UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

	)	
ISO New England Inc.	)	Docket No. ER11-3034-000
	)	

MOTION TO INTERVENE OF THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS AND PROTEST OF THE NEW ENGLAND CONFERENCE OF PUBLIC UTITLIES COMMISSIONERS, CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES, NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, AND VERMONT PUBLIC SERVICE BOARD

Pursuant to Rules 211, 212, and 214(a)(3) of the Rules of Practice and Procedure[1] of the Federal Energy Regulatory Commission ("FERC" or "Commission"), the Commission's Combined Notice of Filings #1 dated March 9, 2011, and Section III.13.8.1(b) of the ISO New England Transmission, Markets and Services Tariff, the New England Conference of Public Utilities Commissioners ("NECPUC")[2] hereby moves to intervene and NECPUC, the Connecticut Department of Public Utility Control ("CT DPUC"), the Massachusetts Department of Public Utilities ("Mass DPU"), the New Hampshire Public Utilities Commission ("NH PUC"), and the Vermont Public Service Board ("VT PSB") hereby protest the March 8, 2011 informational filing by ISO New England Inc. ("ISO-NE") regarding

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1 *See* 18 C.F.R. §§ 385.211 (Protests), 385.212 (Motions), and 385.214(a)(3) (Intervention).

2 The Maine Public Utilities Commission ("ME PUC") abstains from taking a position on this NECPUC filing due to the deadline for the protest and the statutory requirement that the ME PUC deliberate in open meeting concerning the ME PUC's position in a FERC proceeding. *See* 35-A M.R.S.A sec.108-A.

qualification in the Forward Capacity Market ("FCM") for the 2014-2015 Capacity Commitment Period ("Informational Filing").[3]

ISO-NE's Internal Market Monitoring Unit ("IMMU") has determined for the Forward Capacity Auction ("FCA") for the 2014-2015 Capacity Commitment Period ("FCA#5") that, among others, state-sponsored energy efficiency programs offering approximately 151 new MWs are Out-Of-Market Capacity ("OOM").[4] For demand resources, which include energy efficiency, the IMMU has stated that the analysis involves a determination of whether "the program's benefits exceeded their costs" and that "the appropriate way to determine whether a resource is in market or out of market is to determine whether it is cost effective[.]"[5] In state regulatory proceedings, New England's state regulatory commissions have not only deemed these programs cost-effective, but have found cost/benefit ratios as high as three to one.[6] Nonetheless, the IMMU has determined for FCA#5 that some state-approved energy efficiency programs are In-Market Capacity ("In-Market") while other, virtually identical state-approved programs are OOM. While there are some differences in the criteria used by ISO-NE and the states to determine cost-effectiveness, the inconsistencies in the IMMU's determinations evidence that state-sponsored energy efficiency resources classified as OOM have been misclassified.

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3 *ISO New England Inc.*, Informational Filing for Qualification in the Forward Capacity Market, Docket No. ER11-3034-000 (filed Mar. 8, 2011) ("Informational Filing").

4 *See* Attachment A of this Protest ("Attachment A") listing these resources determined to be OOM.

5 ISO New England Inc. Market Monitoring Unit, *Internal Market Monitoring Unit Review of the Forward Capacity Market Auction Results and Design Elements*, June 5, 2009, at 31 ("IMMU FCM Review"), submitted pursuant to Section III.13.8.4 of the Tariff in Docket ER09-1282-000, *available at* http://www.iso-ne.com/regulatory/ferc/filings/2009/jun/er09-1282-000_06-05-09_market_monitor_report_for_fcm.pdf.

6 *See, e.g.,* National Grid et al., D.P.U. 09-116 through D.P.U. 09-120 (2010) at 162, 177 (discussed further in Section IV).

As detailed more fully below, OOM capacity can trigger the Alternative Price Rule ("APR"). The APR raises the clearing price and, ultimately, the cost of procuring capacity. Such an outcome could needlessly cost ratepayers hundreds of millions of dollars. Accordingly, these resources should be classified In-Market for FCA#5.[7] Irrespective of the reason these new energy efficiency resources have been misclassified as OOM, it would be unjust and unreasonable to allow such misclassifications to adversely and significantly impact New England's electricity customers.

NECPUC respectfully asks the Commission to reject the portion of the Informational Filing concerning the IMMU's determination that certain state-sponsored energy efficiency resources seeking to offer below 0.75 times the Cost-of-New-Entry ("CONE") are OOM[8] and instead require a *de novo* review by ISO-NE, affected market participants seeking to offer such resources in FCA#5, and state entities that oversee these energy efficiency programs to determine whether such resources should be designated In-Market or OOM and correct any misclassifications.[9]

I. INTERVENTION

NECPUC is a not-for-profit corporation comprising all of the public utilities commissioners of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Formed over 60 years ago and funded by the New England states, NECPUC's mission is the promotion of regional cooperation and effective communication on

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[7] FCA #5 commences on June 6, 2011. *See* Section III.13.1.10 of the ISO New England Inc. Transmission, Markets and Services Tariff (the "Tariff"). Section III of the Tariff is Market Rule 1.

[8] Attachment A lists the specific resources NECPUC is requesting the Commission to designate In-Market.

[9] Based on the experience qualifying state sponsored energy efficiency resources in the FCM, we have similar concerns regarding the designation of non-state sponsored energy efficiency and other demand resources in the FCM but lack substantiation within this filing deadline that such resources should be designated In-Market. However, the challenge in classifying demand resources, including energy efficiency resources, illustrates a flaw in the market that needs to be addressed in any new FCM design.

all public utility matters within New England. As a representative of New England's interests concerning the electricity industry, NECPUC has a vital stake in the just and reasonable operation of the New England power markets. The Commissioners that comprise the commenter are the Commissioners of the public utility commissions of the respective New England states, which are each a "state commission" as defined by 16 U.S.C. § 796(15) and 18 C.F.R. § 1.101(k). As a representative of New England states' interests, NECPUC may be adversely affected by the outcome of these proceedings and, thus, has a substantial interest which cannot be adequately represented by any other party.

II. COMMUNICATIONS

NECPUC requests that the individuals identified below be placed on the Commission's official service list in this proceeding and that all communications concerning this filing and future filings in this proceeding should be directed to:

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III. BACKGROUND

A. The Qualification Process and Impact of Out-of-Market Designations

1. Offering Energy Efficiency into the Forward Capacity Market

As part of the settlement agreement establishing the current FCM design, the market rules enable energy efficiency to participate in FCAs like other supply resources.[10] Participation requires new resources, including energy efficiency, to submit a qualification package to ISO-NE.[11] To ensure that market participants are offering resources consistent with their long run average net going-forward costs and not behaving anti-competitively, the

[10] The Settlement Agreement was approved in *Devon Power LLC*, 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006); *ISO New England Inc.,* 119 FERC ¶ 61,045 (2007)("Conditional FCM Acceptance").

[11] *See generally* Tariff Section III.13.1.

qualification process requires new capacity supply resources intending to offer at prices below 0.75 times CONE to submit such offers to the IMMU.[12]

The IMMU then reviews each of these offers to determine whether the offer is consistent with the long run average costs of that resource net of expected net revenues other than capacity revenues.[13] As stated above, for demand resources, which include energy efficiency, the IMMU has stated that the analysis involves a determination of whether "the program's benefits exceeded their costs" and that "the appropriate way to determine whether a resource is in market or out of market is to determine whether it is cost-effective[.]"[14] If the IMMU determines that a resource is not cost-effective and its capacity offer should have been greater than it was, then the resource is classified OOM.[15]

2. Triggering the Alternative Capacity Price Rule

The APR establishes a higher clearing price to correct for the effects of OOM and was included in the FCM design to help prevent OOM from artificially suppressing market clearing prices.[16] Under the current market rules instituted last year,[17] OOM resources will generally

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12 *Id. See also* Tariff Section III.13.1.4.2.4.

13 *See generally* Tariff Section III.13.1.

14 IMMU FCM Review at 31.

15 Tariff Section III.13.1.1.2.6.

16 *See id.*; *ISO New England Inc. and New England Power Pool*, Various Revisions to FCM Rules Related to FCM Redesign, Docket No. ER10-787-000 (filed Feb. 22, 2010) ("FCM Redesign Filing") at 3-4, 13; Conditional FCM Acceptance at P 87 (footnote omitted).

17 The FCM Redesign Filing proposed changes to the FCM including replacement of the original APR with a three-part APR. *See* FCM Redesign Filing, amended by *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 Feb. 25, 2010) and *ISO New England Inc. and New England Power Pool*, Supplement to Joint Filing Detailing Stakeholder Process of New England Power Pool Participants Committee, Docket No. ER10-787-000 (filed Mar. 1, 2010). There are several open dockets (ER10-787, EL10-50, and EL10-57) before the Commission regarding these and other proposed revisions to the market rules for ISO-NE's FCM. These dockets were opened in response to the FCM Redesign Filing and related complaints by the New England Power Generators Association and PSEG Energy Resources, et al. The Commission consolidated the two complaints with the proceeding and issued an Order on Forward Capacity Market Revisions and Related Complaints on April 23, 2010. *ISO New England Inc., et al.* 131 FERC ¶ 61,065 (Apr. 23, 2010) ("FCM Order"). The FCM Order accepted certain of the

trigger the APR if either (i) new capacity is required and OOM resources meet this capacity need ("APR-1") or (ii) new capacity is not required but only because a sufficient amount of OOM resources that cleared in prior auctions was carried forward ("APR-2").[18] APR-2 was intended to address situations in which OOM from prior auctions precluded new entrants from setting the clearing price for a current auction and thereby depressed prices for the current and subsequent auctions.[19]

3. OOM Carry Forward and Impacts

The carry forward provisions in APR-2 could have the effect of triggering the APR for the first time and for many years into the future. Under APR-2, if the total amount of OOM resources from the current and previous FCAs is in excess of the new capacity needed in the current auction, then this past excess OOM capacity is carried forward to future FCAs.[20] These resources will continue to be classified as OOM for up to six subsequent auctions.[21] At the same time, new OOM resources could offer into future FCAs and add to the total amount of OOM resources.[22]

The carrying forward of OOM and triggering of the APR could have a significant and lasting impact on the market and consumers. Any APR would be paid to all capacity

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proposed changes in the FCM Redesign Filing but set them for paper hearing. FCM Order at P 1. NECPUC and some individual NECPUC states intervened in these consolidated proceedings.

18 *See* Tariff Sections III.13.2.7.8.1.1 and III.13.2.7.8.2.1; FCM Redesign Filing at 15-16. There is a third tier of the current APR rule, known as APR-3, that is generally less applicable to this Protest since it concerns the setting of the clearing price in the event ISO-NE rejects de-list bids for reliability reasons. *See* Tariff Section III.13.2.7.8.3.

19 *See* FCM Redesign Filing at 16.

20 Tariff Section III.13.2.7.8.2.1(c)(i); FCM Redesign Filing at 16-17.

21 Tariff Section III.13.2.7.8.2.1(c)(i); FCM Redesign Filing at 17.

22 For example, in the fourth FCA ("FCA#4") state sponsored energy efficiency programs offering new resources for the 2013-2014 Capacity Commitment Period were largely classified as OOM. Although we believe that these resources were also misclassified, we are not challenging such classifications in this Protest or asking the Commission to change the classifications for FCA#4. Nonetheless, such OOM determinations from past auctions make it more likely that the APR will be triggered in future FCAs.

resources. For APR-2, the triggering of the APR would raise the clearing price to the lesser of: (i) $0.01 below the price at which the last new capacity supply resource withdrew from the auction or (ii) CONE.[23] We are unable to predict what the APR price might be if the APR is triggered in a future auction. However, for example, a $1/kW-month increase in the clearing price for a 34,000 MW system—which is just under FCA#5's Installed Capacity Requirement of 34,154 MWs[24]—would translate into additional costs to ratepayers of more than $400 million.

4. New Proposed Market Rules Changes

Shortly after the latest FCM market rules went into effect, ISO-NE offered new proposed changes to the FCM market design that purported to respond to the Commission's guidance in the Order on Forward Capacity Market Revisions and Related Complaints issued on April 23, 2010.[25] ISO-NE's latest proposal describes how it would implement a single APR mechanism instead of the original APR or the three-part APR currently in effect. It also describes how CONE would be replaced as the threshold for IMMU review of offers from new resources with benchmarks the IMMU will calculate for each type of generation and demand resources.[26] Resources offering below these benchmark prices would be re-priced using the benchmark price and a new clearing price ("Alternative Clearing Price") would be established.[27] Additionally, there will be a "running tally of carried-forward OOM capacity . . . beginning with OOM capacity clearing in the fourth FCA."[28] These "OOM

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23 Tariff Section III.13.2.7.8.2.2. For FCA#5, CONE is $5.349/kW-month. Informational Filing at 3.
24 *Id.* at 4.
25 FCM Order. *See* First Brief of ISO New England Inc., Docket Nos. ER10-787-000, EL10-50-000, and EL10-57-000 (filed July 1, 2010) ("ISO-NE First Brief").
26 *Id.* at 29-35.
27 *Id.* at 12-17.
28 *Id.* at 22.

resources are then carried forward into future FCAs until offset by load growth and retirements[.]"[29]

Because there are a number of open questions regarding how the proposed changes would be developed and implemented, it is not clear what the effect of the OOM determinations which are the subject of this Protest would be if that proposal were implemented. While the ISO-NE filing explained the proposed changes in some detail, final rules for inclusion in the tariff have not yet been developed nor has the Commission issued a final ruling in the proceedings. Given this uncertainty, it is unclear what the cost implications of misclassifying OOM may be under the latest proposed changes.

B. State-Sponsored Energy Efficiency Programs Are Cost-Effective

1. State Specific Programs

a. Connecticut

Connecticut requires its electric distribution companies to implement conservation and load management programs.[30] The programs are funded by a 3 mill charge on electric bills. These revenues are supplemented with revenues from capacity sales, Class 111 Renewable Energy Certificates and the Regional Greenhouse Gas Initiative. The CT DPUC reviews and approves the conservation plans in an annual proceeding. The CT DPUC has determined that the conservation programs are cost-effective to electric ratepayers using the electric utility cost test and the total resource test. Both state-approved energy efficiency programs that offered resources into FCA#5 were classified as In-Market.

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[29] *Id.* at 14.

[30] General Statutes of Connecticut § 16-245m.

b. Maine

Maine requires its energy efficiency program administrator, the Efficiency Maine Trust ("EMT"), to develop and implement conservation programs that are cost-effective.[31] The EMT delivers a three-year plan to the Maine Public Utilities Commission for review and approval.[32] EMT's most recent plan was approved and the programs were found to be cost-effective.[33] EMT's new energy efficiency resources were classified as In-Market for FCA #5.

c. Massachusetts

Massachusetts requires its electric distribution utilities and municipal aggregators to procure all cost-effective energy efficiency.[34] To comply with this mandate, the four electric distribution utilities and one municipal aggregator[35] ("Program Administrators") in Massachusetts, in coordination with the Massachusetts Energy Efficiency Advisory Council (chaired by the Massachusetts Department of Energy Resources), develop three-year plans for delivering energy efficiency to their ratepayers. These plans are submitted to the Mass DPU for review and approval. Through a series of state proceedings, the energy efficiency programs proposed by the Program Administrators were found cost-effective.[36] The measures

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31 35-A M.R.S.A. § 10110(2).

32 *Id.* at § 10104(4)(D).

33 *Review of Efficiency Maine Trust Triennial Plan*, Maine Public Utilities Commission, Docket No. 2010-116 (Feb. 2, 2011).

34 M.G.L. c. 25, §§ 19(b), 21. D.P.U. 08-50 at 15-25; D.P.U. 08-50-A at 13-24; D.P.U. 08-50-B, Energy Efficiency Guidelines § 3.4.

35 The Cape Light Compact is a municipal aggregator comprised of the towns of Aquinnah, Barnstable, Bourne, Brewster, Chatham, Chilmark, Dennis, Eastham, Edgartown, Falmouth, Harwich, Mashpee, Oak Bluffs, Orleans, Provincetown, Sandwich, Tisbury, Truro, Wellfleet, West Tisbury, Yarmouth, and the Counties of Barnstable and Dukes. The Department is required to review energy efficiency plans submitted by a municipality or group of municipalities, such as the Cape Light Compact, and certify that the energy efficiency plans are consistent with any state energy conservation goals developed pursuant to M.G.L. c. 25A or M.G.L. c. 164. M.G.L. c. 164. § 134(b).

36 *National Grid et al.*, D.P.U. 09-116 through D.P.U. 09-120 (2010) at 162, 177. Although the programs have been found to be cost-effective, the Mass DPU has not yet approved program budgets for the applicable commitment period. Accordingly, the Program Administrators are bidding in projected

from these same programs were subsequently aggregated to become resources submitted to the FCM through the new resource qualification process. While they are virtually identical programs and measures, the resources submitted by two of the Program Administrators (NSTAR and the Cape Light Compact) were classified as In-Market for FCA#5 (representing 45.294 MWs), while the resources submitted by the other three Program Administrators (National Grid, WMECO, and Unitil) were classified as OOM (representing 126.947 MWs).[37]

d. New Hampshire

Electric utilities in New Hampshire have established energy efficiency programs designed for statewide implementation in the service territories of the utilities regulated by the NH PUC. All programs are reviewed annually by the NH PUC and subject to a Total Resource Cost Test[38] that compares the total resource costs for an energy efficiency program to the total resource benefits, including quantifiable cost and benefits associated with saving electricity and other resources (e.g., water, gas or oil) and estimated market effects of energy efficiency programs (e.g., spill-over and post program participation). Environmental and other benefits are internalized in utility avoided-cost reconciliations. The utilities file periodic updates on the performance of the programs, including program expenditures, resulting projected energy savings from implemented measures, and the number of customers served by the programs. Energy efficiency resources resulting from these programs are aggregated and submitted to the FCM through the new resource qualification process. The energy efficiency resources submitted by all four of New Hampshire's electric utilities were determined to be OOM for FCA#5.

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program savings. Because there is some uncertainty in these projections, Program Administrators only offer a portion of their expected program resources into the FCM.

37 *See* Attachment A.

38 Settlement Agreement in 2009 Core New Hampshire Electric Energy Efficiency Programs, Docket No. DE 08-120, December 10, 2008, available at: http://www.puc.state.nh.us/Regulatory/CaseFile/2008/08-120/LETTERS,%20MEMOS/08-120%202008-12-10%20Settlement%20Agreement.pdf.

e. Rhode Island

Pursuant to the System Reliability and Least Cost Procurement Act, Rhode Island electric distribution companies[39] are required to file with the Rhode Island Public Utilities Commission ("RI PUC") on a triennial basis a plan for system reliability and energy efficiency and conservation procurement.[40] The RI PUC is required "[to approve] all energy efficiency measures that are cost-effective and lower cost than acquisition of additional supply[.]"[41] The RI PUC's Standards for Energy Efficiency and Conservation Procurement and System Reliability further requires that utilities' three-year energy efficiency plans be "both aggressive in securing energy, capacity, and system cost savings and is also designed to ensure the programs will be delivered successfully and cost-effectively over the long term."[42] Through a state proceeding and open meeting on December 22, 2010, National Grid's 2011 electric energy efficiency plan was found to meet the statutory requirements for cost-effectiveness.[43] For FCA#5, National Grid offered approximately 17 MWs of new energy efficiency resources based in Rhode Island that the IMMU classified OOM.[44]

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39 As ISO-NE notes in its 2010 Regional System Plan, National Grid's subsidiary, Narragansett Electric, provides about 99% of the efficiency programs in Rhode Island. ISO New England Inc. 2010 Regional System Plan ("2010 Regional System Plan") at 116.

40 R.I.G.L. § 39-1-27.7(c)(4).

41 *Id.* at § 39-1-27.7(c)(5).

42 *In re: Standards for Energy Efficiency and Conservation Procurement and System* Reliability, RI PUC Docket No. 3931, Jul. 18, 2008, at Attachment A, 13-14. (footnote omitted)

43 *In re: National Grid's Proposed Energy Efficiency Program Plan for 2011 Settlement of the Parties and Proposed Energy Efficiency Program Tariff and Provisions for Gas and Electric*, RI PUC Docket No. 4209, Mar. 14, 2011.

44 *See* Attachment A.

f. Vermont

Vermont requires its energy efficiency utility, Efficiency Vermont ("EVT"),[45] and the Burlington Electric Department ("BED") to procure all cost-effective energy efficiency.[46] The Vermont Department of Public Service reviews three-year plans for EVT and BED, which are then submitted to the VT PSB for review and approval prior to their implementation. In addition, the VT PSB requires an independent audit of the cost-effectiveness of the programs delivered by EVT and BED.[47] The Department of Public Service annually verifies the savings and benefits claims of EVT and BED. The new energy efficiency resources qualified for FCA #5 were classified as In-Market for EVT and as OOM for BED.

2. The IMMU's In-Market/OOM Determination

The IMMU's In-Market/OOM determination results from a detailed analysis of these resources' costs and net revenues. The resources that are considered OOM

> are those that participate in the FCM at prices below cost no matter how low the auction price drops; they may be contracted by states … [and] typically are built by a party with a contract that ensures full payment for the resources regardless of the level of FCM prices.[48]

Further,

> [i]n the opinion of the [IMMU], the appropriate way to determine whether a resource is in market or out of market is to determine whether it is cost effective, not how it is funded. Therefore, demand resources should be treated as in market when they are cost effective, even when funded by state[s] [sic].[49]

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45 Efficiency Vermont is currently administered by the Vermont Energy Investment Corporation. The energy efficiency utility was created in Docket 5980, Order of 9/30/00.

46 30 V.S.A. §§ 218c and 209(d).

47 30 V.S.A. § 209(e)(12).

48 IMMU FCM Review at n. 4.

49 *Id.* at 31.

Thus, the IMMU's review of offers below 0.75 times CONE considers whether new demand resources, including energy efficiency resources, are cost-effective. Resources that are cost-effective do not need capacity revenue and thus it would be reasonable for them to offer zero. Such resources that are *not* cost-effective but submit offers that convey that no revenues are needed from the FCM (i.e., a zero bid) should be OOM. For FCA#5, the IMMU determined that a number of state-sponsored energy efficiency programs, deemed cost-effective by their respective state public utility commissions, were nonetheless OOM even though virtually identical programs from different utilities in the same state were classified In-Market.

IV. PROTEST

As explained in the background above, state-sponsored energy efficiency programs that are offered in the FCM are subject to two separate cost-effectiveness evaluations: the first in public proceedings before the state commissions and the second by the IMMU. Admittedly, there are some differences in the criteria used by ISO-NE and the states to determine cost-effectiveness.[50] For instance, in assessing cost-effectiveness for Massachusetts' programs, which comprise the vast majority of state-approved energy efficiency resources classified as OOM, the Mass DPU will consider savings from avoided transmission and distribution as well as demand reduction induced price effects.[51] In theory, the different cost-effectiveness criteria

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[50] For ISO-NE's criteria, see Tariff Section III.13.1.4.2.4.(b) ("Expected net revenues shall include economic development incentives that are offered broadly by state or local government and that are not expressly intended to reduce prices in the Forward Capacity Market. . . . The long run average cost of a New Demand Resource shall be that resource's total cost (including opportunity costs, as appropriate) minus the customer's avoided electric energy charge at the point of delivery, on a levelized, net present value basis over the resource's Measure Life."). *See also* Submittal Template for Offers below 0.75 times CONE for Demand Resources, available at: http://www.iso-ne.com/markets/othrmkts_data/fcm/qual/forms/drcost_benefit_input_workbook_2010_rev%201.xls.

[51] In Massachusetts, "[t]otal resource costs ["TRC"] are comprised of the following: (1) program implementation costs; (2) before-tax performance incentives; and (3) participant costs. . . . The Program Administrators include the following benefits in the TRC test: avoided electric energy benefits, calculated as the product of the program's energy savings and an avoided energy cost factor; avoided generation

could explain the IMMU's OOM determination. However, the differences in these methodologies do not explain the IMMU's inconsistent classifications of almost identical programs administered by different utilities in the same state that were all approved as cost-effective by state commissions. Furthermore, in practice, the benefits considered by state commissions that the IMMU does not consider in its cost-effectiveness analysis are small enough that such differences cannot be material. In fact, state commissions have been finding benefit-cost ratios of some energy efficiency programs as high as three to one.[52] The only plausible explanation for the IMMU to classify these programs as OOM—i.e., not cost-effective—is a misunderstanding, miscommunication, or inadvertent error in the data submitted.

A. It Would Be Unjust And Unreasonable to Pass Costs on to Consumers Resulting from the Misclassification of State-Sponsored Energy Efficiency Resources Offering into the FCM

State-approved energy efficiency programs seeking to offer new resources into FCA#5 include qualified capacity of approximately 254 new MWs, of which approximately 151 MWs—or close to 60%—were classified OOM. Attachment A of this Protest lists the new

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capacity benefits, calculated as the product of the program's reduction in peak demand and an avoided capacity cost factor; avoided transmission and distribution capacity benefits, calculated as the product of the program's reduction in peak demand and avoided transmission and distribution cost factors, respectively; non-electric resource benefits, calculated as the product of the program's savings in natural gas, oil, propane, water and sewerage, and other fuels, and avoided cost factors for each of these resources; non-electric non-resource benefits; and benefits associated with demand-reduction-induced price effect of capacity and energy." *National Grid et al.*, D.P.U. 09-116 through D.P.U. 09-120 (2010) at 39-40, *available at* www.env.state.ma.us/dpu/docs/electric/09-116/12810dpuord.pdf.

52 Through a series of state proceedings, the energy efficiency measures proposed by the Program Administrators in Massachusetts were deemed cost-effective for 2010 through 2012 with a statewide benefit-cost ratio of approximately 3.0 through the Total Resource Cost test. *National Grid et al.*, D.P.U. 09-116 through D.P.U. 09-120 (2010) at 162, 177. Further, the residential retrofit program was deemed cost-effective with a statewide three-year benefit-cost ratio of 5.11. *National Grid et al.*, D.P.U. 09-116 through D.P.U. 09-120 (2010) at 178.

energy efficiency resources that were determined OOM that NECPUC is requesting be designated In-Market for FCA#5.

The OOM classification for a substantial number of cost-effective energy efficiency resources for FCA#5 demonstrates (i) a miscommunication between ISO-NE and market participants, (ii) market participants' lack of understanding of the information they need to submit for an accurate determination to be made, and/or (iii) the IMMU's lack of understanding of the data and information about the state-sponsored energy efficiency projects provided by the Program Administrators. As detailed above, state-sponsored energy efficiency programs are required to be cost-effective. However, for a large number of these resources seeking to qualify for FCA#5, ISO-NE effectively determined by virtue of designating them OOM that their costs exceeded their benefits.

While there are some differences in the criteria used by ISO-NE and the states to determine cost-effectiveness, the fact that some state-approved energy efficiency programs (e.g., those of NSTAR, Cape Light Compact, Efficiency Vermont) are classified In-Market while other, virtually identical state-approved programs (e.g., those of National Grid, WMECO, Burlington Electric Department) are classified OOM, evidences a fundamental failure of the qualification process. At best, this failure is rooted either in (i) continued miscommunication and misunderstanding between ISO-NE and market participants over how the IMMU analyzes the data to determine whether resources are In-Market/OOM or (ii) the mistaken submission of inaccurate data without sufficient opportunity to correct inaccuracies before the qualification deadline.

Irrespective of the reason such cost-effective resources were misclassified OOM, any cost increase incurred as a result of such misclassification by the triggering of the APR should not be borne by ratepayers. Passing on to consumers costs attributable to a misclassification of cost-effective energy efficiency programs resulting from a failure of the qualification process would be unjust and unreasonable, especially when there is ample time and opportunity for correction. Notwithstanding our comments below regarding the need for greater guidance from ISO-NE regarding the criteria applied, market participants have a responsibility to provide accurate data to allow the IMMU to make a determination. Similarly, ISO-NE bears a heightened responsibility as market administrator to detail clearly the criteria it uses to make such determinations and to ensure that participants understand any clarifying questions issued. Neither the mistake of one participant nor a breakdown in communication should be permitted to impact the entire capacity market and potentially pass hundreds of millions of dollars in costs onto consumers.

As discussed above, whether applying the current market rules related to OOM carry-forward or ISO-NE's latest FCM design proposal, it is more likely that the APR will trigger in future auctions should the current capacity surplus decline in futures years as forecast under some scenarios.[53] The potential cost exposure to consumers across the region is substantial should the APR trigger. Again, even assuming a $1kW/month increase in the clearing price would translate into over $400 million in additional capacity payments. Not only would passing on such costs to consumers be unjust and unreasonable, but the possibility that

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[53] *See* 2010 Regional System Plan at 43 (Table 4-8); North American Electric Reliability Corporation (NERC), 2010 Special Reliability Scenario Assessment: Resource Adequacy Impacts of Potential U.S. Environmental Regulations, Oct. 2010, *available at*: www.nerc.com/files/EPA_Scenario_Final.pdf.

programs achieving energy savings could have the effect of increasing the cost of power is counter to the core principles guiding our state-sponsored programs.

To the extent our region's capacity surplus declines in future years and new resources offering into the FCM are classified as OOM, the OOM classifications in FCA#5 could, and perhaps likely would, contribute to the triggering of the APR in later auctions. As explained above, this would result in unjust and unreasonable costs being assessed to consumers.

B. The Commission Should Suspend Issuance of any Ruling or Order on that Portion of the Informational Filing Concerning the In-Market or OOM Classification of New Energy Efficiency Resources and Require a *De Novo* Review of the Determinations and Opportunity to Cure prior to the Commencement of FCA#5

NECPUC respectfully requests that the Commission suspend issuance of any ruling or order related to the In-Market/OOM designation of new energy efficiency resources offering into the auction and require a *de novo* review and opportunity to cure any misclassification of these resources. Such review and opportunity to cure should (i) commence immediately and at minimum no later than 30 days prior to the commencement of FCA#5, which is June 6, 2011; (ii) require ISO-NE to review its In-Market/OOM determinations of new state-sponsored energy efficient resources for FCA#5 with affected market participants seeking to offer such resources in FCA#5 and state entities that oversee energy efficiency programs; (iii) provide an opportunity to correct any misclassification of such resources and ensure any misclassification does not contribute to the running tally of carried-forward OOM capacity; and (iv) take place under FERC's general supervision.

The *de novo* review and opportunity to cure would provide a forum to:

1) Correct errors that but for miscommunication and time restrictions would have been corrected (e.g., a Program Administrator's mistake transposing numbers submitted to the IMMU);

2) Clarify and explain the data submitted; and

3) Analyze whether data deemed questionable by the IMMU made a difference in the OOM determination (e.g., a resource would have been In-Market had a higher discount rate been used).

Because it is unlikely that the APR will trigger for FCA#5, should the parties fail to reach agreement on the proper designation of new state-sponsored energy efficiency resources before the commencement of FCA#5, NECPUC would not oppose the running of the auction subject to a *de novo* review and FERC hearing concerning the carrying forward of new state-sponsored energy efficiency resources designated as OOM. In this event, pursuant to Tariff Section III.13.8.2(c), we would respectfully ask the Commission to suspend certification of the auction results pending the outcome of such review and hearing.

C. For Future Forward Capacity Auctions, the Commission Should Require an Opportunity to Challenge and Cure Misclassifications and Require ISO-NE to Provide a Greater Level of Guidance on Acceptable Data

1. Opportunity to Challenge and Cure

To help resolve miscommunications or misunderstandings during the qualification process and to avoid unnecessary litigation before the Commission, the Commission should require ISO-NE to provide an opportunity during the qualification process for participants offering new resources to challenge OOM classifications and cure any misclassification before the qualification process concludes and an informational filing is made with the Commission. A mechanism to "challenge and cure," while potentially administratively time consuming during the qualification process, would be more efficient than a challenge process that would

need to be adjudicated by FERC after the qualification process is concluded in proceedings like this one.[54]

The Commission should require ISO-NE to work with stakeholders to develop a process and related criteria by which participants offering new resources into the FCM can challenge an OOM designation, clarify any data submitted to support an In-Market designation, and correct any misclassification before the start of the applicable auction.

2. The Qualification Process Should Be Improved to Ensure Proper Classifications Are Made

a. Clarifying Qualification Criteria

The Commission should require ISO-NE to provide a greater level of guidance to market participants seeking to qualify new resources, particularly new state-sponsored energy efficiency, to address any misunderstandings about the criteria the IMMU applies in making an In-Market/OOM determination.

The results from the FCA#5 qualification process make clear that improved communications between market participants offering new resources and ISO-NE are needed to ensure these resources are classified accurately. As noted above, just over 151 MWs of cost-effective energy efficiency resources were classified as OOM while 103 MWs of virtually identical programs were determined In-Market. The only logical explanation is that information was not provided, was provided incorrectly or not in the form the IMMU requires, or was not understood by the IMMU.

ISO-NE has offered training and web conferences detailing the qualification requirements for demand resources participating in the FCM. NECPUC appreciates the

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[54] Any such mechanism, while helpful in resolving miscommunications and misunderstandings early in the qualification process, would not supplant the opportunity for FERC review.

considerable time and effort that is required to host the existing trainings and web conferences in addition to the resources expended to administer the markets. However, Program Administrators have informally reported continued challenges they have experienced in trying to understand how the IMMU analyzed data for new resources as part of its In-Market/OOM determination. In one example, a participant was told that their actual discount rate was unreasonably low, without further explanation of what constitutes a reasonable discount rate.

The FCA#5 results, coupled with information provided by Programs Administrators, strongly suggest that additional guidance is necessary to ensure there is a clear understanding of how the IMMU analyzes data to determine whether a new resource is In-Market or OOM. Transparency during the qualification process is critical to elevating substance over form.[55]

V. CONCLUSION

WHEREFORE, for the foregoing reasons, NECPUC hereby files this Motion to Intervene and Protest and respectfully requests that the Commission recognize NECPUC as an intervener in this proceeding, with all rights attendant thereto, and asks the Commission to rule as outlined above.

[55] We are not aware of any claims regarding gaming or falsification of data during the qualification process, but to the extent such concerns arise, they should be addressed in a separate enforcement proceeding.

Respectfully submitted,

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Date: March 23, 2011

Attachment A

State-Sponsored Energy Efficiency Programs Determined Out-of-Market by the ISO-NE IMMU that NECPUC Requests be Classified as In-Market for FCA#5

State	Resource ID	Project Name	Project Type	FCA Qualified MW
Massachusetts	12670	ngrid_nema_fca1_eeodr	NGRID_NEMA_FCA5_EEODR	29.300
	12673	ngrid_sema_fca1_eeodr	NGRID_SEMA_FCA5_EEODR	39.400
	12674	ngrid_wcma_fca1_eeodr	NGRID_WCMA_FCA5_EEODR	51.900
	12657	Unitil CORE Energy Efficiency Programs-2	FGE EE Portfolio 2014 Expansion	0.607
	12806	WMECO - Conservation & Load Management (CL&M) - Energy Efficiency Project	FCA#5-New Expansion	5.740
New Hampshire	12801	UES CORE Energy Efficiency Programs	UES EE Portfolio 2014 Expansion	0.842
	12757	NHEC Energy Efficiency Programs	NHEC Core EE Programs (FCA 5)	0.309
	12671	ngrid_nh_fca1_eeodr	ngrid_nh_fca5_eeodr	2.600
	12693	PSNH CORE Energy Efficiency Programs	PSNH CORE EE Program (FCA5)	3.207
Rhode Island	12672	ngrid_ri_fca1_eeodr	NGRID_RI_FCA5_EEODR	17.100
Vermont	12822	Burlington Electric Department - On-Peak Efficiency	FCA #5 Expansion of Asset 12822	0.450
				151.455

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010 (2008), I hereby certify that I have this day served, via electronic mail or first class mail, the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Boston, Massachusetts on this 23rd day of March, 2011.

/s/
Jason R. Marshall