

/s/ Bruce Anderson

Dan Dolan, President
Bruce Anderson, Director of Market and Regulatory Affairs
New England Power Generators Association, Inc.
141 Tremont Street, Floor 5
Boston, MA 02111
Tel: 617-902-2347
Fax: 617-902-2349
Email: banderson@nepga.org

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation Into the Need if Any For Additional Capacity in the NEMA/Boston Load Zone	)	**D.P.U. 12-77**

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing documents upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 5th day of December, 2012

/s/ Bruce Anderson

Bruce Anderson, Director of Market and Regulatory Affairs
New England Power Generators Association, Inc.
141 Tremont Street, Floor 5
Boston, MA 02111
Tel: 617-902-2347
Fax: 617-902-2349
Email: banderson@nepga.org