

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England Inc.

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Docket No. ER14-1409

**MOTION TO INTERVENE AND PROTEST OF GEORGE JEPSEN, ATTORNEY
GENERAL FOR THE STATE OF CONNECTICUT**

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission’s (the “Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 385.212 and 385.214, and Section III.13.8.2(c) of the ISO New England Transmission, Markets and Services Tariff (the “Tariff”)¹, George Jepsen, Attorney General for the State of Connecticut (“CTAG”), hereby moves to intervene as a full party in the above-captioned proceedings and further protests and objects to the Forward Capacity Auction Results Filing (“FCA Results Filing”) by ISO-New England (“ISO-NE”) on February 28, 2014. The Commission should not accept the FCA Results Filing until it has investigated whether the rates are the result of abuse of market power and, therefore, unjust and unreasonable. The Commission should order its Office of Enforcement to conduct an investigation into the results of ISO-NE’s Forward Capacity Auction for the 2017-2018 Capacity Commitment Period (“FCA-8”) pursuant to 18 C.F.R. § 1.c.2.²

¹ Capitalized terms not otherwise defined herein have the meanings ascribed thereto in the Tariff.

² 18 C.F.R. § 1.c.2(a) provides:

(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

I. MOTION TO INTERVENE

The CTAG is an elected Constitutional official and the chief legal officer of the State of Connecticut. Among the CTAG's responsibilities are interventions in various types of proceedings to protect the State, the public interest and the people of the State of Connecticut, and assuring the enforcement of a variety of laws of the State of Connecticut, including Connecticut's Unfair Trade Practices Act and Antitrust Act, so as to promote the benefits of competition and to assure the protection of Connecticut's consumers from anti-competitive abuses. The CTAG's request for leave to intervene in these proceedings is in furtherance of these overall responsibilities.³

The CTAG seeks to intervene in this proceeding to represent the interests of the State of Connecticut and the people of the State of Connecticut. The results of FCA 8 appear to reflect the market impacts of certain conduct by Energy Capital Partners II, LLC ("ECP")⁴, the owner of the Brayton Point Energy, LLC generation station ("Brayton") a 1500 Megawatt ("MW")

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

³ The CTAG has previously initiated or intervened in a number of recent FERC proceedings addressing important policy issues affecting the electric industry and electric ratepayers in Connecticut and New England. These proceedings include FERC Docket Nos: EL14-007, *New England Power Generators Association v. ISO New England Inc.*; ER-13-185, *ISO New England, Inc.*; EL-13-033; *Environment Northeast, et al. v. Bangor Hydro-Electric Company, et al.*; ER12-1455, *ISO New England, Inc.*; ER12-953, *ISO New England, Inc.*; EL11-66, *Martha Coakley, Massachusetts Attorney General, et al. v. Bangor Hydro-Electric Company, et al.*; IN12-007, *Constellation Energy Commodities Group, Inc.*; ER11-1943, *ISO New England, Inc.*; RM11-026, *Promoting Transmission Investment Through Pricing Reform* EL11-20, *PJM Power Providers Group v. PJM Interconnection LLC*; ER10-902, *ISO New England Inc. and New England Power Pool*; ER10-787, *ISO New England Inc. and New England Power Pool Participants Committee*; EL10-50, *New England Power Generators Association v. ISO New England Inc.*; EL09-47, *Richard Blumenthal v. ISO New England, Inc.*; ER09-1051, *ISO New England Inc. and New England Power Pool*; ER09-197, *ISO New England, Inc.*

⁴ Unless otherwise specified, ECP shall include all affiliates and subsidiaries controlling Brayton Point, including its ECP subsidiary Equipower Resources Corp., the direct owner of Brayton Point.

plant located in Fall River, Massachusetts. ECP withdrew Brayton from the auction, an act that appears to have contributed – perhaps substantially – to a shortage of capacity and triggered administrative pricing rules which more than doubled the overall costs of capacity obligations from the previous year throughout New England. If approved, the FCA Results Filing will have a profound and negative impact upon the prices paid by Connecticut electricity consumers, who will see their capacity costs rise from \$277 million per year to \$617 million per year.⁵

As the public official charged with responsibility to represent the State, the public interest and the people of the State of Connecticut with respect to such matters insofar as they affect the electric industry and electric consumers in Connecticut, the CTAG's interests in this matter are direct and substantial, and no other party can represent adequately those interests. For these reasons, the CTAG should be granted leave to intervene in this proceeding with full rights as a party.

II. PLEADINGS AND OTHER COMMUNICATIONS

Service of all documents should be addressed to the following persons whose names and addresses should be placed on the official service list compiled by the Secretary for this proceeding:

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⁵ Connecticut's net installed capacity requirement is 7319 MW X \$7.025 X 12 Months X 1000 (kW to MW conversion) = \$616,991,700.

III. PROTEST

The Federal Power Act ("FPA") requires that all rates must be just and reasonable. The FPA provides the Commission with the authority to regulate wholesale rates and transactions and the sellers who engage in them because such sales are "for ultimate distribution to the public" and thus are "affected with a public interest." 16 U.S.C. § 824(a). The Commission is charged to ensure that the ratemaking process does not "produce arbitrary or unreasonable consequences." *Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968). The FPA is primarily a consumer protection statute. *See Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) ("primary aim of this legislation was to protect consumers against exploitation"). "A major purpose of the whole Act is to protect consumers against excessive prices." *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). The FPA requires just and reasonable rates in order to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 388 (1959).

Rates that reflect the unilateral exercise of market power cannot be just and reasonable. For the reasons discussed below, the Commission should suspend acceptance of the FCA results until the Office of Enforcement has determined whether they are tainted by unilateral exercise of market power. ECP may have exercised market power in the forward capacity market when it became a pivotal supplier into FCA-8 and thereafter withheld 1500 MW of capacity from the auction by permanently retiring Brayton Point. ECP's decision to withhold 1500 megawatts of capacity created a shortage for FCA-8 and triggered the Tariff rules concerning "insufficient competition" (the "IC Rule"). FCA Results Filing, 4. As a result, the administratively set Tariff price of \$7.025 per kilowatt month ("kW month") was applied to all NE existing generation,

except for existing resources located within the northeastern Massachusetts / Boston ("NEMA") capacity zone, where ISO-NE applied a "Capacity Carry Forward Rule" to administratively set the Tariff price at \$15 per kW month. ECP's actions increased its incremental revenues to its remaining 1600 MW of New England generation in FCA-8 by \$77 million over its revenues in FCA-7. The total cost to New England consumers was greater still, with the total overall New England wide capacity cost obligations rising from \$1,219,919,000 in FCA-7 to \$2,952,236,000 in FCA-8. This cost increase represents an overall increase in costs of \$1.733 billion, or a 140 percent increase. The additional incremental costs to Connecticut consumers will be \$340 million for one year.

The Commission should not accept the FCA Results Filing until it has investigated whether an exercise of market power occurred and, if so, whether the rates resulting from the auction are unjust and unreasonable. The investigation should be conducted by the Office of Enforcement pursuant to 18 C.F.R. § 1.c.2. Moreover, the results of the investigation should be made public. The public has a right to know if the Commission finds these auction results to be tainted by abuse of market power and, if so, what changes should be made to the ISO-NE Tariff to better protect consumers in the future.

A. Background

In March 2013, Dominion Energy New England agreed to sell Brayton Point, a 1500 MW coal and gas fired generation facility located near Fall River, Massachusetts, and two additional Illinois based power generating facilities to ECP for a total of \$650 million.⁶ On

⁶ The Illinois plants were the 1532 MW coal fired Elwood Power Station (<http://www.eqpwr.com/secondary.asp?pageID=19>) and the 1093 MW gas fired Kincaid power plant (<http://www.eqpwr.com/secondary.asp?pageID=20>).

August 20, 2013, the FERC approved the sale, *see Dominion Brayton Point, LLC*, 144 FERC ¶ 61,139 (2013), and the transaction closed on August 29, 2013.

On October 7, 2013, five weeks after the closing of the transaction, ECP submitted a Non-Price Retirement Request (“NPRR”) for Brayton Point Units 1-4 pursuant to Section III.13.2.5.2.5 of the Tariff.⁷ This notice came, however, four months after the close the qualifications period for new capacity to participate in the auction to serve as a capacity resource for the FCA-8 commitment period. This NPRR had dramatic effects on the market. First, by removing 1500 MW of capacity from the auction, the NPRR moved the region from an existing capacity surplus to an existing capacity deficiency. Second, because the qualification period for new capacity to participate in the auction was now closed, it was no longer possible for prospective new capacity to enter the auction to ease the capacity shortage. As a result of this capacity shortage, it became all but assured that the FCA-8 auction would fail due to insufficient competition, thereby triggering administrative default pricing.

On October 31, 2013, the New England Power Generators Association (“NEPGA”) filed a complaint at the Commission to increase the administrative default price from \$3.47 per kW-month to \$10 per kW-month. Docket No. EL14-7, *New England Power Generators Association v. ISO New England*. On November 25, 2013 ISO-NE made its own “exigent circumstances” filing to increase administrative default price from \$3.47 per kW-month to \$7.025 per kW-month. Docket No. ER14-463, *ISO New England*. In that filing, ISO-NE acknowledged that the region had rapidly moved from a capacity surplus to deficiency. ISO-NE stated:

⁷ An auction participant may enter a “delist” bid prior to the auction establishing a floor price below which the bidder will not accept capacity obligations and will exit the auction. The NPRR seeks to withdraw the bidder entirely from the auction and that ECP intended to retire the Brayton units regardless of any price the FCA auction yields.

The ISO has conducted seven capacity auctions since 2008. In each of these auctions, with one limited exception, the market cleared at the price floor and the region has procured significant excess capacity. And as recently as the early fall of 2013, it appeared very likely that a surplus of capacity resources (new and existing) would be participating in FCA 8.

Well after the deadlines for qualifying new resources to participate in FCA 8, however, the New England capacity supply situation changed dramatically. In August, after prevailing in its litigation with the State of Vermont, Entergy announced the retirement of the 604 MW Vermont Yankee nuclear plant and submitted a non-price retirement request (“NPRR”). In October, an additional 2,500 MWs left the FCM by submitting NPRRs. These events *changed the supply-demand balance from a surplus of existing resources of over 2,000 MWs to a deficiency of existing resources of over 1,000 MWs, compared with the ICR.* The abrupt change in the supply-demand balance, coupled with the general decline in the amount of new resources seeking to participate in the auction (likely because of low prices set by the current vertical demand curve structure, which signaled that new resources were not needed), means that it is possible that the IC Rule will be invoked in FCA 8.

(Emphasis added) ISO-NE Filing Letter, November 25, 2013 at 3. This filing made clear to all market participants that the FCA-8 would clear at the cost of new entry or by administrative pricing following an insufficiently competitive auction. ISO-NE further acknowledged that ECP's late NPRR request revealed a structural deficiency in the Tariff because:

the resource supply circumstances in New England did not change until well after new resources could qualify to participate in FCA 8. The current process, wherein NPRRs are received late in the process, is deficient. This is because there is no opportunity for new resource entry at this late stage of the process.

ISO-NE Filing Letter, November 25, 2013 at 13.

On December 20, 2013, ISO-NE rejected the Brayton NPRR on the basis that the units were necessary to ensure a reliable supply of electricity to the region. As a result, ISO-NE agreed to negotiate full cost-of-service compensation to keep Brayton Units on-line through June 1, 2018.

On January 24, 2014, FERC issued orders in Dockets Nos. EL14-7 and ER14-463 that raised the administrative default rate compensation from \$3.47 per kW-month to \$7.025 per kW-

month. See *ISO New England, Inc.*, 146 FERC ¶ 61,038 (2014) and *NEPGA v. ISO New England, Inc.*, 146 FERC ¶ 61,039 (2014).

On January 27, 2014, ECP notified ISO-NE that it would not accept cost-of-service compensation to keep Brayton Units 1-4 in service through June 1, 2018, but will retire the Brayton Units effective June 1, 2017.

On February 3, 2014, ISO-NE conducted FCA-8. As a result of Brayton’s withdrawal from the FCM, the “Inadequate Competition Rule” was triggered establishing a new administrative default price of \$7.025 per kWm for nearly all the existing generation throughout New England. This default pricing would not have occurred but for ECP’s withholding of Brayton Point’s 1500 MW.

The cost of this market failure to New England consumers is significant. In FCA-7, 32,273 MWs of capacity cleared at the price floor of \$3.15, for a total regional cost of \$1,219,919,400. In FCA-8, the total cost will rise to \$2,955,325,500. This represents an increase of more than \$1.7 billion, or 140 percent over the previous year. The below table provides the detail for this calculation.

Existing Capacity	24,885	\$7.025	\$2,097,805,500
NEMA/Boston	3,085	\$15	\$555,800,000
Capacity Under Multi-Year Contracts	1,030	\$4.5	\$55,620,000
New Capacity	1,370	\$15	\$246,600,000
Self Supply	3,300	-	-
Total			\$2,955,325,500

Also as a result of the triggering of default pricing, ECP’s four other generating facilities that have 1624 MW of capacity in New England will receive capacity payments in FCA-8 that are approximately \$77 million dollars more than they received in the previous FCA-7 even with

the removal of Brayton Point from the auction. The below table provides the detail for this calculation.

ECP MW Summer Capacity	ICAP at \$3.15 kW month	ICAP at \$7.025	Incremental Revenue
1654.27	\$62,531,217	\$139,454,540	\$76,923,323

B. The FCA-8 Results Indicate that the Exercise of Market Power May Have Occurred

The FCA-8 raises serious questions about the existence and use of unilateral market power by ECP. On October 7, 2013, when ECP submitted its NPRR, the following circumstances were public information: (1) the net installed capacity requirement for FCA-8 was 33,855 MW; (2) by withdrawing Brayton's 1500 MW, the region's existing capacity that could be offered into the auction would be 32,732, meaning; (3) the region's existing capacity would be short by 1,123 MWs; and (4) the last opportunity for new generation to qualify for the FCA-8 auction had passed four months earlier. Those shortage conditions virtually guaranteed that the Tariff rules for insufficient competition would be invoked and that the capacity compensation rate would be set at the administrative default rate.⁸

On October 31, 2013, the NEPGA filed a complaint at the Commission to increase the administrative default price from \$3.47 per kW-month to \$10 per kW-month. Docket No. EL14-7, *New England Power Generators Association v. ISO New England*. On November 25, 2013, ISO-NE made its own Section 205 “exigent circumstances” filing to increase the administrative default price from \$3.47 per kW-month to \$7.025 per kW-month. Docket No. ER14-463, *ISO New England*. ISO-NE's Section 205 filing would be presumed to be "just and reasonable" and

⁸ The default rate at that time was \$3.47 (or 1.1 X \$3.15, the clearing price of the previous auction). But ECP's conduct also increased the likelihood that ISO-NE would offer Brayton full cost of service compensation under an RMR contract.

would be very likely to be approved, meaning that there was a very high likelihood both that: (1) the administrative default rate would be triggered by insufficient competition; and (2) that default rate would be at least \$7.025. Because ECP also had 1624 MW of capacity participating in the FCA-8 auction, that capacity would see a minimum of \$77 million in new incremental revenues above what ECP received in the FCA-7 auction.

On December 20, 2013, ISO-NE offered Brayton a full cost of service "reliability-must-run" ("RMR") contract. An RMR contract offers a generation owner full cost of service compensation, including a return of all expenses and an authorized return on the investment of approximately 12 percent.

ECP did not respond to ISO-NE's offer until after the Commission issued its orders in Dockets Nos. EL14-7 and ER14-463 concerning the administrative default rate that would apply if the auction failed due to insufficient competition. The Commission issued those orders on January 24, 2014. On that date, ECP knew that it had the unilateral ability to move the "clearing" price from \$3.15 in FCA-7 to the \$7.025 in FCA-8. The next business day, ECP informed ISO-NE that it would reject the RMR agreement and withhold Brayton Point's 1500 MW from the auction.

Under the FPA, rates that result from the exercise of market power are unjust and unreasonable. The just and reasonable standard was instituted to address the complete market break-down resulting from the unfettered exercise of market power in the context of the electric utility industry. *See e.g. Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 758 (1973); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). It is generally recognized that rates resulting from the exercise of market power are injurious to consumers and to the economy. Rates that reflect the exercise of market power, and therefore

allow for the collection of monopoly rents, are *per se* outside the permissible zone of reasonableness.

The Commission has modernized its regulatory framework to authorize certain "exempt wholesale generators" to participate in market based transactions under FERC Orders 697 and 697-A (the "FERC Orders").⁹ The Commission's finding that an entity lacks market power is, however, an essential predicate to allowing the entity to exercise market based rate authority under the FERC Orders. A utility must obtain prior Commission approval to exercise market based rate authority by, among other things, showing that it lacks or has adequately mitigated market power. Market Power is defined as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 n.4 (9th Cir. 2004) (quoting *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,177 (1989)), *cert. denied*, 551 U.S. 1140 (2007). Not only must an entity demonstrate that it lacks market power to receive market based rate authority, but it must meet continuous reporting requirements demonstrating that it remains free of market power.

FERC will grant approval of a market-based tariff only if a utility demonstrates that it lacks or has adequately mitigated market power, lacks the capacity to erect other barriers to entry, and has avoided giving preferences to its affiliates. *See* Market-Based Rates, P7, 72 Fed. Reg. 39907. In addition to the initial authorization of a market-based tariff, FERC imposes ongoing reporting requirements. A seller must file quarterly reports summarizing the contracts that it has entered into, even extremely short-term contracts. *See California ex rel.*

⁹ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity And Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252,119 FERC ¶ 61,295 (2007).

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity And Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 (2008)

Lockyer v. FERC, 383 F.3d 1006, 1013 (CA9 2004). It must also demonstrate every four months that it still lacks or has adequately mitigated market power. See *ibid.* If FERC determines from these filings that a seller has reattained market power, it may revoke the authority prospectively. See Market-Based Rates, P5, 72 Fed. Reg. 39906.

Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1, 554 U.S. 527, 537 (2008).

As noted above, all of the information necessary to understand that the Brayton retirement would trigger the Inadequate Competition Rule was public information. ISO-NE publicly displays the status of all NPRRs and delist bids on its website, allowing any market participant to determine the qualified capacity to participate in the auction. The Commission published the region-wide installed capacity requirement on January 16, 2014 in *ISO New England, Inc.*, 146 FERC ¶ 61,014 (2014). Indeed, the consequences of Brayton's retirement were sufficiently apparent that the New England Power Generators filed their complaint at the Commission to increase administrative default price on October 31, 2013.

The Commission should not accept the FCA Results Filing until it has investigated whether the resulting rates are attributable to use of market power, and, if so, are unjust and unreasonable. The FCA-8 auction process has failed. ECP may have deliberately withheld 1500 MW of generation, triggering a shortage, with the result that the capacity auction prices went from \$1.2 billion in FCA-7 to \$3 billion in FCA-8. If, as noted above, the definition of market power is a seller's ability to "significantly influence price in the market by withholding service," *California ex rel. Lockyer v. FERC*, 383 F.3d at 1012 n.4 (9th Cir. 2004), ECP has demonstrated that power without question. The Commission should therefore not accept the FCA Results Filing until it has investigated whether there was an abuse of market power and, if so, whether the rates resulting from the auction are unjust and unreasonable.

IV. CONCLUSION

WHEREFORE, the CTAG respectfully request that the Commission grant the CTAG's motion to intervene and refuse to accept the FCA Results Filing until it has investigated whether the rates are the result of abuse of market power and are, therefore, unjust and unreasonable. The Commission should order its Office of Enforcement to conduct an investigation into the results of ISO-NE's Forward Capacity Auction for the 2017-2018 Capacity Commitment Period ("FCA-8"). The investigation should be conducted by the Office of Enforcement pursuant to 18 C.F.R. § 1.c.2.

Respectfully submitted,

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Dated: April 14, 2014

CERTIFICATE OF SERVICE

I, John S. Wright, hereby certify that on this day I caused the foregoing to be served upon all parties identified on this agency's service list for this proceeding.

John S. Wright
John S. Wright

Dated: April 14, 2014