

April 23, 2009

VIA ELECTRONIC FILING

Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Docket No. EL09-____-000
*The Connecticut Department of Public Utility Control and the
Connecticut Office of Consumer Counsel v. ISO New England Inc. and
Unidentified Installed Capacity Resources Committed to Import over the
Northern New York AC Interface*

Docket No. EL09-47-000
*Richard Blumenthal, Attorney General for The State of Connecticut v. ISO
New England Inc. and Certain Unidentified Market Participant
Importer(s) of Installed Capacity*

Dear Secretary Bose:

Please find attached for electronic filing the Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel's (collectively, the "Connecticut Representatives") Complaint against ISO New England Inc. and Unidentified Installed Capacity Resources Committed to Import over the Northern New York AC Interface. Additionally, and in accordance with Rule 206(b)(10) of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, a form of notice suitable for publication in the Federal Register is included with this Complaint and is submitted as a separate electronic file as well.

The Connecticut Representatives respectfully request this Complaint receive Fast Track processing.

Also attached for electronic filing is the Joint Motion to Consolidate of the Connecticut Department of Public Utility Control, the Connecticut Office of Consumer Counsel, and Richard Blumenthal, Attorney General for The State of Connecticut.

Please contact Rebecca Grunfeld at (202) 682-3520 if you have any questions.

Respectfully submitted,

/s/

Randall L. Speck
*Counsel for the Connecticut Department
of Public Utility Control*

encl.

cc: Service List

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Michael Wertheimer, Assistant Attorney General of The State of Connecticut
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The Honorable Donald L. Carcieri, Governor of The State of Rhode Island
The Honorable Deval Patrick, Governor of The Commonwealth of Massachusetts
Honorable James H. Douglass, Governor of The State of Vermont
The Honorable John E. Balducci, Governor of The State of Maine
The Honorable John H. Lynch, Governor of The State of New Hampshire
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Rep. John Larson of The State of Connecticut
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Rep. Jim Himes of The State of Connecticut
Rep. Christopher Murphy of The State of Connecticut
Sen. Jack Reed of The State of Rhode Island
Sen. Sheldon Whitehouse of The State of Rhode Island
Rep. Patrick Kennedy of The State of Rhode Island
Rep. Jim Langevin of The State of Rhode Island
Sen. Edward Kennedy of The Commonwealth of Massachusetts
Sen. John Kerry of The Commonwealth of Massachusetts

Rep. Michael E. Capuano of The Commonwealth of Massachusetts
Rep. William Delahunt of The Commonwealth of Massachusetts
Rep. Barney Frank of The Commonwealth of Massachusetts
Rep. Stephen Lynch of The Commonwealth of Massachusetts
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Rep. Ed Markey of The Commonwealth of Massachusetts
Rep. Richard E. Neal of The Commonwealth of Massachusetts
Rep. John Olver of The Commonwealth of Massachusetts
Rep. John Tierney of The Commonwealth of Massachusetts
Rep. Niki Tsongas of The Commonwealth of Massachusetts
Sen. Patrick Leahy of The State of Vermont
Sen. Bernard Sanders of The State of Vermont
Rep. Peter Welch of The State of Vermont
Sen. Susan Collins of The State of Maine
Sen. Olympia Snowe of The State of Maine
Rep. Michael Michaud of The State of Maine
Rep. Chellie Pingree of The State of Maine
Sen. Judd Gregg of The State of New Hampshire
Sen. Jeanne Shaheen of The State of New Hampshire
Rep. Paul W. Hodes of The State of New Hampshire
Rep. Carol Shea-Porter of The State of New Hampshire
Steven Chu, Secretary, Department of Energy
Carol Browner, Assistant to the President for Energy and Climate Change
Kevin Kolevar, Assistant Secretary, Office of Electricity Delivery and Energy Reliability
Patricia A. Hoffman, Acting Assistant Secretary, Office of Electricity Delivery and Energy Reliability
Patricia A. Dalton, Managing Director, Natural Resources and Environment, Government Accountability Office
Mark Gaffigan, Director, Energy Issues, Natural Resources and Environment, Government Accountability Office
Frank Rusco, Acting Director, Energy Issues, Natural Resources and Environment, Government Accountability Office

confidence in electricity markets, the Connecticut Representatives request Fast Track Processing and full disclosure of the extent of this illicit manipulation. Moreover, ISO New England Inc.’s (“ISO-NE’s”) delay in identifying, disclosing, and dismantling this scheme and its failure to take action to make customers whole casts doubt on the independence and efficacy of its market monitoring function and dictates an overhaul even beyond the reforms currently contemplated to comply with the Commission’s regulations on *Wholesale Competition in Regions with Organized Electric Markets*, 125 FERC ¶ 61,071 (2008) (“Order No. 719”).

The publicly available facts – which should be supplemented with evidence from a thorough investigation and discovery in a hearing proceeding – tell the story of a narrow group of supposed capacity importers who blatantly disregarded market rules and for more than two years successfully defrauded electricity customers. This plan was much more than the clever exploitation of loopholes in the rules. Most capacity importers followed the rules, offering their energy at competitive rates and performing their reliability functions when called. One faction, however – the capacity resources that had committed to import over the Northern New York AC Interface¹ (the “NNY Capacity Resources”) – flouted the central premises of the capacity rules, intending from the beginning to take capacity payments but never to provide any capacity services. The fault was not in the failure of the rules to foreclose every opportunity for

¹ The Northern New York interface is also known as “the Roseton Interface, which consists of several lines linking New England to up-state New York.” David B. Patton and Pallas LeeVanSchaick, “2007 Assessment of the Electricity Markets in New England,” Independent Market Monitoring Unit, ISO New England Inc. (June 2008) (“2007 Markets Assessment”) at 29. Despite the Connecticut Representatives’ requests, ISO-NE has refused to disclose the identity of NNY Capacity Resources. (These identities cannot be deemed proprietary or confidential because ISO-NE discloses comparable information for capacity suppliers in the FCM.) As an initial matter, therefore, the Connecticut Representatives request that the Commission order ISO-NE to disclose the identity of the NNY Capacity Resources and the amount of capacity payments they each received over a two-year period while refusing to perform.

manipulation but in the greed of these rogue companies and their eagerness to take millions of dollars from customers while providing nothing in return. Public officials, regulators, and customers will never trust markets if a few aberrant companies can sabotage the system while keeping tens of millions of dollars in ill-gotten gains.

The fact that this fraud on customers continued with almost no variations for more than two years is also an indictment of ISO-NE's failed market monitoring function. Only two scenarios are plausible, and both are damning: (1) ISO-NE's market monitors, despite early, explicit warnings, failed to detect an unwavering pattern of implausible energy price offers and concomitant non-performance, or (2) the market monitors identified the contours of this unlawful strategy at an earlier stage but permitted it to persist without disclosure or correction. The backbone of the Commission's reliance on market-based rates rests on the existence of a viable, independent watchdog that has complete access to the necessary data and authority to take whatever action is warranted to protect market integrity. The Commission's Order No. 719 recognized the need to overhaul the market monitoring function to ensure that it performs as intended, but this case demonstrates that additional steps are needed in New England. No one will trust markets until the Commission's designated monitor demonstrates its independence by ferreting out anti-competitive conduct that undercuts any semblance of fairness or justice. The facts here cast substantial doubt on ISO-NE's ability or willingness to perform effective market monitoring and to highlight promptly and publicly deep flaws in the same market rules that ISO-NE and the market monitor had a large hand in developing.

Although the scheme began at the very start of the Forward Capacity Market ("FCM") transition period on December 1, 2006, ISO-NE took no action at the Commission until March 20, 2009, when it proposed to revise its rules so that capacity suppliers will have fewer

opportunities for manipulation. This belated attempt to prevent further pillage – which ISO-NE proposed would not become effective until July 1, 2009 – is an insufficient remedy. These capacity resources took at least \$85.8 million from electric customers while never intending to provide anything in return. Customers must be made whole. The Commission must also restore confidence in markets by publicly exposing the full extent of this unlawful scheme and taking steps to ensure that no similar injustices can recur.

II. PARTIES

A. The Connecticut Department of Public Utility Control

The CT DPUC is Connecticut’s state commission charged with regulating electric companies and setting retail electricity rates for all electricity used within the state. The CT DPUC, like the Commission, must balance the interests of utilities providing electricity services with customers who must pay a fair price – but no more – for those services. The CT DPUC is authorized by General Statutes of Connecticut § 16-6a (2009) to participate in proceedings before federal agencies and courts on matters affecting utility services rendered or to be rendered in Connecticut. In accordance with its authority granted by the State of Connecticut, the Commission’s regulations, and the Federal Power Act, the CT DPUC initiates the Complaint in this proceeding to represent the interest of Connecticut’s retail customers and electric companies with respect to the conduct of ISO-NE and the NNY Capacity Resources.

B. The Connecticut Office of Consumer Counsel

The CT OCC, an independent agency of the State of Connecticut, is the statutory advocate for Connecticut consumers in utility matters (including the electric industry). Under Connecticut General Statutes § 16-2a(a) (2009), CT OCC is “authorized to appear in and participate in any regulatory or judicial proceedings, federal or state” in which the interests of Connecticut consumers in utility matters may be affected, or in which matters affecting utility

services rendered or to be rendered in Connecticut may be involved. The pattern of conduct alleged in this Complaint injures Connecticut's electric consumers. The resolution of these issues by the Commission will have direct and profound impacts upon consumers in Connecticut. The CT OCC, therefore, represents an interest that is directly affected by the outcome of this proceeding – namely, the interests of Connecticut consumers of electric services.

III. CORRESPONDENCE AND COMMUNICATIONS

All correspondence and communications to the CT DPUC in this docket should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary in connection with these proceedings:

Randall L. Speck Kaye Scholer LLP 901 Fifteenth Street, NW Washington, DC 20005 Telephone: (202) 682-3510 Facsimile: (202) 414-0320 Email: rspeck@kayescholer.com	Robert Luysterborghs, Esq. The Department of Public Utility Control 10 Franklin Square New Britain, CT 06051 Telephone: (860) 827-2742 Facsimile: (860) 827-2613 Email: Robert.Luysterborghs@po.state.ct.us
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All correspondence and communications to the OCC in this docket should be addressed to the following individuals, whose names should be entered on the official service list maintained by the Secretary in connection with these proceedings:

Joseph A. Rosenthal Office of Consumer Counsel Ten Franklin Square New Britain, CT 06051 Telephone: (860) 827-2900 Facsimile: (860) 827-2929 Email: Joseph.Rosenthal@ct.gov	Mary J. Healey Consumer Counsel Ten Franklin Square New Britain, CT 06051 Telephone: (860) 827-2900 Facsimile: (860) 827-2929 Email: Mary.Healey@ct.gov
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IV. STATEMENT OF FACTS

A. The Forward Capacity Market Settlement

On March 6, 2006, ISO-NE and a broad group of settling parties proposed a settlement that created the FCM.² Because the FCM purchased capacity three years in advance of the Commitment Period, the settlement agreement included a transition period from December 1, 2006, until May 31, 2010. During that period, fixed payments would be paid to all installed capacity so that “[a]ll suppliers will receive transition payments, though these payments will be . . . adjusted to account for outages.”³ Some parties opposed the transition provisions of the settlement, arguing “that the transition payments are ‘money for nothing’” because “nothing is required of suppliers other than their continued existence.”⁴ The settlement’s supporters responded that the transition mechanism did provide benefit because it “includes an availability adjustment if a resource fails to perform.”⁵

The Commission concluded that while it “may not consider the transition payments ideal as a single market design element, when considered as a part of the larger Settlement Agreement, . . . they serve as a reasonable transitory mechanism that enables the New England region to shift to the FCM.”⁶ The Commission found that the transition payments “will be more closely tied to the availability of a unit,” a “significant improvement[] over the existing capacity market. . . .”⁷ “[T]he transition payments will be adjusted to account for unit performance during periods of

² See *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (“FCM Settlement Order”) at P 2.

³ *Id.* at P 75.

⁴ *Id.* at P 77.

⁵ *Id.* at P 83.

⁶ *Id.* at P 89.

⁷ *Id.* at P 103.

high demand” and “will also be adjusted by an [equivalent demand forced outage rate (“EFORD”)] score that is weighted according to on-peak hours, seasonal peak hours, and shortage hours (including certain periods of system-wide emergency operations or actions).”⁸ In sum, the transition mechanism was intended and expected to produce improved reliability and capacity supplier performance, and those suppliers that failed to perform were expected to be penalized.

B. Transition Period Market Rules

On September 1, 2006, ISO-NE filed market rules for implementing the transition provisions of the FCM Settlement.⁹ Those rules included provisions for an “ICAP Import Contract [which] represents a commitment to offer and supply firm energy to the New England Control Area from resources located in an external Control Area.”¹⁰ ICAP Import Contracts “must self-schedule or submit a Supply Offer in the Day-Ahead Energy Market, must provide the ISO with certain outage information, must perform audits, and must submit specific operation data.”¹¹ The rules “also incorporate currently-effective provisions regarding the failure of ICAP Import Contracts to schedule or deliver energy as required” including “penalties . . . for failure to schedule and deliver energy as required under the energy transactions backing an ICAP

⁸ *Id.*

⁹ “Filing Implementing the Transition Provisions of the FCM Settlement Agreement, *ISO New England Inc. and New England Power Pool*, Docket No. ER06-1465 (filed Sep. 1, 2006) (“Transition Rules Filing”).

¹⁰ *Id.* at 12.

¹¹ *Id.* See Transition Rules Filing, Attachment 1, Market Rule 1, Section III.8.3.7.1(c) at 1st Rev. Sheet No. 7245 (requiring the ICAP Import Contract to either Self-Schedule or submit a Supply Offer for each hour in the Day-Ahead Energy Market “unless and to the extent the generating unit is unable to do so due to an outage as defined in the ISO New England Manuals or due to temperature related de-ratings”).

Import Contract.”¹² ISO-NE concluded that the weighted EFORD approach in the FCM Settlement could not be used for ICAP Import Contracts, however, because neither annual operating data nor availability measures over an entire season were available. Rather, ISO-NE proposed “to continue using the currently-effective availability provisions for these resources.”¹³ Thus,

[w]ith regard to both fixed and dispatchable ICAP Import Contracts, the ISO will compare on an hourly basis the ICAP value of the ICAP Import Contract and the amount of energy actually delivered. . . . Any energy shortfalls will be added together for each month and if the monthly delivery shortfall exceeds the EFORD of the unit, except in certain limited circumstances, a delivery penalty will be charged. The penalty amount will be the percentage of actual delivery shortfall multiplied times the UCAP value of the transaction multiplied by the ICAP Deficiency Rate, as in the current market.¹⁴

ISO-NE proposed to use these availability provisions “only during the ICAP Transition Period, when capacity will be purchased from all qualifying ICAP Resources.”¹⁵

The transition rules specified that “[a]n ICAP Import Contract represents a *commitment* by the submitting party to offer and supply firm energy to the ISO-NE Control Area from resources located in an external Control Area.”¹⁶ In addition to other requirements, “an ICAP Import Contract *must perform* as an ICAP Resource” as either dispatchable or non-dispatchable energy and as either backed by an external resource or backed by a Control Area.¹⁷ The rules make the ICAP Import Contract “responsible for making any and all transmission arrangements

¹² Transition Rules Filing at 12, 14.

¹³ *Id.* at 14.

¹⁴ *Id.*; *see also id.*, Attachment 1, Market Rule 1, Section III.8.3.7.3.1.1(a) at 2nd Rev. Sheet No. 7254.

¹⁵ Transition Rules Filing at 14.

¹⁶ Transition Rules Filing, Attachment 1, Market Rule 1, Section III.8.3.7.2 at 2nd Rev. Sheet No. 7246 (emphasis added).

¹⁷ *Id.*, Attachment 1, Market Rule 1, Section III.8.3.7.2.1 at 2nd Rev. Sheet Nos. 7246-47 (emphasis added).

needed for the transaction, and . . . for submitting Supply Offers, in both the ISO system and the External Control Area in such a manner that the Energy associated with the ICAP Import Contract could *actually be delivered*.”¹⁸ ISO-NE also required “[v]erification that [the external resource] has made all arrangements required by its Control Area to ensure that the Energy associated with the Resource’s Unforced Capacity sale to the New England Control Area can be delivered to the New England Control Area.”¹⁹

The Commission accepted the proposed transition rules as filed, effective on December 1, 2006.²⁰ In its only discussion of the treatment of imports as capacity resources, the Commission noted that “[i]mported capacity will be measured using the currently-effective availability provisions” rather than the weighted-EFORd measures used for other capacity resources.²¹

C. “Reservation Flexibility Changes” to Transition Period Rules for Import Capacity

On March 21, 2008, pursuant to the terms of the FCM Settlement Agreement, ISO-NE and the New England Power Pool Participants Committee (“NEPOOL”) filed proposed tariff revisions for the treatment of External Transactions during the transition period until full implementation of the FCM.²² As the Commission summarized, the filing parties sought to

¹⁸ *Id.*, Attachment 1, Market Rule 1, Section III.8.3.7.2.2(e) at 1st Rev. Sheet No. 7252 (emphasis added); *see* ISO New England Manual for Installed Capacity, Manual M-20, Rev. 22 (Jun. 6, 2008) (“Manual M-20”), § 3.8.7.2(5) at 3-22 (same).

¹⁹ Manual M-20, § 3.8.7.4(5) at 3-24; *see* ISO New England Operating Procedure No. 9, Scheduling and Dispatch of External Transactions, Rev. 8 (Oct. 1, 2008), Section V.A.12 at 8 (“ISO will verify that required transmission arrangements under Section II of the ISO Tariff are in place . . .”).

²⁰ ISO New England Inc. and New England Power Pool, 117 FERC ¶ 61,132 (2006) at P 26.

²¹ *Id.* at P 18.

²² *ISO New England Inc. and New England Power Pool*, 123 FERC ¶ 61,190 (2008) (“Reservation Flexibility Order”) at PP 1, 4.

redress the disparity between internal resources that were not required to reserve transmission service in advance and external resources that were.²³ The proposed rule changes would “allow market participants to submit transmission reservations associated with a priced external transaction supporting a capacity obligation up to an hour before it is to be scheduled in the real-time energy market, rather than at the time the external transaction is offered into the energy markets.”²⁴

These changes apparently did not apply to the Northern New York AC Interface, however, because ISO-NE treated this interface as a Pool Transmission Facility (“PTF”).²⁵ Nevertheless, even in early 2008, there were warnings that external resources might “engage in strategic bidding behavior” as a means for avoiding their capacity obligations.

[Certain transmission owners] express concern that the proposed Reservation Flexibility Changes would allow an external resource with a capacity obligation to receive capacity payments while offering inflated day-ahead and real-time energy bids, guaranteeing that its resource would not be dispatched, while also eliminating the need for the resource to reserve transmission.²⁶

The Commission dismissed this suggestion at the time because the proponents had not provided sufficient justification and because ISO-NE had delayed implementation of the new rules until July 1, 2009 “to provide the ISO’s Internal Market Monitoring Unit ([INT]MMU) with time to

²³ *Id.* at PP 7-8.

²⁴ *Id.* at P 5.

²⁵ ISO New England Open Access Transmission Tariff, Section II.44(b) at 2nd Rev. Sheet No. 558 (advanced physical reservations are not required for “external interfaces solely made up of PTF, such as the AC facilities that make up the New York/New England interface”).

²⁶ Reservation Flexibility Order at P 43 (footnote omitted).

develop a process to ensure that Market participants with External Transactions submit competitively priced energy offers in support of a Capacity Obligation.”²⁷

D. Conduct of NNY Capacity Resources and ISO-NE During the Transition Period

From the beginning of the transition period on December 1, 2006, until at least January 2009, the NNY Capacity Resources demonstrated by their conduct that they intended to collect the payments that were available to all capacity resources but never intended to perform as the rules required for import capacity suppliers. ISO-NE summarized its findings as follows:

with the commencement of the ICAP Transition Period in December 2006 and the payment structure associated with that period, Market Participants with ICAP Import Contracts typically submit high-priced (over \$660/MWh) Supply Offers over the Northern New York AC Interface, with most approaching the energy offer cap. The ISO has observed *persistent performance problems* when it has sought to dispatch high-priced energy associated with these ICAP Import Contracts. During the period from January 2005 to January 2009, every Market Participant that submitted a Supply Offer in excess of \$660/MWh over the Northern New York AC Interface failed to perform when dispatched every time (a total of 108 instances).²⁸

²⁷ *Id.*

²⁸ Tariff Revisions Regarding Competitive Offer Requirement for Capacity Imports, *ISO New England Inc. and New England Power Pool*, Docket No. ER09-873-000 (filed Mar. 20, 2009) (“2009 Transition Rules Filing”) at 4-5 (emphasis added). In a November 12, 2008 presentation to the NEPOOL Markets Committee, ISO-NE stated that “ISO has called on high priced capacity transactions [to be imported over the Northern New York AC Interface] and energy has not flowed.” Revised Capacity Import Competitive Offer Proposal, ISO-NE Presentation to NEPOOL Markets Committee Meeting (Nov. 12, 2008), available at http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2008/nov12132008/a2_iso_presentation_11_12_08.ppt (“Markets Committee Presentation”), at 2; *see* Minutes of the NEPOOL Markets Committee Meeting (Nov. 12-13, 2008), available at http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mins/2008/mc_minutes_08111213.doc (“Markets Committee November Minutes”), at 1 (“Mr. O’Connor indicated that there have been a number of transactions scheduled and not received over the Roseton tie line with the NYISO during the ICAP Transition Period”). Thus, ISO-NE has vetted its conclusions with Market Participants over several months without contradiction or objection.

(continued...)

As ISO-NE emphasized, “Market Participants with capacity obligations must provide energy when needed” in order to maintain reliability, but, contrary to the essence of the capacity obligations that they assumed, “Market Participants with high-priced energy transactions backing capacity imports have not provided energy when called upon.”²⁹ In a transparent attempt to avoid being called to perform, “[c]oncurrent with the initiation of the ICAP Transition Period” on December 1, 2006, the NNY Capacity Resources – whose offers “are not subject to energy Supply Offer mitigation” – “began submitting Supply Offers for the energy backing those imports at or near the \$1000/MWh offer cap.”³⁰ As the NNY Capacity Resources intended, their “capacity imports have been so high priced that they are seldom called upon to deliver energy,” with the “practical effect” that “New England’s electricity consumers are paying for capacity imports that are not providing the expected energy and capacity.”³¹

The NNY Capacity Resources’ conduct is unique and has “only been observed over the Northern New York AC Interface.”³² According to ISO-NE’s analysis, until December 2006, only a small quantity of NNY Capacity Resources were ICAP resources in New England, but with the advent of the FCM Transition Period, more than 500 MW of new NNY Capacity Resources chose to enter ICAP Import Contracts.³³ The quantity of opportunistic NNY Capacity

Moreover, no party in Docket No. ER09-873-000 commented on or objected to ISO-NE’s testimony about these “persistent performance problems.”

²⁹ 2009 Transition Rules Filing, Attachment 3, Joint Testimony of David LaPlante and John P. O’Connor (“LaPlante/O’Connor Testimony”) at 9:6-12.

³⁰ *Id.* at 9:16-20; *see id.* at 14:3-9 (“capacity imports are not subject to mitigation” and “are able to receive full capacity payments without offering energy competitively”).

³¹ *Id.* at 9:23-10:2.

³² *Id.* at 10:10-15.

³³ *Id.* at 12:5-11. Importers were attracted by the fixed transition payments – beginning at \$3.05/kW-month until May 31, 2008 and increasing to \$3.75/kW-month through May 31, (continued...)

Resources swelled to almost 1000 MW by the end of 2007, all of which adopted an identical strategy by pegging their obligatory offers into the energy markets to the \$1000/MWh cap.³⁴

One Market Participant apparently broke ranks slightly toward the end of 2008 and into January 2009, but about 600 MW of NNY Capacity Resources persistently offered at or near the cap.³⁵

ISO-NE's recently disclosed analysis starkly revealed the NNY Capacity Resources objective in this strategy.

From January 2005 to January 2009, the ISO requested high-priced energy associated with capacity imports during a total of 108 hours spread over 18 of the 26 months of transition period covered in the analysis. The greatest number of hours high priced energy was requested in any one month was 30 hours. On none of these occasions was the requested energy delivered.³⁶

2009 – that were easily accessible. Capacity commitments in the New York ISO control area were generally only one month, so that any resource could de-list as a capacity resource in the New York ISO and need only register with ISO-NE for a two-consecutive-month ICAP Import Contract. See Manual M-20, § 3.8.7.1 & Attachment G.

³⁴ 2009 Transition Rules Filing, LaPlante/O'Connor Testimony at 12:8-11.

³⁵ *Id.* at 12:14-13:2.

³⁶ *Id.* at 13:6-10 (emphasis in original). According to the LaPlante/O'Connor Testimony, ISO-NE included 2005 in this study, but it is clear from the data and ISO-NE's description that all of the 108 hours when the NNY Capacity Resources failed to perform occurred during the 26 months of the transition period analysis. See Markets Committee Presentation at 3 (summarizing the "Hours When ICAP Contracts Failed to Deliver High Priced Energy"); Minutes of the NEPOOL Markets Committee Meeting (Oct. 21-22, 2008), available at http://www.iso-ne.com/committees/comm_wkgrps/mrkt_comm/mrkt/mins/2008/mc_minutes_08102122.doc ("Markets Committee October Minutes"), at 8 (committee member noting "that the problem was not the high offer itself but the fact that the resources did not (or could not) deliver"). On April 21, 2009, ISO-NE issued a "press release" contending that this sworn testimony that the Vice President of Internal Market Monitoring and the Senior Market Analyst in the Market Monitoring Department filed with the Commission was actually "unintentionally misleading." See ISO New England Inc, ISO New England Issues Statement Concerning Capacity Transactions (Apr. 12, 2009), available at http://www.iso-ne.com/nwsiss/pr/2009/042109_capacity_import_filing_press_release.pdf. ISO-NE's attempt to spin the original sworn testimony from the INTMMU as "misleading" came only in response to public officials' serious concerns about the trustworthiness of wholesale markets and provokes even more serious questions about ISO-NE's apparent dispatch procedures and
(continued...)

As a consequence of this scheme, from December 2006, through January 2009, New England’s electricity customers gave the NNY Capacity Resources \$85.8 million in ICAP Payments when those supposed reliability resources were either deliberately priced so that they would not be requested to provide energy or, despite their high prices, flatly refused to perform when requested.³⁷ The NNY Capacity Resources were never penalized for their failure to perform.³⁸

V. COMPLAINT

A. The NNY Capacity Resources Acted Unjustly and Unreasonably In Violation Of FPA Section 206.

The NNY Capacity Resources violated Section 206 by entering ICAP Import Contracts and accepting New England capacity payments when they never intended to perform the obligations of capacity resources. As the Transition Rules make clear, the capacity payments that began on December 1, 2006, required ICAP resources to provide energy when ISO-NE called them and when they were needed for reliability.³⁹ As a key part of the FCM Settlement, all capacity resources receive fixed payments during the transition period with no competition based on price and no limit on the amount of capacity that will be paid. This aspect of the Agreement could only qualify as just and reasonable because the blanket payments to all installed capacity assured continued performance from existing resources and adequate reliability

about the independence of the market monitoring function. *See infra* at 24-30. At a minimum ISO-NE’s abrupt about-face highlights the need for a full-fledged investigation and hearing, with an opportunity for comprehensive discovery and determination of the facts.

³⁷ 2009 Transition Rules Filing, LaPlante/O’Connor Testimony at 13:15-20.

³⁸ *Id.* at 15:6-8.

³⁹ Transition Rules Filing, Attachment 1, Market Rule 1, Section III.8.3.7.2 at 2nd Rev. Sheet No. 7246 (“[a]n ICAP Import Contract represents a commitment by the submitting party to offer and supply firm energy to the ISO-NE Control Area from resources located in an external Control Area”).

until new capacity could be attracted through a forward auction process.⁴⁰ The entire basis for fixed, assured transition period payments collapses, however, if resources that agreed to be there when needed essentially “crossed their fingers” when they made that promise and never intended to perform at all. That is precisely what the NNY Capacity Resources did.

The evidence permits no other rational conclusion. Simultaneously with the commencement of the transition period, the NNY Capacity Resources implemented their scheme to offer their energy at prices that would rarely, if ever, be accepted. Such uncompetitive bids certainly violated the intent of the Market Rules because they effectively removed the NNY Capacity Resources’ supply from New England’s energy markets.⁴¹ Consequently, energy prices in New England were higher and less competitive than they would have been if the NNY Capacity Resources had performed reasonably as Import Capacity – *i.e.*, by giving New England first call on their energy.⁴²

Because most organized wholesale markets employ some form of price mitigation to prevent economic withholding,⁴³ the Commission has had few occasions to address a high-price bidding strategy like the one the NNY Capacity Resources used to avoid their capacity obligations. The nearest analogy was *In re Edison Mission*, 123 FERC ¶ 61,170 (2008). In that case, Edison Mission “offer[ed] its capacity resource generation units at prices near the \$1,000/MWh PJM bid cap so that they would not be taken in the PJM day-ahead (DA) market

⁴⁰ See FCM Settlement Order at P 30.

⁴¹ See Affidavit of Boris L. Shapiro, Ph. D. of Levitan & Associates, Inc. on Behalf of the Connecticut Department of Public Utility Control (Attachment B hereto) (“Shapiro Affidavit”) at 12-13, ¶ 26.

⁴² *Id.* at 15-16, ¶ 33.

⁴³ As noted *supra* at 3-4, ISO-NE took no steps until March 20, 2009, to mitigate import offers, and, thus, such bids were effectively unconstrained, permitting suppliers to exercise market power or to engage in manipulative bidding strategies.

and would instead be taken in the subsequent PJM real-time (RT) market,” which the Commission described as “the high offer strategy.”⁴⁴ Based on these facts, the Commission conducted a multi-year investigation but ultimately reached a settlement and, therefore, made “[n]o findings with respect to Edison Mission’s use of the high offer strategy.”⁴⁵ Nevertheless, the Commission reported that “Edison Mission discontinued use of this strategy in April 2006 and agree[d as part of the settlement] not to use in it in the future.”⁴⁶ The NNY Capacity Resources’ high-offer strategy was no less culpable or injurious to customers, markets, and long-term reliability.

Perhaps the most harmful violation occurred, however, when the NNY Capacity Resources executed the second element of their strategy – refusal to perform even when called.⁴⁷ At their extremely high offer prices, the NNY Capacity Resources could be assured that they would almost never be accepted. Nevertheless, when they were called, they had promised to provide their energy, the *sine qua non* of the Import Capacity Contract. The fact that ISO-NE reached such an elevated level in the supply stack demonstrated a serious shortage condition, and New England certainly needed those committed and paid-for resources to produce to maintain reliability.⁴⁸ This was precisely the circumstance for which capacity payments were tailored, and a failure to perform at this crucial juncture jeopardized the integrity of the entire system. Instead

⁴⁴ *Id.* at P 3.

⁴⁵ *Id.* at P 10.

⁴⁶ *Id.*

⁴⁷ It is irrelevant whether ISO-NE’s dispatchers actually attempted to dispatch the NNY Capacity Resources and they refused or whether the dispatchers simply checked with the resources or the New York ISO and confirmed that the NNY Capacity Resources would not be available even if formally called. The effect in either case was the same.

⁴⁸ *See Shapiro Affidavit at 13-14, ¶¶ 27-29.*

of responding as they had pledged, however, the NNY Capacity Resources consistently, repeatedly, and cavalierly disregarded their responsibilities.

This brazen misconduct cannot be justified as mere exploitation of an imperfection in the transition period rules that permitted import capacity resources to be paid while willfully withholding performance. Instead, the NNY Capacity Resources' conduct should be viewed as a failure to participate in the markets while nevertheless receiving compensation as if they were – *i.e.*, a one-sided sale of nothing. Only importers over the Northern New York AC Interface treated their capacity obligations as a sham. Other importers, operating under the same rules, apparently performed as expected and intended, thereby providing value in return for capacity payments. The NNY Capacity Resources intentionally violated the most fundamental aspect of the transition rules – that capacity payments entitled customers to energy when called, especially at times of extreme needs and high prices.⁴⁹ This is not an instance when performance was not possible because of an unexpected outage or other exigent circumstances. Nor was this an instance when the offer price was insufficient to attract economic performance. Rather, the NNY Capacity Resources determined from the beginning that they would take capacity payments, take every step to avoid being called upon to perform, and then refuse to perform when called in a crisis. This cynical disregard for the sanctity of their obligations is indisputably unjust and unreasonable, and the Commission may not turn a blind eye to such conduct.

The Commission may order retroactive refunds of capacity payments for the NNY Capacity Resources' violations of the market rules by refusing to perform as capacity resources when needed. The Commission's "discretion is at its zenith in determining an appropriate

⁴⁹ See Shapiro Affidavit at 8, ¶ 13.

remedy for violations.”⁵⁰ Thus, for violations of statutes, orders, rules, or regulations, “[t]he Commission can order, among other things, disgorgement of unjust profits.”⁵¹ Under Section 206, “the Commission clearly has authority to order disgorgement of profits associated with an illegally charged rate, *i.e.*, a rate other than the rate on file or in violation of a Commission rule, order, regulation, or tariff on file.”⁵² As the Ninth Circuit concluded in *California, ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1016 (9th Cir. 2004),

[t]he power to order retroactive refunds when a company’s non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC’s authority to approve a market-based tariff in the first instance. . . . In fact, if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory. Parties aggrieved by the illegal rate would have no FERC remedy, and the filed rate doctrine would preclude a direct action against the offending seller. That result does not comport with the underlying theory or the regulatory structure established by the FPA.

Finally, the Connecticut Representatives also request that the Commission exercise its authority under FPA Section 309 to order disgorgement of monies where price manipulation is found. *See* 16 U.S.C. § 825h; *Niagara Mohawk Power Corp.*, 379 F.2d at 158 (Section 309 is “not restricted to procedural minutiae” but “authorize[s] an agency to use means of regulation not spelled out in detail, provided the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the Act”); *Towns of Concord v. FERC*, 955 F.2d

⁵⁰ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006) (“Market-Based Rate Order”) at P 32, citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967).

⁵¹ Market-Based Rate Order at P 32, citing *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320 (5th Cir. 1993); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986); cf. *Maryland Pub. Serv. Comm’n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169 (2008) at P 51 (“[t]he Commission does not have authority to order retroactive relief unless a party violates its tariff by charging a rate other than the filed rate”).

⁵² Market-Based Rate Order at P 32 (citing *Transcontinental Gas Pipe Line Corp.*, 998 F.2d at 1320).

67, 73 (D.C. Cir. 1992) (holding that the Commission's authority to order refunds of amounts improperly collected in excess of the filed rate may be inferred from Section 309 of the Federal Power Act); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) (time limits applicable to Section 206 proceedings are not applicable to a Section 309 proceeding).

By any measure, ISO-NE has not been forthright or transparent in providing complete information about the NNY Capacity Resources' conduct. Indeed, ISO-NE has declined even to identify the NNY Capacity Resources, although that minimal information should not be considered confidential or proprietary. Thus, as a first step, the Commission should order ISO-NE to disclose critical information (under an appropriate protective order, if warranted). The Connecticut Representatives have identified in Attachment C to the Complaint a number of critical facts and documents that will be essential to assess ISO-NE's and the NNY Capacity Resources' conduct. These inquiries are not comprehensive but will provide an initial factual foundation for a further investigation.

The NNY Capacity Resources violated the tariff by posing as legitimate capacity resources and taking capacity payments when they never intended to fulfill any of the attendant reliability responsibilities. The public and electricity customers will have no faith in markets if such conduct is permitted with no more than prospective relief to close identified loopholes. Even the most exhaustively codified rules are susceptible to crafty evasion, but markets are not intended to reward skullduggery. When a Market Participant's conduct circumvents the essential purpose of the rules, it must not be permitted to retain the undeserved benefits of its conduct. As ISO-NE reported to the NEPOOL Markets Committee, it "does not see how capacity that can

only be called at a really high price can or should be paid for capacity.”⁵³ The NNY Capacity Resources must be ordered to repay at least the full amount of capacity payments they obtained unlawfully plus any other profits from their unlawful scheme.

B. The NNY Capacity Resources Manipulated New England Power Markets In Violation Of FPA Section 222.

By taking capacity payments while never intending to perform as capacity resources, the NNY Capacity Resources manipulated the New England markets, defrauded customers, and satisfied the scienter requirement for remedies under Section 222. Congress intended in Section 222 to proscribe exactly the kind of conduct described in this Complaint.

It shall be unlawful for any entity . . . , directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance . . . , in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.⁵⁴

The Commission’s rules specify the requirements for showing prohibited electric market manipulation.

- (a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,
 - (1) To use or employ any device, scheme, or artifice to defraud,
 - (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

⁵³ Market Committee October Minutes at 9.

⁵⁴ 16 U.S.C. § 824v(a).

- (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.⁵⁵

The Commission explained that it

will act in cases where an entity: (1) uses a fraudulent device, scheme or artifice, or makes a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engages in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy . . . subject to the jurisdiction of the Commission.⁵⁶

The Commission defined “fraud” “to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”⁵⁷ The Commission has since determined that “[t]here are no *per se* violations of Part 1c. Rather, all facts surrounding the conduct must be examined and all of Part 1c’s elements must be satisfied.”⁵⁸ In evaluating the facts in a particular case, the Commission will consider (1) whether the Market Participant’s actions were explicitly contemplated by the Commission; (2) whether those actions served a legitimate business purpose; (3) whether the market transactions were fraudulent or deceitful; and (4) whether the Market Participant intended to, or with reckless disregard did, manipulate electricity markets.⁵⁹

The Commission also emphasized that the Commission’s anti-manipulation authority “is independent of other provisions of the . . . FPA, including . . . FPA section 206” and applies the same requirements for filing complaints as set out in Rule 206 and the same process for handling

⁵⁵ 18 C.F.R. § 1.c.2(a).

⁵⁶ *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 (2006) (“Market Manipulation Rulemaking”) at P 49.

⁵⁷ *Id.* at P 50.

⁵⁸ *DC Energy, LLC v. H.Q. Energy Services (U.S.), Inc.*, 124 FERC ¶ 61,295, at 62,655 (2008).

⁵⁹ *Id.*

complaints, including the allocation of the burden of proof.⁶⁰ The Commission’s authority under Section 222 is parallel to its authority to remedy unjust and unreasonable rates under Section 206. The Commission expressly “reject[ed] any suggestion that the Commission cannot remedy manipulative conduct after it has occurred, such as by ordering the disgorgement of profits and/or imposing a civil penalty” because “Congress did not limit the Commission’s jurisdiction under . . . FPA section 222 to prospective conduct and associated remedies only.”⁶¹

The facts alleged in this Complaint satisfy all of the elements for Commission action under Section 222. *First*, the NNY Capacity Resources deceived customers by agreeing to be listed as New England capacity resources when they never intended to perform the required reliability functions. By accepting capacity payments under the false pretense that they would perform, they misrepresented material facts. For more than two years, they engaged in a course of business – a high-offer strategy intended to make their capacity unavailable in New England – that was designed and operated to extract payments from New England’s electricity customers while providing them nothing in return.

Second, the NNY Capacity Resources knowingly and intentionally manipulated both the capacity and energy markets. The scheme began concurrently with the start of the transition period, when capacity payments would be paid to all installed capacity, including import capacity, at a fixed rate. It then continued unabated for more than two years. The NNY Capacity Resources conspicuously refused to perform *every time* when called, thus eliminating any possibility that their derelictions might have been attributable to any exogenous factors. No other importers failed to perform in this way. This was a calculated scheme that achieved its

⁶⁰ Market Manipulation Rulemaking at P 70.

⁶¹ *Id.* at P 72.

objective – to reap the rewards of a capacity resource while shouldering none of the responsibilities.

Third, the NNY Capacity Resources actions directly impacted markets within the Commission’s jurisdiction. By only masquerading as a true capacity resource, the NNY Capacity Resources led ISO-NE and New England customers to believe that they would be available when needed to provide energy and to preserve system reliability.⁶² Had ISO-NE known that those resources were entirely untrustworthy, it would have been able to make alternative arrangements and would not have relied on them to be there. Moreover, because of their refusal to perform, ISO-NE had to resort to other, less efficient capacity resources to maintain reliability.⁶³ In addition, the NNY Capacity Resources’ high-bids that were never intended to be real offers distorted the New England energy markets, increasing the required clearing price unnecessarily.⁶⁴

Fourth, the Commission certainly did not contemplate deceitful and fraudulent conduct by import capacity that would make it worthless as a reliability resource. The entire purpose of the capacity market is to provide a stream of revenue to attract and keep generation or demand response that could maintain an adequate level of reliability. In no respect could the Commission have expected supposed capacity resources to shirk their duties as the NNY Capacity Resources did.

Finally, the NNY Capacity Resources’ actions did not serve any legitimate business purpose. Fundamentally, anything that detracts from completing voluntarily undertaken

⁶² See Shapiro Affidavit at 13-14, ¶¶ 28-29.

⁶³ See *id.* at 15-16, ¶ 33.

⁶⁴ See *id.*

obligations cannot be a “legitimate” business purpose. Once a resource commits to sell its energy in New England when needed, it forgoes any other business opportunity and must be held to its bargain. Moreover, it is inconceivable that the NNY Capacity Resources could have had a legitimate business purpose that warranted their refusal to sell their energy at their offer prices near the \$1000/MWh cap. At those prices, the NNY Capacity Resources could make enormous profits, and any failure to perform under those circumstances is inexcusable.

Commission action in this instance is particularly important. Public officials, regulators, and customers are understandably skeptical of complex electricity markets where the only protection from market power and manipulation are intricate rules that can never fully control a supplier that may be driven by an unrestrained profit motive. Merely letting ISO-NE and NEPOOL attempt once more to rectify prior omissions with even more restrictive rules that may still leave loopholes for a wily supplier will not instill the necessary confidence that is essential for properly functioning markets. The Commission must show that it will not tolerate blatant disregard for commitments and obligations, and Market Participants will not be permitted to profit from their own perfidy. The Commission should require the NNY Capacity Resources to disgorge all of their profits from either capacity payments or their high-bid energy offers and impose appropriate civil penalties that will deter such conduct in the future.

C. ISO-NE’s Market Monitoring Functions Failed In Their Primary Function To Protect Customers From Unjust And Unreasonable Practices.

ISO-NE’s market monitoring functions permitted the NNY Capacity Resources to prolong their unlawful strategies in the capacity and energy markets. Either of the only two plausible scenarios – (1) that ISO-NE’s market monitors failed to detect the NNY Capacity Resources’ abrupt adoption of a new pattern of unreasonable energy price offers in December 2006, and the repeated failures to perform, or (2) that ISO-NE’s market monitors identified NNY

Capacity Resources' unlawful strategies early on and tolerated them for more than two years without required disclosures to regulators and stakeholders – evidence the inability of ISO-NE's market monitoring functions to ensure the integrity of New England's markets. To rectify these failures, the Commission should require substantial reforms to ISO-NE's market monitoring structure to protect New England's ratepayers from unjust and unreasonable practices. As explained below, the Commission should critically assess whether ISO-NE's hybrid market monitoring structure can meaningfully support the market monitoring obligations that are an essential component of market-based rates.

ISO-NE's hybrid market monitoring structure is particularly vulnerable to conflicts of interest between ISO-NE's management and its market monitoring function. ISO-NE's governance structure makes the market monitoring function subordinate to ISO-NE's management interests. Even compliance with Order No. 719 – which continues to permit hybrid market monitoring functions where an internal monitor retains principal responsibility – will not remedy this structural problem. In fact, ISO-NE's market monitoring reforms seem more designed to achieve paper compliance than to effectuate meaningful reform.

As more than two years of NNY Capacity Resources' anomalous bidding behavior and conduct has made clear, ISO-NE's market monitoring functions have not given ratepayers confidence that anyone is scrutinizing New England's wholesale markets with the requisite diligence. Under its current business practices, ISO-NE's market monitoring functions are parceled between its internal ISO-NE staff and an external consultant.⁶⁵ With this division of

⁶⁵ Participants Agreement Among ISO New England Inc., New England Power Pool, and Individual Participants (Jan. 24, 2005), § 9.4.2 (ISO-NE market monitoring and market power functions fulfilled “though an internal market monitoring unit [] reporting to the
(continued...)

labor, the ISO-NE Internal Market Monitoring Unit (“INTMMU”) takes on the primary decision-making in developing and maintaining the Market Monitoring and Mitigation Plan, executing mitigation operations, reporting to ISO-NE, and determining what information to disseminate to regulators and stakeholders. The Independent Market Monitoring Unit (“IMMU”) is an external consultant with a far less prominent role in day-to-day operations, merely providing advice to the INTMMU and to ISO-NE. Although the IMMU is required to “promptly inform” the state public utility commissions, the Commission, and other stakeholders if it identifies any problems with New England markets, the INTMMU is designated as the “primary” organization to interact with these entities.⁶⁶ As this case demonstrates, however, ISO-NE’s market monitoring function delayed identifying or disclosing this scheme and allowed it to persist without notifying interested parties. Its failure, for whatever reason, demonstrates that the hybrid market monitoring function does not provide an effective market watchdog, does not operate independently from ISO-NE management, and has not exposed market abuse and market design flaws.

The structural changes to its market monitoring that ISO-NE will file in its Order No. 719 compliance filing later this month will not rectify the core deficiencies that permitted the NNY Capacity Importers to violate the tariff and defraud customers for more than two years. ISO-NE intends only to make changes to its tariff that are necessary for compliance with Order No. 719,

ISO Chief Executive Officer and the ISO Board and by contracting with an independent market monitoring unit [] selected by and reporting to the ISO Board”).

⁶⁶ Compare *id.*, § 9.4.3(a) (IMMU is required to “promptly inform” the Commission, ISO Board, state public utility commissions and governance participants whenever it “uncovers problems with the New England Markets”) with *id.*, § 9.4.4(h).

“*i.e.*, nothing beyond compliance with as few changes as possible.”⁶⁷ In fact, by focusing on technical compliance instead of implementing the Commission’s intent in adopting the Order No. 719 reforms, ISO-NE’s planned compliance filing actually weakens the market monitoring function by creating even less independence and transparency than before.

For example, in attempting to conform with Order No. 719, ISO-NE’s internal market monitor will continue to execute all the mitigation functions, but the IMM’s role will now be limited to a “review [of] the quality and appropriateness of mitigation performed by the [INTMMU].”⁶⁸ Thus, the IMM will not even be consulted about a mitigation, and its role will be limited to reviewing “quality and appropriateness” of the INTMMU’s already executed decisions.⁶⁹ The IMM will be fully excluded from the earliest and most important decision-making processes, *i.e.*, whether market data should be reviewed and how the analysis should be performed and whether a market participant may be engaging in a pattern of behavior that should be investigated. Because the “go” or “no-go” monitoring decisions will be made internally by ISO-NE, its market monitoring function will be less independent than before.

ISO-NE must take more resolute steps to address the market monitoring failure that precipitated this Complaint. *First*, the external market monitoring function must have real

⁶⁷ Minutes of the NEPOOL Markets Committee Meeting (Mar. 10, 2009), available at http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mins/2009/mc_minutes_090310.doc, at 4; *id.* at 5 (“we do not think we can make these non-compliance changes in this filing”).

⁶⁸ ISO New England Inc., Memorandum to NEPOOL Markets Committee from D. LaPlante re: Appendix A Revisions for Order 719 – Overview of significant changes (Mar. 6, 2009) at 1, available at http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2009/mar102009/a4_iso_memo_03_06_09.doc.

⁶⁹ Market Rule 1, Revised Appendix A, Section III.A.2.2(d) at 1st Rev. Sheet No. 7410, available at http://www.iso-ne.com/committees/comm_wkgrps/mrks_comm/mrks/mtrls/2009/mar102009/a4_mr_1_app_a_redlined_03_04_09.doc.

authority and must be fully independent from ISO-NE. ISO-NE's hybrid structure of market monitoring function leaves principal authority with the INTMMU and relegates the IMMU to a titular role. Only a single, consolidated market monitoring body, organized as a separate legal entity, can act forcefully to protect market integrity.⁷⁰ By keeping the market monitoring function separate from ISO-NE's business operations – *i.e.*, with its own employees, compensation plan, and equipment – the Commission can assure the necessary autonomy for the market watchdog.

Second, the Commission should substantially curtail the ISO-NE Board's current control over the market monitoring function. While the market monitor should report to the Board, the market monitoring function should not be subjected to the direction or supervision of the Board or any of its members. The ISO-NE Board's oversight should be limited to (1) reviewing the budget of the market monitoring contractor and (2) requesting Commission approval to terminate the market monitor for cause, renew the market monitoring contract for another term or replace the market monitor with another contractor.⁷¹ No member of the ISO-NE Board should have the right to review, screen, alter, delete or exercise editorial control over any market monitoring actions or investigations or the findings, conclusions, and recommendations that are developed

⁷⁰ The recent reorganization of the PJM Interconnection's market monitoring function is a reasonable prototype for a fully independent market monitoring function.

⁷¹ *See, e.g.*, Settlement Agreement and Explanatory Statement of the Settling Parties, *Allegheny Elec. Coop., Inc. v. PJM Interconnection, L.L.C.*, Docket Nos. EL07-56-000, *et al.*, EL07-58-000, *et al.* (filed Dec. 19, 2007) ("PJM Settlement"), Attachment 1, Explanatory Statement, at 7, and Attachment 2, Settlement Agreement, Tariff Revisions at 448; *id.* at 448.02-.04 (standards and process for proposed termination and replacement).

by the market monitor.⁷² The Board should not interfere with the market monitor's independent participation in Commission proceedings.

Third, the market monitor should provide independent advice and opinions in Commission and NEPOOL forums. In addition to participating in the NEPOOL stakeholder process as appropriate, the market monitor should chair a Market Monitoring Advisory Committee to enhance communications between the market monitor and interested parties.⁷³ This Committee should meet regularly to discuss any matters relating to the market monitoring function and should be open to all stakeholders and representatives of state regulatory agencies and other authorized government representatives.

Fourth, the market monitor should meet regularly and otherwise as necessary with the New England Conference of Public Utilities Commissioners ("NECPUC") to discuss market monitoring, to report on the functioning of New England wholesale markets, and to provide opinions on the functionality and design of New England wholesale markets.⁷⁴ Upon the request of NECPUC or individual state commissions, the market monitor should provide studies or reports on wholesale market issues, including wholesale market transactions occurring under a state-administered auction process in the New England area.⁷⁵ Any request and any study or report should be made publicly available, subject to protection of confidential information. If the

⁷² See, e.g., PJM Settlement, Attachment 2, Settlement Agreement, Tariff Revisions at 448. For example, ISO-NE's contract with its IMMUs requires that the IMMUs provide to the Office of General Counsel copies of powerpoints to be distributed to the Markets Committee meetings eight days prior to each meeting, presumably for review and comment.

⁷³ The Market Monitoring Advisory Committee will not have authority to direct, supervise, review, or otherwise interfere with market monitoring functions. See, e.g., PJM Settlement, Attachment 2, Settlement Agreement, Tariff Revisions at 448.04.

⁷⁴ *Id.*

⁷⁵ *Id.* at 448.06.

market monitor discovers evidence of misconduct by market participants that the market monitor reasonably believes to be within a state commission's jurisdiction, the market monitor should promptly report such information to the state commission.⁷⁶

The Commission should demand to know why it took ISO-NE's market monitoring function more than two years to disclose or take action to correct the NNY Capacity Importers' high-handed disregard for market rules – *i.e.*, taking capacity payments but never intending to perform. Whether market monitoring failed to detect these patterns, did not adequately review or understand available data, or, for whatever reason, neglected to disclose this fraud on consumers, ISO-NE's market monitoring failed its most basic functions. In light of these failures, the Commission should establish hearing procedures to determine what structural reforms are necessary to assure that ISO-NE's market monitoring function effectively protects market integrity going forward.

VI. RULE 206(b) REQUIREMENTS

As required by Rule 206(b) of the Commission's Rules of Practice and Procedure,⁷⁷ the Connecticut Representatives also submit the following:

A. Rule 206(b)(1): Action Or Inaction Alleged To Violate Statutory Standards Or Regulatory Requirements.

As described more fully in Section V of the Complaint, the Connecticut Representatives allege that the NNY Capacity Resources' high-offer strategy and their scheme to take capacity payments but to avoid performing as capacity resources manipulated New England's capacity and energy markets and thereby violated FPA Sections 206 and 222, Part 1c of the

⁷⁶ *Id.*

⁷⁷ 18 C.F.R. § 385.206(b).

Commission's Rules and Regulations, and the tariff provisions that govern capacity obligations during the transition period since December 1, 2006.

B. Rule 206(b)(2): Legal Bases For Complaint.

As described more fully in Section V of the Complaint, the NNY Capacity Suppliers deceived and defrauded customers by taking capacity payments when they never intended to perform as capacity resources. Such conduct is unjust and unreasonable, violates the applicable tariff, and constitutes unlawful manipulation under the Commission's Rules and Regulations. Moreover, ISO-NE's failure to address and redress the conspicuous nonperformance by the NNY Capacity Resources demonstrates fundamental flaws in its market monitoring function that make those provisions in its tariff unjust and unreasonable.

C. Rule 206(b)(3): Issues Presented As They Relate To The Complainant.

As described more fully in Section V of the Complaint, the issues presented in the Complaint include:

1. Whether the NNY Capacity Resources' conduct was unjust and unreasonable in violation of FPA Section 206;
2. Whether the NNY Capacity Resources violated the tariff by agreeing to accept the obligations of a capacity supplier and accepting capacity payments but never intending to perform as capacity suppliers when needed;
3. Whether the NNY Capacity Resources unlawfully manipulated the capacity and energy markets and deceived customers in violation of FPA Section 222 and Part 1c of the Commission's Rules and Regulations; and
4. Whether ISO-NE's conduct in permitting the NNY Capacity Resources to continue their unlawful scheme for more than two years demonstrates that its

market monitoring functions, as implemented, are unjust and unreasonable and require modification to assure independence and diligent identification and remediation of unjust or unreasonable conduct by market participants.

D. Rule 206(b)(4): Quantification Of Financial Impact On Complainant.

As ISO-NE concluded unequivocally in its 2009 Transition Rules Filing,

New England electricity customers have paid a total of \$85.8 million in ICAP Payments for capacity imports for which Market Participants offered energy above \$660/MWh over the period from December 2006 through January 2009. This figure consists of capacity payments to Market Participants whose associated energy was never requested due to high-priced energy Supply Offers, or whose high-priced energy was requested but not delivered.⁷⁸

Thus, New England's load-serving entities – and, ultimately, retail customers – paid at least \$85.8 million for capacity that the NNY Capacity Resources never intended to provide, and customers received nothing for their money. The Commission should order disgorgement of those payments. Because the NNY Capacity Resources also affected the energy market through their high-price strategy, they should also be required to make customers whole for their distortion of energy prices, although the amount of this injury cannot currently be quantified.

E. Rule 206(b)(5): Non-Financial Impact On Complainant.

The NNY Capacity Resources' conduct has undercut confidence in ISO-NE's electricity markets generally. Public officials, regulators, and customers cannot trust supposedly competitive markets when some market participants can manipulate the outcome to their financial benefit but suffer no penalties or sanctions. Moreover, the fact that this conduct went unchecked for more than two years shakes any confidence in the

⁷⁸ 2009 Transition Rules Filing, LaPlante/O'Connor Aff. at 13:15-20.

viability of a market monitoring process that does not actually protect customers from unreasonable and unlawful practices. Unless the Commission takes forceful action to show that it will not tolerate such market manipulation, customers and public officials will have no reasonable option but to seek alternatives to these ineffective markets.

F. Rule 206(b)(6): Related Proceedings.

On April 20, 2009, Richard Blumenthal, Connecticut's Attorney General, filed a complaint based on the same conduct by the NNY Capacity Resources. *Blumenthal v. ISO New England Inc.*, Docket No. EL09-47-000 (filed Apr. 20, 2009). The Connecticut Representatives are simultaneously moving with the Connecticut Attorney General for consolidation of these two complaint proceedings.

G. Rule 206(b)(7): Relief Requested.

The Connecticut Representatives request (a) a full and complete public hearing to investigate and disclose the extent of the NNY Capacity Resources' market manipulation and tariff violations and how these practices were permitted to persist for more than two years; (b) disgorgement of all capacity payments made to the NNY Capacity Resources since December 1, 2006, (c) an order requiring the NNY Capacity Resources to make customers whole for any injury caused by their high-offer strategy, (d) penalties to be levied against the NNY Capacity Resources for market manipulation, and (e) modifications to the structure of ISO-NE's market monitoring functions to ensure independence and diligent protection of customers and competitive markets.

H. Rule 206(b)(8): Documents Supporting The Facts Of The Complaint.

As part of this Complaint, the Connecticut Representatives attach the following documents, which they contend support the facts and legal arguments presented in the Complaint:

1. Attachment A – Form of notice for publication;
2. Attachment B – Affidavit of Boris L. Shapiro; and
3. Attachment C – List of questions for ISO-NE.

I. Rule 206(b)(9): Informal Dispute Resolution.

For more than two years, ISO-NE's Market Monitoring function either failed to detect this unlawful and manipulative scheme or turned a blind eye to it. It was not until March 20, 2009, that ISO-NE proposed to revise its market rules. The Connecticut Representatives have no reason to believe that informal dispute resolution efforts would persuade ISO-NE to reform its market mitigation functions to protect customers or to persuade the NNY Capacity Resources to make customers whole. Considering the gravity of the concerns raised, the futility of further persuasion, and the urgent need to restore confidence in the markets, expediency in getting this issue before the Commission without the delay inherent in informal dispute resolution procedures is essential. In addition, alternative dispute resolution under the Commission's supervision is unlikely to assist the parties in their efforts to resolve the issues set forth in this Complaint, and mediation of the legal issues raised in this Complaint would be ineffective.

J. Rule 206(b)(10): Form Of Notice Suitable For Publication.

Attachment A hereto is a form of notice suitable for publication in the Federal Register, submitted as a separate electronic file as well.

K. Rule 206(b)(11): Fast Track Processing.

Commission regulations provide for Fast Track processing of complaints if complainants demonstrate “why the standard processes will not be adequate for expeditiously resolving the complaint.”⁷⁹ This complaint requires Fast Track processing.

For over two years, New England’s customers have been unknowing victims of a manipulative and unlawful scheme that ISO-NE’s market monitor either failed to detect or permitted to continue without disclosure. NNY Capacity Resources’ scheme to take capacity payments without ever intending to provide any capacity services when called upon, ISO-NE’s market monitors’ failure to perform its watchdog function, and ISO-NE’s denial of any problem at all has seriously undermined customer confidence in the efficiency and fairness of the markets and the ability of the market monitor to function independently and effectively.

Ensuring market credibility is an essential part of the Commission’s role in protecting the consumer from exploitation by non-competitive electric power companies.⁸⁰ Until the NNY Capacity Resources’ fraud is exposed and the Commission brings an end to this unlawful activity, customer confidence will continue to deteriorate. Expeditious Commission action is imperative to show that neither the Commission nor the competitive markets tolerate supplier fraud and to restore consumer trust in the markets. For these reasons, the Commission should grant the request for Fast Track processing of this Complaint pursuant to Rule 206h.⁸¹

⁷⁹ 18 C.F.R. § 385.206(b)(11).

⁸⁰ *See NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *aff’d*, 425 U.S. 662 (1976).

⁸¹ 18 C.F.R. § 385.206(h).

VII. CONCLUSION

The conduct by the NNY Capacity Resources and ISO-NE threaten the fundamental underpinnings of trust in wholesale markets. The Connecticut Representatives urge the Commission to accept the Complaint for fast track processing, to establish hearing procedures, and to conduct an exhaustive investigation that will permit a thorough assessment of the facts. ISO-NE may contend that its prior sworn testimony was “mistaken” and that there was never any problem at all, but the Commission should not decide this crucial matter on the basis of incomplete or disputed material facts. Connecticut’s regulators, customer representatives, and customers themselves deserve a full examination, a comprehensive evaluation, and complete remedies for unjust, unreasonable, and unlawful conduct.

Date: April 23, 2009

Respectfully submitted,

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Attachment A

to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the “eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, D.C. There is an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on April __, 2009.

Kimberly D. Bose
Secretary

Attachment B

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I. INTRODUCTION

1. My name is Boris L. Shapiro, Ph.D. I am an Executive Consultant at Levitan & Associates, Inc. (LAI). My business address is 100 Summer Street, Suite 3200, Boston, MA 02110.

2. LAI is a management consulting firm that specializes in the energy industry. LAI performs resource planning, market analysis, wholesale power procurement, system operations, valuations, and other studies pertaining to competition for market participants throughout North America. LAI has represented Independent System Operators in the greater Northeast, including ISO-New England (ISO-NE). On behalf of the Connecticut Department of Public Utility Control (the Department), LAI has oversight responsibility for the procurement of wholesale power supplies for Standard Service and Supplier of Last Resort Service. LAI has also provided the Department with technical assistance regarding the selection of new peaking generation in Connecticut to meet ISO-NE's Locational Forward Reserves Requirement.

3. I have over 30 years of experience in the energy industry. I have international and domestic experience providing technical and commercial advice to state regulatory commissions, electric utilities, and ISOs on diverse matters pertaining to wholesale market design, resource planning, and transmission reliability. Prior to LAI, I was employed by the Massachusetts Department of Public Utilities where I participated in the development of the Forward Capacity Market (FCM) and, as a member of the regional Planning Advisory Committee, in the New England Regional System Planning process. I have also worked for the PA Consulting Group. I received my M.S. degree in Electrical and Mechanical Engineering from the Moscow Power Engineering

Institute, and a Ph.D. in Electric Power from the Russian Electric Power Research Institute.

4. The purpose of this Affidavit is to analyze the ISO-NE market rules regarding external capacity resources, analyze the price offering strategy and energy delivery patterns employed by external capacity resources that had committed to provide capacity over the Northern New York AC Interface (NNY Capacity Resources), and assess whether the NNY Capacity Resources that collected \$85.8 million in ISO-NE ICAP payments for the period from December 2006, to January 2009, met the requirements for compensation during the FCM Transitional Period.

II. SUMMARY OF CONCLUSIONS

5. All capacity resources receiving capacity payments under the New England ICAP Transitional Period rules are contractually required to participate in the ISO-NE energy markets. This obligation requires capacity resources to supply associated energy in order to maintain system reliability in New England. The consistent submissions of high-priced offers by the NNY Capacity Resources were not supported by any economic rationale. Instead, the apparent objective of the high-priced offering strategy was to allow the NNY Capacity resources to avoid their responsibilities to participate in ISO-NE's energy market.

6. The NNY Capacity Resources circumvented a major principle set forth in the FCM Settlement Agreement as related to the ICAP Transitional Period that requires capacity resources to support the reliability of the ISO-NE power system. The NNY Capacity Resources failed to supply energy when needed and, therefore, did not support system reliability. In addition, the NNY Capacity Resources failed to operate and

support the New England system during the periods of high demand when there was a shortage of capacity.

7. NNY Capacity Resources imposed higher costs on New England customers under economic dispatch principles. By not providing energy when called on by ISO-NE to do so, ISO-NE would have had to call upon more expensive resources, thereby raising the market price paid to all generators. If NNY Capacity Resources had not inflated their offers and offered at reasonable level, ISO-NE would not have needed other more expensive resources, and the clearing prices would have been lower.

III. BACKGROUND INFORMATION

A. ISO-NE and NEPOOL Filing in ER09-873-000

8. On March 20, 2009, ISO-NE and New England Power Pool (NEPOOL) jointly submitted to FERC revised tariff sheets regarding competitive offer requirements for energy transactions associated with ICAP Import Contracts, *i.e.*, Docket No. ER09-873-000. The submission included a filing letter and the joint testimony of David LaPlante and John O'Connor, both from ISO-NE's Market Monitoring Department (the LaPlante/O'Connor Testimony). According to the ISO-NE and NEPOOL filing, ISO-NE has found that, with the commencement of the ICAP Transitional Period¹ NNY Capacity Resources typically submitted high-priced (over \$660/MWh) energy Supply Offers over the NNY AC Interface, with most approaching the energy offer cap.² ISO-

¹ The ICAP Transitional Period started in December 2006 in accord with the FCM Settlement Agreement that established major principles for the FCM.

² The energy offer cap is set at \$1000/MWh.

NE has observed persistent performance problems when it has sought to dispatch high-priced energy associated with these NNY Capacity Resources. According to the ISO-NE and NEPOOL filing, ISO-NE requested high-priced energy associated with the NNY Capacity Resources over 18 of the initial 26 months of the ICAP Transition Period for a total of 108 hours. On none of these occasions was the requested energy delivered (LaPlante/O'Connor Testimony at 13).³

9. ISO-NE's Internal Market Monitoring Unit (INTMMU) has identified three key concerns regarding the market rules governing energy transactions associated with ICAP Import Contracts: (1) no requirement is applied to imports to ensure competitiveness of their energy offer prices; (2) inadequacy of the penalty structure for failure to deliver as applied to the imports; and (3) the lack of incentives to offer energy competitively and limited incentives to deliver energy when requested. These concerns resulted in no meaningful obligation for the NNY Capacity Resources to competitively offer and deliver energy during the ICAP Transition Period.

10. ISO-NE calculated that New England electricity customers paid a total of \$85.8 million in ICAP payments for capacity from the NNY Capacity Resources over the period December 2006 through January 2009. ISO-NE notes that this figure consists of capacity payments to the NNY Capacity Resources whose associated energy was

³ On April 21, 2009, ISO-NE issued a press release admitting a "mistake" in its March 20, 2009 filing. Upon closer examination, ISO-NE's press release now contends that delivery of energy was required neither for reliability nor for economic reasons because other less expensive resources were available. For purposes of my affidavit, however, I have accepted ISO-NE's sworn testimony rather than its contradictory press release.

never requested due to high-priced energy Supply Offers or whose high-priced energy was requested but not delivered.⁴

11. In order to address the INTMMU concerns, ISO-NE jointly with NEPOOL proposed market rule changes. In particular, the rule changes establish a new requirement that Market Participants submit energy offers associated with ICAP Import Contracts at prices that are competitive. In addition, the rule changes establish an objective methodology to calculate competitive offer levels for energy transactions associated with ICAP Import Contracts. Finally, the rule changes revise the performance penalty structure. ISO-NE and NEPOOL requested that the Commission accept the rule changes and make them effective on or after July 1, 2009.

B. Overview of ISO-NE Market Rules on ICAP Transition Period Payments

12. The principles for setting the rates and rules governing capacity payments in New England for the period from December 2006, through May 2010, were established in the context of the FCM Settlement Agreement. In 2006, a number of stakeholders developed the concept and agreed on the major FCM principles.⁵ Due to certain timing constraints, the FCM initial commitment period could not start prior to June 2010. In the interim, in order to maintain system reliability by retaining existing capacity resources, the settling parties agreed to establish a rate schedule and a set of rules for the ICAP Transition Period that started on December 1, 2006 and is scheduled to end on June 1, 2010.

⁴ Id. at 13.

⁵ Explanatory Statement in Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues, *Devon Power LLC*, Docket Nos. ER03-563-000, -030, and -055 (March 6, 2006).

13. The ICAP Transition Period payment rate schedule was a result of negotiations between the settling parties. The parties recognized the importance of the transition period payments. It was a common understanding that the ICAP Transition Period market rules would be developed to ensure that the main purpose of the capacity payments, *i.e.*, maintaining system reliability, is fulfilled. One important parameter designed to ensure system reliability was the availability of the resources and their actual performance in the energy markets, particularly during periods of capacity scarcity, high demand, or capacity deficiency (*e.g.*, Operating Procedure 4 (OP4) events).

14. Energy supply obligations during the ICAP Transition Period applicable to the ICAP Import Contracts are clearly established in Market Rule 1. An ICAP Import Contract represents a commitment by the submitting party to offer and supply firm energy to the ISO-NE Control Area from resources located in an external Control Area.⁶

15. ICAP Import Contracts' scheduling process and energy market requirements are specified in Manual M-20. In particular, market participants with ICAP Import Contracts are required to properly enter daily external transactions for the Day-Ahead (DA) Energy Market and the Real-Time (RT) Energy Market into the energy scheduling system in support of the ICAP import. The market participant has an option either to self-schedule or to price the energy associated with a particular ICAP Import Contract.⁷

⁶ Market Rule 1, Section III.8.3.7.2.

⁷ Manual M-20, Section 3.8.7.

IV. ANALYSIS

A. NNY Capacity Resources' Energy Market Offering Strategy

16. The LaPlante/O'Connor Testimony distinguishes high-priced and low-priced energy supply offers based on whether they are below or above a cut-off level of \$660/MWh. The cut-off price was determined based on a 22,000 Btu/kWh heat rate and a fuel price of \$30/MMbtu.⁸ Any offer above the cut-off level would be categorized as a high-priced offer, while any offer below the cut-off value would be a low-priced offer.

17. Based on the ISO-NE analysis presented in its March 20, 2009 filing, all of the high-priced offers placed by the NNY Capacity Resources between December 2006, and January 2009, were greater than \$800/MWh and during most of the months the price was essentially at the \$1,000/MWh offer cap.⁹

18. To better understand whether the NNY Capacity Resources' energy price offers were economically rational, it is useful to compare the NNY Capacity Resources' energy price offers with the Locational Marginal Prices (LMPs) at the NY-NE AC External Node over the same period of time. According to the ISO-NE INTMMU 2007 Annual Markets Report, the Maximum On-Peak RT and DA LMP values at the NY-NE AC External Node were \$329/MWh and \$200/MWh, respectively, for the period from January to December 2007.¹⁰ The off-peak hours' LMPs were even lower.¹¹

19. It is highly unlikely that a market participant whose objective is to clear in the DA or in the RT Energy Market would consistently submit price offers significantly

⁸ LaPlante/O'Connor Testimony at 11.

⁹ Id. at 12; see also Figure 1 on the same page.

¹⁰ ISO-NE INTMMU 2007 Annual Markets Report, Table A-3 at 183.

¹¹ Id., Table A-4 at 184.

exceeding the maximum LMP values. Based on the comparison of the maximum LMP values at the NY-NE AC External Node to the NNY Capacity Resources' energy price offers, it is reasonable to conclude that the objective of the NNY Capacity Resources' offering strategy was to ensure that they would never clear in the ISO-NE energy market. While they may have submitted their energy price offers as a formality to comply with the requirements for ICAP Import Contracts, it appears that they had no intent to actually supply energy under any system conditions.

20. To further explore whether there is any rational explanation of the NNY Capacity Resources' offering strategy, it is helpful to investigate any significant energy price differentials between NNY and New England. It may be economically inefficient to offer energy in New England at a low price at the time when the energy prices in NNY are substantially higher. This economic efficiency principle is recognized by ISO-NE. According to the proposed market rule changes, ISO-NE would not penalize the imports that failed to supply energy during the hours when the energy prices in the neighboring exporting area are higher than in New England.¹²

21. The Independent Market Monitoring Unit (IMMU) analyzed scheduling of imports and exports between New England and adjacent regions, including New York.¹³ The IMMU observed that flows across the NNY AC interface tend to flow into New York during on-peak periods and into New England during off-peak periods. In general, New England is a net importer of power from adjacent areas.¹⁴

¹² See LaPlante/O'Connor Testimony at 25-26.

¹³ 2007 Assessment of the Electricity Markets in New England, Potomac Economics, June 2008.

¹⁴ Id. at 31.

22. It may be unreasonable to expect that a NY resource, albeit with the New England ICAP obligation, would want to clear in the ISO-NE energy market if revenue expectations in the NY energy market were higher. As the IMMUNotes, there are transaction costs associated with scheduling imports and exports that somewhat offset the energy revenues earned in the adjacent control area. Participants are not expected to schedule additional power between regions unless they expect a price difference greater than these transaction costs. Also, risks associated with curtailment and congestion reduce participants' incentives to pursue external transactions when the expected price difference is small.¹⁵ However, the historical data show that in many off-peak hours energy prices in New England significantly *exceeded* the price in New York, making imports into New England economically attractive for importers.

23. The historical LMP data in NNY and in New England indicate that the energy price differentials have been both positive and negative. These differentials affect the direction of scheduled flows in the DA and RT markets, by increasing net flows scheduled into the higher priced region. Review of the IMMUNotes 2007 Assessment of the Electricity Markets in New England report suggests that market participants (apparently with the exception of the NNY Capacity Resources) generally help improve the convergence of prices between regions, although the arbitrage of prices is far from complete.

24. Offering at or near the offer price cap of \$1000/MWh, NNY Capacity Resources appear to have completely ignored price differences in NNY and ISO-NE that affected the direction of the power flow. This price offering strategy does not

¹⁵ Id. at 33.

appear to have been economically driven and cannot be justified by consistently higher energy prices in NNY compared to New England as that was not the case.

25. Economically rational behavior of an NNY Capacity Resource would have been to offer in the ISO-NE DA Energy Market as required and deliver, if scheduled. If not scheduled in the ISO-NE DA market, the NNY Capacity Resources would have had another option to offer and clear in the RT market, or to self-schedule and be a price-taker. In fact, according to ISO-NE, other importers' price offering strategy has been completely different from the strategy of the NNY Capacity Resources. Other importers offered, cleared, and delivered energy, consistent with economically rational behavior discussed above.

26. It is hard to believe the NNY Capacity Resources deliberately acted irrationally against their financial interests. It is possible that their high-priced offering strategy was a trade-off to minimize risks associated with curtailment and congestion and avoid transaction costs associated with scheduling of the imports into ISO-NE. It appears that the NNY Capacity Resources would have disregarded the potential gain from selling energy into ISO-NE at times when it would have been economic to do so. What is more troublesome is the NNY Capacity Resources ostensible disregard for the ICAP Transition Period rule requiring participation in the ISO-NE energy market in return for the perception of lower exposure to the risks associated with being involved in the inter-regional energy transactions. The particular mechanism NNY Capacity Resources selected for implementing this strategy, *i.e.*, offering at or near the cap, effectively resulted in withdrawing their generation from the ISO-NE energy markets, including periods of capacity shortage, high demand, and even OP4 events. This raises

the more fundamental question of whether the NNY Capacity Resources were even capable of supplying energy when required.

27. There were five OP4 events in 2007 and in 2008 that affected the entire New England control area: February 10, 2007, August 2, 2007, September 8, 2007, December 1, 2007, and May 8, 2008. Any additional available resources during capacity shortage would have been helpful in supporting reliability of the system. It appears that the NNY Capacity Resources did not contribute to the reliability of the New England system during each of the OP4 events. My review of the Major Emergency Events in NYISO shows that no emergency conditions existed in NYISO control area at the time when the OP4 events were declared by ISO-NE. Had this been the case, it might help explain why the NNY Capacity Resources were prevented from supporting the ISO-NE system.¹⁶ However, the record shows that there were no simultaneous Emergency Events in NYISO when ISO-NE declared OP4 events in New England.

B. Reliability Impact of NNY Capacity Resources' Offering Strategy

28. ISO-NE states that the purpose of purchasing capacity is to assure that the region has the resources it needs to maintain reliability.¹⁷ Furthermore, ISO-NE confirms that to maintain reliability, Market Participants with capacity obligations must provide energy when needed.¹⁸ In none of the 108 hours when ISO-NE needed high-priced energy from the NNY Capacity Resources did they deliver. It is more likely than not that during those 108 hours, the high-priced energy offers were economic, or were

¹⁶ http://www.nyiso.com/public/market_data/reports/major_emergency_events.jsp.

¹⁷ LaPlante/O'Connor Testimony at 9.

¹⁸ Id.

expected to be economic; otherwise, ISO-NE would not have even considered them for scheduling. Although ISO-NE has not identified the specific times for those 108 hours, some of them may have coincided with the capacity scarcity conditions and OP4 events. ISO-NE relies on the capacity resources that are considered available, especially during scarcity periods. NNY Capacity Resources' consistent failure to deliver during the 108 hours is particularly disturbing because withdrawal of a capacity block as big as 1000 MW from the relatively small energy system like New England during the period of capacity scarcity could potentially result in involuntary load shedding or, in the worst case scenario, a blackout. I presume that ISO-NE dispatchers managed to avoid trouble by activating other resources that were available in lieu of the "phantom" NNY Capacity Resources. Luckily, ISO-NE was able to rely on other generating capacity and demand resources to ensure reliable operation.

29. Although ISO-NE has provided insufficient evidence to determine whether the NNY Capacity Resources' failure to offer at a lower price in the New England energy markets detrimentally affected reliability of the ISO-NE system, there is no doubt that the NNY Capacity Resources did not contribute to the reliability of the system. Failure to support the reliability of the ISO-NE system violates a major objective of the ICAP transitional period payments. The NNY Capacity Resources collected about \$85 million in the ICAP payments and failed to support system reliability in return.

C. Economic Impact of NNY Capacity Resources' Offering Strategy

30. ISO-NE clears the DA and RT energy markets in accordance with the Security Constrained Economic Dispatch principles. Based on the DA supply offers

and demand bids, ISO-NE constructs aggregate supply and demand curves. The intersection of these curves identifies the market-clearing price, or LMP, for each location every hour. Supply offers below the identified locational price and demand bids above the locational price “clear,” or are scheduled. Transmission losses and constraints are included in the market clearing process, ensuring that the schedules that result can be supported by the New England transmission system.

31. After the DA market clears and its results are published, a two-hour re-offer period commences beginning at 4:00 p.m. the day before the operating day. When the re-offer period closes, ISO-NE performs a reliability assessment using unit commitment software. In real-time, generators can also deviate from the day-ahead clearing schedule by submitting a request to “come on” in any hour not cleared in the day ahead through a self-commitment and self-schedule submittal, or ask to “stay off” in any hour even if they have already cleared day ahead. These requests require approval from ISO-NE based on a reliability assessment.

32. Market Participants are allowed to offer or request imports and exports of electricity from neighboring control areas with at least one hour’s notice. In real-time, ISO-NE issues “dispatch rates” and dispatch targets to balance real-time supply and demand. This results in five-minute price signals based on the aggregate offers of generators, and which will produce the required energy production. Transmission losses and limits are included in the real-time five-minute dispatch.

33. The energy supply curve is typically steeply sloped at the high end corresponding to the high-priced offers. If a resource whose energy offer is priced relatively high is not available, ISO-NE has to replace it with another resource, typically

one that is much more expensive. If the NNY Capacity Resources had submitted reasonably priced offers, presumably much lower than the \$660/MWh cut-off price, they could have been dispatched instead of more expensive resources, and the LMP values in New England would have been lower than they actually were. Thus, it is reasonable to conclude that the high-priced offers consistently submitted by the NNY Capacity Resources resulted in economically inefficient dispatch.

I declare under penalty of perjury that the foregoing is true and correct.

Date: April 23, 2009


Boris L. Shapiro

Attachment C

List of Questions for ISO-NE

1. Please identify each of the 108 hours that are referenced in the LaPlante/O'Connor Testimony at 13:4-10 ("the 108 hours") filed in FERC Docket No. ER09-873-000, including at least the following information for each hour:
 - a. The date and time of the referenced hour;
 - b. Any relevant system conditions (*e.g.*, weather, load, transmission constraints, system outages) relating to that hour;
 - c. Day-ahead and real-time energy clearing prices at relevant nodes during that hour and for the three hours before and after that hour;
 - d. Energy offer schedules for each ICAP Resource that was scheduled in Day-Ahead or scheduled and dispatched in Real-Time during each of the hours identified in response to 1(c).
2. Please provide all data or documents relating to the conduct or performance of the day-ahead or real-time energy markets during the 108 hours.
3. Please provide for each NNY Capacity Resource all (a) data or documents required and (b) communications pursuant to Section III.8.3.7.1(a)-(e) of the Tariff from December 1, 2006, to the present.
4. Please provide for each NNY Capacity Resource all notifications to the ISO Operations Department required by Section III.8.3.7.2.2 of the Tariff indicating for any hour of any day that the NNY Capacity Resource cannot provide the full amount of temperature-adjusted rated capacity due to a maintenance or forced outage between December 1, 2006 and the present.
5. Please provide for each NNY Capacity Resource documentation of "check out" in accordance with Section III.8.3.7.2.2(d) and the provisions of ISO New England Operating Procedures.
6. Please identify each communication internally within ISO-NE (including with the INTMMU or IMMU) or between anyone at ISO-NE and any NNY Capacity Resource or with the New York ISO relating in any way to any of the 108 hours and to those resources' energy market offers (either in the day-ahead or real-time markets), the possible dispatch of those resources, the ability of those resources to perform if called, any decision whether those resources should be called, or any reliability need for those resources during those 108 hours. For each such communication provide the following information:
 - a. The date and time of the communication;
 - b. Whether the communication was oral or in writing and, if in writing, the form of the communication (*e.g.*, email, letter, memo, etc.);
 - c. Identification of any written documents;

- d. Each person who participated in the communication;
 - e. The title of each person who participated in the communication; and
 - f. The entire substance of the communication.
7. Please identify each control room operator at ISO-NE who was responsible for dispatch decisions during each of the 108 hours.
 8. Please provide all of the information that Messrs LaPlante and O'Connor used, relied on, or reviewed in preparing their March 19, 2009 Testimony in FERC Docket No. ER09-873-000.
 9. Please provide all of the information that anyone at ISO-NE used, relied on, or reviewed in preparing ISO-NE's April 21, 2009 Press Release (http://www.iso-ne.com/nwsiss/pr/2009/042109_capacity_import_filing_press_release.pdf).
 10. Please identify each Market Participant that Messrs LaPlante and O'Connor reference in their March 19, 2009 Testimony at 9:9-12. For each such Market Participant, please provide the following information:
 - a. The amount of its capacity obligation and its offer prices in the day-ahead and real-time energy markets for each of the 108 hours.
 - b. Any analysis or compilation that ISO-NE has prepared relating to those Market Participants' offers since December 1, 2006, in the ISO-NE day-ahead or real-time energy markets;
 - c. Any communications that anyone at ISO-NE (including the INTMMU or the IMMU) had with those Market Participants relating to their offers since December 1, 2006, in the ISO-NE day-ahead or real-time energy markets; and
 - d. Any documents relating to those Market Participants' offers since December 1, 2006, in the ISO-NE day-ahead or real-time energy markets.
 11. Please provide all the data used to prepare the chart in the March 19, 2009 LaPlante/O'Connor Testimony at 12:8-11.
 12. Please identify the basis for Messrs LaPlante's and O'Connor's March 19, 2009 testimony at 10:10-15 that "[t]he practice of Market Participants routinely submitting high-priced energy from capacity imports has only been observed over the Northern New York AC interface."
 13. Please identify all persons who helped prepare or contributed information to preparing ISO-NE's presentation at the November 12, 2008 NEPOOL Market Committee Meeting entitled "Revised Capacity Import Competitive Offer Proposal, and provide all data or documents on which that presentation was based.

CERTIFICATE OF SERVICE

In accordance with Rules 206(c) and 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.206(c), 385.2010 (2009), I hereby certify that I have this day served, electronically or via first class mail, the foregoing document upon ISO New England Inc., New England Power Pool, as a representative of the unidentified installed capacity resources committed to import over the Northern New York AC Interface, affected regulatory agencies, others that may be expected to be affected by the complaint, and all parties on the official service list compiled by the Secretary of the Commission in Docket No. ER09-873-000, in which ISO New England Inc. sought changes to its market rules relating to import capacity resources, and in Docket No. EL09-47-000, in which Richard Blumenthal, Attorney General for The State of Connecticut, filed a Complaint against ISO-NE England Inc.

Dated at Washington, D.C. on this 23rd day of April, 2009.

/s/
Rebecca Grunfeld

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