

130 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

ISO New England Inc. and
New England Power Pool

Docket No. ER09-1051-000

ORDER ON COMPLIANCE FILING

(Issued January 21, 2010)

1. On April 28, 2009, ISO New England Inc. (ISO-NE) and the New England Power Pool Participants Committee (NEPOOL) (jointly, Filing Parties) submitted a compliance filing,¹ pursuant to Order No. 719,² that proposes revisions to the ISO-NE Open Access Transmission Tariff (OATT).³ Filing Parties request that their various proposed tariff

¹ ISO-NE April 28, 2009 Compliance Filing.

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008) (Order No. 719), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *reh'g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

³ NEPOOL joins with ISO-NE to reflect its agreement to the changes to the Participants Agreement, Second Restated NEPOOL Agreement, and the OATT that were broadly supported by the Participants Committee. NEPOOL notes, however, that there were many other topics discussed at the NEPOOL Participants Committee and RTO Responsiveness Working Group that Participants may have provided additional input on, but on which no formal input was taken by NEPOOL. NEPOOL clarifies that it does not join the filing on these topics. Moreover, NEPOOL states that the NEPOOL Participants Committee did not vote on whether the total package of changes is compliant with Order No. 719 or whether more can or should be done and, again, NEPOOL does not join the filing on these topics. NEPOOL also states that it is not in a position to join the filing insofar as it includes ISO-NE's observations of relationships and communications to which NEPOOL is not a party.

revisions be made effective as of June 28, 2009, June 1, 2010 and December 1, 2010.⁴ In this order, we accept Filing Parties' compliance filing, including the revised tariff sheets, to be effective as requested, subject to a further compliance filing, as discussed below.

I. Background

2. In Order No. 719, the Commission established reforms to improve the operation of organized wholesale electric power markets⁵ and amended its regulations under the Federal Power Act (FPA) in the areas of: (1) demand response, including pricing during periods of operating reserve shortage; (2) long-term power contracting; (3) market-monitoring policies; and (4) the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission stated that these reforms are intended to improve wholesale competition to protect consumers in several ways: by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, removing barriers to demand response, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.⁶

3. In the area of demand response, Order No. 719 required each RTO and ISO to: (1) accept bids from demand response resources in the RTO's or ISO's markets for certain ancillary services, on a basis comparable to other resources; (2) eliminate, during a system emergency, a charge to a buyer that takes less electric energy in the real-time market than it purchased in the day-ahead market; (3) in certain circumstances, permit an aggregator of retail customers (ARC) to bid demand response on behalf of retail customers directly into the organized energy market; and (4) modify their market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power.⁷

⁴ As discussed below, Filing Parties request later effective dates for certain tariff revisions to provide sufficient time to build, test and deploy the necessary software.

⁵ Organized market regions are areas of the country in which a regional transmission organization (RTO) or independent system operator (ISO) operates day-ahead and/or real-time energy markets. The following Commission-approved RTOs and ISOs have organized markets: ISO-NE; PJM Interconnection, L.L.C. (PJM); New York Independent System Operator, Inc. (NYISO); Midwest Independent Transmission System Operator, Inc. (Midwest ISO); California Independent System Operator Corp. (CAISO); and Southwest Power Pool, Inc. (SPP).

⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 1.

⁷ *Id.* P 4, 15.

4. Additionally, the Commission recognized that further reforms may be necessary to eliminate barriers to demand response in the future. To that end, the Commission required each RTO or ISO to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction. The Commission further required each RTO's or ISO's independent market monitor to submit a report describing its views on its RTO's or ISO's assessment to the Commission.⁸

5. With regard to long-term power contracting, Order No. 719 required each RTO and ISO to dedicate a portion of its website for market participants to post offers to buy or sell power on a long-term basis.⁹

6. To improve market monitoring, the Commission required each RTO and ISO to provide its Market Monitoring Unit (MMU) with access to market data, resources and personnel sufficient to carry out its duties. The Commission further required that the MMU (or the external MMU in a hybrid structure and, in some cases, the internal MMU) report directly to the RTO or ISO board of directors.¹⁰ In addition, the Commission required that the MMU's functions include the core functions of: (1) identifying ineffective market rules and recommending proposed rules and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying appropriate Commission staff of instances in which a market participant's behavior may require investigation.

7. The Commission also took the following actions with regard to MMUs: (1) expanded the list of recipients of MMU recommendations regarding rule and tariff changes, and broadened the scope of behavior to be reported to the Commission; (2) modified MMU participation in tariff administration and market mitigation, required each RTO and ISO to include ethics standards for MMU employees in its tariff, and required each RTO and ISO to consolidate all its MMU provisions in one section of its tariff; and (3) expanded the dissemination of MMU market information to a broader constituency, with reports made on a more frequent basis than in the past, and reduced the time periods before energy market bid and offer data are released to the public.

8. Finally, Order No. 719 established an obligation for each RTO and ISO to establish a means for customers and other stakeholders to have a form of direct access to

⁸ *Id.* P 274.

⁹ *Id.* P 301.

¹⁰ The use of the phrase "board of directors" herein also includes the board of managers, board of governors, and similar entities.

the RTO or ISO board of directors and thereby to increase its responsiveness to customers and other stakeholders. The Commission stated that it will assess each RTO's or ISO's compliance filing using four responsiveness criteria: (1) inclusiveness; (2) fairness in balancing diverse interests; (3) representation of minority positions; and (4) ongoing responsiveness.

9. The Commission required the RTOs and ISOs to make compliance proposals to implement the reforms adopted in Order No. 719. In each of the four areas described above, the Commission required each RTO or ISO to consult with its stakeholders and make a compliance filing within six months of the date that the Final Rule is published in the *Federal Register*. The compliance filing must explain how the RTO's or ISO's existing practices comply with the Final Rule's reforms, or describe the entity's plans to attain compliance.¹¹ Order No. 719 also required RTOs and ISOs to assess the technical feasibility and value to the market of smaller demand response resources providing ancillary services and report to the Commission within one year of the date that the Final Rule is published in the *Federal Register*.¹²

10. On July 16, 2009, the Commission issued an Order on Rehearing, Order No. 719-A.¹³ With few exceptions, the Commission denied the requests for rehearing.¹⁴

II. Notice of Filing and Responsive Pleadings

11. Notice of Filing Parties' filing was published in the *Federal Register*, 74 Fed. Reg. 21795 (2009), with interventions and protests due on or before May 26, 2009.

12. Timely motions to intervene were filed by the Calpine Corporation; Comverge, Inc.; Constellation Energy Commodities Group, Inc.; Constellation NewEnergy, Inc.;

¹¹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 8, 578-83.

¹² *Id.* P 97, 581. *See also* Errata Notice, Docket No. RM07-19-000 (Mar. 23, 2009) (clarifying deadline).

¹³ *Wholesale Competition in Regions with Organized Electric Markets, order on reh'g*, 74 Fed. Reg. 37776 (Jul. 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009) (Order No. 719-A).

¹⁴ Order No. 719-A, FERC Stats. & Regs ¶ 31,292 at P 69 (July 16, 2009). Each RTO and ISO is required to make a compliance filing within 180 days of the issuance date of Order No. 719-A; accordingly these compliance filings are required to be filed on or before January 16, 2010 and will be addressed by the Commission in subsequent orders.

CPower, Inc.; DC Energy, LLC; Dynegy Power Marketing Inc.; Electric Power Supply Association; EnergyConnect, Inc.; EnerNOC, Inc.; Exelon Corporation; Industrial Energy Consumer Group; Mirant Parties; NEPOOL Industrial Customer Coalition; New England Power Generator's Association, Inc. (NEPGA); Northeast Utilities Service Company; NRG Companies; Vermont Department of Public Service (Vermont DPS); and Wal-Mart Stores, Inc.

13. Notices of intervention were filed by the Connecticut Department of Public Utility Control (Connecticut PUC), the Maine Public Utilities Commission (Maine PUC), and the Massachusetts Department of Public Utilities (Mass. DPU). Timely motions to intervene and comments were filed by the Massachusetts Office of Attorney General (Mass. AG), the Connecticut Office of Consumer Counsel (Connecticut OCC), the Attorney General of the State of Connecticut (Connecticut AG), State of Maine's Public Advocate's Office (Maine PAO), Central Maine Power Company (Central Maine), the Electricity Consumers Resource Council (ELCON), the Consumer Demand Response Initiative (CDRI), and Bangor Hydro-Electric Company (Bangor Hydro).

14. Protests were filed by NEPOOL Industrial Consumer Coalition (Demand Response Supporters),¹⁵ Portland Cement Association and ArcelorMittal USA (Industrial Consumers) and, collectively, Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, and New Hampshire Electric Cooperative, Inc. (Public Systems).

15. Motions to intervene out-of-time were submitted by BG Energy Merchants, LLC and Vermont Public Service Board (Vermont PSB), along with comments submitted jointly by Vermont DPS and Vermont PSB.

16. Answers were filed by ISO-NE, NEPOOL, NEPGA and Public Systems.

III. Discussion

A. Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. The Commission also finds that good cause exists to grant all late-filed motions to intervene as this will not delay, disrupt, or otherwise prejudice this proceeding, or place an additional burden on existing parties.

¹⁵ The Demand Response Supporters include NEPOOL ICC, Comverge, Inc., CPower, Inc., EnergyConnect, Inc., EnerNOC, Inc., and Viridity Energy, Inc.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

19. We find that Filing Parties' filing, with certain modifications, complies in part with Order No. 719 in the areas of: (1) demand response and pricing during periods of operating reserve shortage; (2) long-term power contracting; and (3) market-monitoring policies. Accordingly, we accept Filing Parties' filing to be effective June 28, 2009, June 1, 2010, and December 1, 2010, as requested, subject to a further compliance filing as discussed below.¹⁶ Filing Parties are directed to make the compliance filing within 90 days of the date of issuance of this order.

20. This order makes no findings as to Filing Parties' compliance with the fourth area of reforms identified in Order No. 719: the responsiveness of RTOs and ISOs to their customers and other stakeholders. The Commission recently issued a notice announcing that its staff will hold a technical conference in the near future to provide a forum for interested participants to discuss that topic.¹⁷ Following that technical conference, the Commission will issue a separate order addressing Filing Parties' compliance with this aspect of Order No. 719.

1. Demand Response and Pricing During Periods of Operating Reserve Shortages in Organized Markets

a. Ancillary Services Provided by Demand Response Resources

21. Order No. 719 required each RTO and ISO to accept bids from demand response resources, on a basis comparable to any other resources, for ancillary services (energy imbalance, spinning reserves, supplemental reserves, reactive and voltage control, and regulation and frequency response) that are acquired in a competitive bidding process, if such demand response resources: (1) are technically capable of providing the ancillary service within the response time requirements and meet reasonable requirements adopted

¹⁶ We will grant waiver of the Commission's 120-day notice requirements to permit the requested effective dates. 18 C.F.R. § 35.3(a) (2009).

¹⁷ First Notice of Technical Conference on RTO/ISO Responsiveness, Docket No. ER09-1048-000, November 13, 2009. *See also* Notice of Date of Technical Conference on RTO/ISO Responsiveness, Docket No. ER09-1048-000.

by the RTO or ISO as to size, telemetry, metering and bidding; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.¹⁸

22. Additionally, Order No. 719 directed each RTO and ISO to file, as part of its compliance filing, a proposal to adopt reasonable standards necessary for system operators to call on demand response resources, together with mechanisms to measure, verify, and ensure compliance with any such standards.¹⁹ Further, Order No. 719 required RTOs and ISOs to describe their efforts to develop adequate customer baselines.²⁰ Finally, it required RTOs and ISOs to coordinate with each other in the development of technical requirements for demand response resources participating in ancillary services markets, and provide the Commission with a technical and factual basis for any necessary regional variations.²¹

i. Filing Parties' Filing

Demand Response Ancillary Service Bids/Comparability

23. Filing Parties state that ISO-NE is already accepting ancillary service bids from technically capable demand response sources through market rules permitting the provision of reserves by the Dispatchable Asset Related Demand asset (DARD) class. Specifically, market participants with DARDs bid for (usually in the form of a bid curve) and pay up to their bid price for electricity. Filing Parties state that demand participating in this manner increases the elasticity of the real-time demand curve, improving pricing and efficiency. Under ISO-NE's current tariff, the peak load of the retail customer associated with a DARD must be greater than or equal to 5 MW, and the DARD must be capable of having its consumption modified in real time in response to electronic dispatch instructions. DARDs may also be assigned obligations in the Forward Reserve Market, and are held to the same terms and conditions as generators assigned forward reserve operations.

24. DARDs bid into the market, and their bids are used in the optimal dispatch of the system. As such, these bids can set the price for both energy and reserves in the co-

¹⁸ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47, 49.

¹⁹ *Id.* P 61.

²⁰ *Id.* P 57.

²¹ *Id.* P 59.

optimized energy and reserves market.²² The market participant with a DARD is responsible for paying for the energy it consumes, and the price is settled nodally. Filing Parties state that the capacity and operating reserves costs for a market participant with a DARD are reduced by the amount of load that can be dispatched in real time. According to Filing Parties, while a market participant with a DARD does not receive an explicit payment like a Forward Capacity Resource, it does receive comparable credit in the various markets. Filing Parties state that this treatment is appropriate since DARDs are ultimately a load on the system, and therefore primarily responsible for their respective share of capacity and operating reserve costs.

25. In addition to the DARD class, Filing Parties state that the Demand Response Reserves (DRR) Pilot Program permits small (i.e., maximum load reduction of less than 5 MW) demand response resource participation in the reserve markets. Filing Parties state that the purpose of the DRR Pilot is to assess the reliability of smaller demand response resources in the reserves market and determine whether relaxed and less expensive dispatch and metering requirements could be implemented reliably for demand resources. The DRR Pilot is also intended to test alternative communication, dispatch, metering, and telemetry technology for smaller demand resources before large scale deployment. The initial phase of the DRR Pilot was conducted from October 2006 through September 2008. Filing Parties state that the initial phase showed that demand resources could respond in 30 minutes to multiple interruption instructions over a season, and in 10 minutes for some resources. The Commission recently approved the extension of this pilot program until May 2010 to allow ISO-NE to develop real-time responsiveness metrics for demand resources.²³

26. In November 2008, ISO-NE initiated a pilot program, similar to the DRR Pilot Program, to evaluate the ability, including physical and economic performance, of alternative technologies to provide regulation services. Alternative technologies include technologies that allow response to a regulation dispatch signal at four-second intervals. Filing Parties state that the regulation pilot program has several key objectives: (i) to develop operating experience with new regulating technologies; (ii) to understand the ability of the alternative technologies to operate reliably and how their operation might in turn affect the cost and reliability of the New England control area; and (iii) to provide alternative technology resource developers with the opportunity to operate and earn

²² ISO-NE April 28, 2009 Compliance Filing at 23.

²³ Letter Order Accepting Tariff Revisions to Market Rule 1 Concerning the Extension of the Demand Response Reserves Pilot Program, Docket No. ER08-1313-000, issued September 9, 2008.

revenue in a realistic market environment. Filing Parties state that the regulation pilot program will operate until superseded by revised rules, but for a minimum of 18 months.

27. With regard to the requirement that ISOs and RTOs establish policies and procedures that demand resources receive treatment comparable to supply-side resources, Filing Parties have concluded that ISO-NE complies with this requirement with respect to reserves and regulation.²⁴ Noting that Order No. 719 does not provide specific guidance as to what constitutes “comparable treatment,” Filing Parties contend that from an economic and market design perspective, comparable treatment implies that both buyer and seller in a market have the same access and opportunities for participation. They contend that under the DARD infrastructure, a market participant can submit a price-sensitive demand bid into the day-ahead and real-time energy markets. They argue that these demand bids are comparable to the supply bids for generation by market participants. Filing Parties contend that DARDs also receive comparable credits and charges for their participation in the various markets.²⁵

Bidding Parameters

28. With regard to the requirement that ISO-NE incorporate bidding parameters that allow demand resources to specify limitations on the duration, frequency and amount of their service, Filing Parties propose three new definitions in Market Rule 1, section III.1.3 that offer bidding parameters for DARDs: Maximum Demand Dispatch Duration, Maximum Demand Dispatch Frequency, and Dispatchable Asset Related Demand Minimum Down-Time. Maximum Demand Dispatch Duration is the maximum number of hours, not greater than 24 hours, during which a DARD may be dispatched below its Maximum Consumption Limit. Maximum Demand Dispatch Frequency is the maximum number of times in an Operating Day that a DARD is available for dispatch. Dispatchable Asset Related Demand Minimum Down-Time is the minimum amount of time that must elapse between Dispatch Instructions to a DARD to consume below its Maximum Consumption Limit. Filing Parties propose to modify the current list of parameters for bidding DARD into the Day-Ahead Energy Market, contained in Market Rule 1, section 1.10.1A (d) (viii) to include these new bidding parameters. Filing Parties state that the new proposed parameters are in addition to current bidding rules that allow market participants to control reductions through the Minimum Consumption Limit and Maximum Consumption Limit parameters, which can be changed in real time. Filing Parties further propose to clarify the language in the current definition of “Demand Bid”

²⁴ ISO-NE April 28, 2009 Compliance Filing at 22.

²⁵ *Id.* at 23.

in Market Rule 1, section III.1.3 in order to make it analogous to the definition of "Supply Offers."

Regional Variation

29. Order No. 719 requires RTOs and ISOs to confer with each other on specific bidding parameters and implementation methods, providing a technical and factual basis for any regional variations.²⁶ Filing Parties state that ISO-NE participated in meetings on these topics with representatives of NYISO on January 2 and March 3, 2009 and with members of the ISO/RTO Council on December 4-5, 2008 and during 2009 on March 13 and 27, and April 2-3. Filing Parties state that ISO-NE's meetings with NYISO clarified that the parameters to be used by the respective entities will not create a new "seam" between their markets. Further, Filing Parties note that the council agreed that because the RTOs and ISOs have developed their demand response programs independently, regional variations on bidding parameters and technical requirements are appropriate for the time being. Finally, Filing Parties state that during 2009, the council plans to proceed with coordinated efforts among the ISOs and RTOs to develop standardized communications protocols for smaller demand resources, and to test the validity and feasibility of telemetering every demand resource regardless of size.

Customer Baselines

30. Regarding the development of customer baselines, Filing Parties state that ISO-NE and its stakeholders have recently devoted significant attention to this issue. They contend that over the past five months the New England region has been involved in a stakeholder review process to evaluate and make recommendations on ways to achieve price-responsive demand in the electricity markets. They state that among other things, the region held multiple meetings at the NEPOOL Markets Committee and Demand Resources Working Group to discuss the future of price-responsive demand in New England. Filing Parties state that while the region has generally discussed the issue of customer baselines as part of its ongoing review of price-responsive demand, it has not yet fully vetted such issues given that the future of price-responsive demand is still largely unknown. They state that while ISO-NE has shared its review of the current customer baseline methodology with market participants and state regulators, neither NEPOOL nor the New England Conference of Public Utilities Commissioners (NECPUC) have made any recommendations with respect to the issue. Additionally, Filing Parties note that no customer baseline is required for DARDs, as any reserve quantity assigned to a DARD is based on its current consumption and its lower reported Minimum Consumption Limit.

²⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 86.

Smaller Demand Response in Reserves/Regulation Markets

31. Order No. 719 requires RTOs/ISOs to perform an assessment, in cooperation with their customers and other stakeholders, of the technical feasibility and value to the market of smaller demand response resources providing ancillary services, within one year from the date that Order No. 719 is published in the *Federal Register*, including whether (and how) smaller demand resources can reliably and economically provide operating reserves.²⁷ Filing Parties state that the current DRR Pilot program and regulation pilot program contribute to the fulfillment of this requirement. Further, Filing Parties state that ISO-NE's assessment with stakeholders will also: include an analysis of existing Market Rule 1 provisions; include an evaluation of the performance of smaller demand response resources under the current pilot programs; address the need for measurement and verification standards and a small demand response resource definition; and consider the results of the ISO/RTO Council's development efforts regarding a communications protocol for small demand response resources.

ii. Protests and Comments

32. While generally supportive of ISO-NE's initial progress towards addressing demand response issues, Demand Response Supporters argue that ISO-NE's Market Rules are still restrictive and continue to stifle demand response participation as contemplated in Order No. 719. For example, specifically addressing demand response participation in ancillary services markets, Demand Response Supporters contend that ISO-NE's reliance on participation of DARDs to claim compliance is misplaced. They argue that DARDs are a "narrow asset class of resources," with specific characteristics that exclude all other demand resources from participation. As such, they contend the reliance on DARDs as the basis for compliance would render Order No. 719's requirements almost meaningless.²⁸ As evidence of this restrictiveness, Demand Response Supporters note that at the time of their filing, only two resources, both pumped hydro facilities, have participated as DARDs.

33. Demand Response Supporters also point to other unduly restrictive rules governing DARDs, including lengthy commitment periods (twelve months), and an inability to aggregate resources to meet the 5 MW peak load requirement or participate in

²⁷ *Id.* P 97.

²⁸ In support, Demand Response Supporters note that the peak load of a retail customer with a DARD must be greater than or equal to 5 MW, DARDs must take pricing at a system node, and must be capable of having their energy consumption modified in real-time in response to electronic dispatch.

the Forward Capacity Market (FCM).²⁹ Further, Demand Response Supporters argue that DARD participation in the Forward Reserve Market is significantly restricted by the requirement that the asset submit bids in the Day Ahead Energy Market, as this is a hurdle for customers unaccustomed to locational marginal price volatility.

34. Specifically addressing the FCM, Demand Response Supporters contend that DARDs are integrated into the market as demand-side resources, and not as supply-side resources, whereas demand resources, including demand response, are integrated into the FCM as supply-side resources. They argue that this construct forces a single market selection determination for these resources. Further, they contend that in the case of any demand-side integration approach for demand response, it forces a Curtailment Service Provider to either become a load-serving entity or partner with every load-serving entity within ISO-NE that serves demand response customers. Demand Response Supporters argue that this “mixed construct” will not work, and imposes insurmountable barriers to the comparable treatment of demand response as envisioned under Order No. 719.

35. Addressing the participation of smaller demand resources in the ancillary services market, Demand Response Supporters contend that ISO-NE’s argument that it can not unilaterally lower the 5 MW peak load threshold for DARDs (since DARDs must participate through their local distribution companies) indicates that it is delegating its authority to modify its rules to the load serving entity. Further, Demand Response Supporters allege barriers to participation for smaller demand resources, and note that ISO-NE’s DRR Pilot Program has few members.

36. Advocating efficiency, Demand Response Supporters request that the Commission evaluate comments and protests across several or all RTO regions, rather than solely within a particular region. As such, Demand Response Supporters state that the Commission should establish a generic proceeding to address common RTO issues. Further, since the current price-responsive demand programs are scheduled to expire on May 31, 2010, Demand Response Supporters contend that by February 1, 2010, the Commission should either require the continuation of the existing programs or modifications to the existing programs.

37. Finally, Demand Response Supporters contend that (outside of DARDs), ISO-NE does not allow for demand response to qualify to provide spinning or non-spinning reserves, due in part to the lack of a measurement and verification standard to allow demand response to be used comparably. Demand Response Supporters state that a spinning reserves standard is needed based on measurement and verification that includes

²⁹ Demand Response Supporters note that, by contrast, generation resources can participate in both ancillary and capacity markets, as well as the ISO-NE energy market.

requirements for end-to-end data verification, ongoing verification of MW availability, and near real-time estimation of load reduction before and after a demand response event is activated. Demand Response Supporters state that this process should be placed on a fast track at ISO-NE to ensure comparability with generation, consistent with Order No. 719.

38. In comments addressing all of the RTO/ISO compliance filings, ELCON argues that the compliance filings fail to implement Order No. 719's directives on comparability, incorrectly equating "comparable treatment" with "identical treatment." It contends that the RTOs and ISOs have proposed to place conditions on demand response providers identical to those for generators based on systems that were originally established to meet the needs of generators. ELCON argues that demand response providers should not be penalized because the control systems were originally designed to operate generation resources, as this will inhibit demand response.

39. CDRI states that it is limiting its comments in this proceeding, as it feels that the ongoing NEPOOL stakeholder process concerning price-responsive demand is the proper vehicle for addressing specific market design issues. However, CDRI contends that ISO-NE proposes an inappropriate standard for comparability. CDRI argues that ISO-NE appears to think that all that is required for comparability is the ability to buy and sell at wholesale. CDRI contends that ISO-NE has misidentified the product as a commodity, and that this view of comparability is simplistic and incorrect.³⁰ By contrast, CDRI argues that the actual product is safe and reliable service at just and reasonable rates, the only product sanctioned under the Federal Power Act. CDRI states that this product reflects social policy, physical, and technical preferences that have a "well-defined pedigree."

40. Mass. DPU filed comments in support of ISO-NE's efforts in the integration of demand response into its wholesale markets. Mass. DPU also states its appreciation for ISO-NE's acknowledgement that more needs to be done in this area and its awareness that many demand response providers are frustrated that the integration of demand response has not progressed more quickly. Mass. DPU states that it looks forward to receiving additional details from ISO-NE, including a timetable for implementation, concerning additional integration of demand response into the ancillary services markets.

iii. Answer

41. In its answer, ISO-NE notes that the stakeholder comments on demand response appear to reflect a general consensus that the ongoing stakeholder review process should continue to be the primary forum for addressing the future structure of price-responsive

³⁰ CDRI May 26, 2009 Comments at 4.

demand in New England, including for those commenters who are seeking significant market rule changes. ISO-NE states that the current stakeholder process has examined: the future of the current Real-Time Price Response and Day-Ahead Load Response programs (both slated to expire on June 1, 2010), the methodology for achieving price responsive demand in the region (supply-side or demand-side), whether to adopt the Peak Energy Rent (PER) deduction³¹ for demand resources that participate in the energy market, and the need for a load reconstitution methodology for FCM demand resources. As such, ISO-NE avers that any additional market rule changes for New England's demand response programs should be developed through this stakeholder process.

42. While noting that more work needs to be done to fully integrate demand resources into the ancillary services markets, in its answer NEPOOL generally addresses the comments of Demand Response Supporters, Mass. DPU, and ELCON. In response to specific process requests by these parties (and noting that it overwhelmingly supported the revisions to Market Rule 1 included in the Compliance Filing), NEPOOL argues that the Commission should allow the region to work through these issues in the ongoing stakeholder process. NEPOOL states that it does not take a position on the comments filed in this proceeding by CDRI as these comments challenged general policy claims made by ISO-NE, but did not directly address the specifics of the compliance filing.

43. Responding to the comments of Demand Response Supporters and Mass. DPU, NEPGA contends that demand response has extensive opportunities to participate in the ISO-NE markets through a combination of existing demand response programs, the FCM, and the changes put forth in Order No. 719. NEPGA believes that the rules allowing resources to participate as DARD permits participation of demand response in the ancillary services markets without compromising reliability. NEPGA notes that ISO-NE must know what can be delivered reliably in 10 minutes or 30 minutes, and thus the existing technical requirements for resources providing ancillary services are truly necessary. In response to the suggestions of CDRI, NEPGA states that it is not acceptable or necessary to artificially incent demand response at the exclusion of other resources, or create conditions in the market that alter conventional analysis of energy supply and demand and create unfair advantages for any particular class of resources.

³¹ The PER deduction is a feature of the FCM whereby the capacity payments to generating resources are reduced by the difference between the locational marginal price and the PER threshold for all hours when the locational marginal price exceeds the PER threshold price.

iv. Commission Determination

Comparability

44. Order No. 719 requires each RTO or ISO to accept bids from demand response resources on a basis comparable to other resources, for ancillary services that are acquired in a competitive bidding process, if the demand response resources: (1) are technically capable of providing the ancillary service and meet the necessary technical requirements; and (2) submit a bid under the generally-applicable bidding rules at or below the market-clearing price, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate.³² Further, Order No. 719 states that all accepted bids “would receive the market-clearing price” for “competitively-bid markets, if any, for energy imbalance, spinning reserves, supplemental reserves, reactive supply and voltage control, and regulation and frequency response.”³³

45. ISO-NE acquires the following ancillary services through competitive markets: ten minute spinning reserves, ten-minute non-spinning reserves, thirty minute operating reserves, and regulation.³⁴ Further, ISO-NE’s market design co-optimizes the procurement of reserves and energy. Under this market design, the decision to schedule a resource to provide either energy or real-time reserves is based on the resource’s bid in the energy market. As Filing Parties note in the transmittal letter, through co-optimization, the market is able to reflect the redispatch costs that are incurred to maintain reserves in the clearing prices of both energy and reserves.³⁵

46. As noted previously, in order to demonstrate compliance with the comparability requirement in the ancillary services market, Filing Parties rely on the DARD construct which was part of the ASM Phase II market rule changes accepted by the Commission in May 2006.³⁶ Under New England’s market rules, to provide real-time contingency reserves, a demand resource must participate in the energy and reserve markets as a DARD. Protesters have argued that the requirements to participate as a DARD (i.e.,

³² Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47.

³³ *Id.* P 47 and P 49.

³⁴ ISO-NE April 28, 2009 Compliance Filing at 16.

³⁵ *Id.* at 17.

³⁶ *ISO New England Inc. and New England Power Pool*, 115 FERC ¶ 61,175 (2006).

advanced metering, capability of having consumption modified in real time in response to electronic dispatch instructions, 5 MW minimum peak load requirement, etc.) have limited the participation in the program to a small subset of demand side resources. As an example, the Internal Market Monitoring Unit (Internal MMU) has noted that the 5 MW minimum peak load requirement for DARD participation may not be comparable with generation, which has a 1 MW minimum size requirement.³⁷

47. Importantly, the DARD infrastructure allows for demand-side treatment of these resources, with the demand resource provider assuming the role of load-serving entity for the customer. The corresponding market participant is responsible for paying for the energy it consumes, and as such, there is no direct payment for load reductions. However, DARD is eligible to set the price for both energy and reserves, and DARD receives a credit for capacity and reserve quantities associated with the dispatchable portion of their load.³⁸ The demand resource provider's cost to serve the retail customer would decrease relative to what it would otherwise have been. Demand resource providers argue that the lack of a direct payment is a commercial barrier to their participation because they are required to negotiate a payment based on a retail customer's avoided cost. Similarly, others have noted that the current market rules force demand response resources to choose whether to participate in the FCM as a supply-side resource or in the ancillary services market as a demand-side resource (through the DARD construct), establishing a barrier to the comparable treatment of demand response as envisioned under Order No. 719.

48. Addressing compensation for demand resources in the ancillary services market, Order No. 719 states that "all accepted bids would receive the market-clearing price."³⁹ Based on the information provided in the compliance filing, the Filing Parties have not sufficiently demonstrated compliance with this market-clearing price requirement for demand resources in the ancillary services market. For example, we can presume that a DARD with a Forward Reserve Obligation receives credit at the clearing price of the Forward Reserve Market Auction. Under such a scenario, it may be possible to find ISO-NE in compliance with the market-clearing price requirement of Order No. 719. But, Filing Parties did not provide enough information in the compliance filing to demonstrate how the tariff revisions with respect to DARDs without Forward Reserve Obligations (that simply have avoided costs) satisfy the requirements of Order No. 719.

³⁷ ISO-NE April 28, 2009 Compliance Filing, Attachment 7 at 8.

³⁸ *Id.* at 23.

³⁹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47.

49. We agree with ISO-NE's statement that Order No. 719 did not direct that co-optimized markets should be modified to permit demand resources to bid only in the reserve markets. However, the Commission did adopt a provision which allows demand response resources to specify operational limits in their bids as a way for these resources to minimize the risk that they are called on too frequently, thereby making participation in ancillary services markets more feasible.⁴⁰ We are also aware of the current stakeholder process to address the future of the price responsive demand programs in ISO-NE. This process is attempting to address several broad demand response questions, including how to model/compensate price-responsive demand in the energy market, whether on the supply-side or demand side.⁴¹ A review of the July 31 Report and December 18 Report demonstrates that some of the current proposals under consideration in that stakeholder process would affect how demand resources are compensated in the reserves and regulation markets. We will require ISO-NE to address this issue in the current stakeholder proceeding. ISO-NE's filing must demonstrate how DARDs or any revised mechanism that is developed for demand response resources complies with the comparability requirements of Order No. 719 as they pertain to the provision of ancillary services as previously discussed. Further, if the stakeholders commit to its retention, we will also require an examination of the current rules that require a minimum 5 MW peak load size requirement and deny DARDs the ability to aggregate. In its July 31 Report, ISO-NE states that it plans to file any revised market rules on price-responsive demand with the Commission by June 1, 2010 with an effective date of June 1, 2012 consistent with the third Capacity Commitment Period.⁴² Those revised rules must also include any of the revisions generated by our finding here. Therefore, we will reject the February 1, 2010 deadline requested by Demand Response Supporters for any revisions or extensions to the existing price-responsive demand programs. Further, we note that the Commission

⁴⁰ *Id.* P 89.

⁴¹ *See* July 31, 2009 Report of ISO New England Inc. and New England Power Pool Regarding Treatment of Price-Responsive Demand in the New England Electricity Markets, Docket No. ER08-830-002 (July 31 Report). On December 18, 2009, ISO-NE and NEPOOL filed an updated status report. Since the submission of the July 31 Report, NEPOOL stakeholders have passed a "Demand-Side Option," which allows Market Participants to purchase voluntary wholesale product in which the energy component is priced on an hourly, real-time basis but failed to approve a "Supply-Side Option." *See* December 18, 2009 Report of ISO New England Inc. and New England Power Pool Regarding Treatment of Price-Responsive Demand in the New England Electricity Markets at 2, Docket No. ER08-830-000.

⁴² July 31 Report at 5.

recently approved the extension of the current Real-Time Price Response Program and Day-Ahead Load Response Program to May 31, 2012.⁴³

50. We are not persuaded by the arguments of Demand Response Supporters that the prerequisite capability to respond to electronic dispatch instructions for any demand resource seeking to participate in the ancillary services market violates the comparability requirement of Order No. 719. In this regard, Order No. 719 specifically notes that in contrast to simply providing energy or capacity, demand response resources seeking to provide ancillary service must “meet the necessary technical requirements.”⁴⁴ Further, Filing Parties state, “operating reserves may be provided by any qualified resource that can respond to dispatch instructions, whether it is a generating resource that changes production or a demand resource that changes consumption.”⁴⁵

51. Demand Response Supporters state that ISO-NE does not allow for demand response resources (outside of the DARD class) to qualify to provide spinning or non-spinning reserves, due in part to the lack of a measurement and verification standard to allow comparability with generation. This argument is a critique of the current DARD mechanism, because a DARD resource can provide spinning reserves, with any assigned reserve quantity being a function of its current consumption versus its lower reported Minimum Consumption Limit. While Demand Response Supporters seek fast track treatment at ISO-NE to establish this measurement and verification standard, we find such a request to be premature at this point, pending the submittal of the June 10, 2010 filing.

52. We find that the new definitions that Filing Parties have proposed for DARD (Maximum Demand Dispatch Duration, Maximum Demand Dispatch Frequency, and Minimum Down-Time), along with the existing Maximum Consumption Limit and Minimum Consumption Limit parameters comply with the Order No. 719 requirement for RTOs to incorporate bidding parameters that allow market participants with demand resources to specify limitations on the frequency, duration, and amount of service in their bids to provide ancillary services. The existing Maximum Consumption Limit and Minimum Consumption Limit parameters allow DARD to specify the amount of service, while the Maximum Demand Dispatch Frequency will allow specification of the frequency of service, and Maximum Demand Dispatch Duration will allow specification of the duration of service. In addition, the Dispatchable Asset Related Demand

⁴³ See *ISO New England Inc.*, Docket No. ER09-1737-000 (unpublished letter order, Oct. 29, 2009).

⁴⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 47.

⁴⁵ ISO-NE April 28, 2009 Compliance Filing at 17.

Minimum Down-Time parameter will allow greater control over reductions for market participants with DARD by allowing the specification of a minimum time that must elapse before a DARD can be dispatched again, thus beginning a new maximum duration period of service. Without such a parameter, back-to-back dispatching becomes possible, with each dispatch for the maximum duration, even if that was not the intent of the market participant. Thus, we accept the proposed definitions for new DARD bidding parameters in Market Rule 1, section III.1.3, and the modifications to the list of DARD bidding parameters for the Day-Ahead Energy Market in Market Rule 1, section 1.10.1A (d) (viii).

53. We note that with respect to regional coordination, the Commission finds that the demand response matrix and the North American Energy Standard Board submission of “Measurement and Verification Demand Response Products” are steps toward promoting demand response consistently in all regions.⁴⁶ The development of the matrix enables ISO/RTO Council members to compare market designs and other features such as bidding thresholds of demand resource participation in the wholesale markets and is consistent with Order No. 719’s requirement that RTOs and ISOs confer with each other on bidding parameters and methods to provide a technical and factual basis for regional variations at this stage of the process.⁴⁷ The ISO/RTO Council has also developed a service comparison matrix that includes information beyond measurement and verification (e.g., product and service definitions).

54. ELCON also requests that the Commission pursue uniform demand response standards, and Demand Response Supporters similarly request that the Commission hold a generic proceeding to address comparability across all of the RTOs. In Order No. 719, the Commission specifically chose not to develop “a standardized set of minimum requirements for minimum size bids, measurement, telemetry and other factors, and instead allowed RTOs and ISOs to develop their own minimum requirements, including bidding parameters.”⁴⁸ It would be inappropriate to use the compliance filing process as a forum to reconsider that determination in the Final Rule. However, we note that the North American Energy Standards Board (NAESB) has adopted Phase I business practice standards for the measurement and verification of demand response, a first step in a

⁴⁶ See the ISO/RTO Council matrix at: <http://www.isorto.org/site/c.jhKQIZPBlmE/b.2603295/k.BEAD/Home.htm>.

⁴⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 86.

⁴⁸ *Id.* P 87.

process that may lead to greater standardization through the NAESB consensus process.⁴⁹ Furthermore, the Commission will continue to examine the need for further generic policy reforms to identify and eliminate barriers to demand response, and ELCON's concerns with standardization can be addressed in relevant future Commission proceedings.

b. Eliminating Deviation Charges During System Emergencies

55. In Order No. 719, the Commission required RTOs and ISOs to modify their tariffs to eliminate a deviation charge to a buyer in the energy market for taking less electric energy in the real-time market than was scheduled in the day-ahead market. This charge would be eliminated only during a real-time market period for which the RTO or ISO declares an operating reserve shortage or makes a generic request to reduce load in order to avoid an operating reserve shortage.⁵⁰ Order No. 719 also directed RTOs and ISOs to modify their tariffs to eliminate deviation charges for virtual purchasers, during the same period as they are eliminated for physical purchasers, unless the RTO or ISO makes a showing upon compliance that it would be appropriate to assess such deviation charges for virtual purchasers during this period.⁵¹

i. Filing Parties' Filing

56. To address the requirement to eliminate deviation charges during operating reserve shortages, Filing Parties have changed the language of Market Rule 1, Appendix F section 3.1 to prevent market participants with positive Real-Time Load Obligation Deviations from being allocated charges related to Real-Time Net Commitment Period Compensation (NCPC) Credits if the deviations occur during emergency conditions. The emergency conditions are delineated as the dispatch of demand resources, or the declaration of Operating Procedures No. 4 and No. 7, in any area within the load zone.

57. Filing Parties state that the modified rule text further indicates that all such excluded positive deviations will be allocated to Real-Time Load Obligation within the applicable Load Zone. They further contend that the rule text exempts market participants with postured DARD and a Real-Time Load Obligation from having their

⁴⁹ Standards for Business Practices and Communication Protocols for Public Utilities, Notice of Proposed Rulemaking, Docket No. RM05-5-017, 128 FERC ¶ 61,263 (Sep. 17, 2009).

⁵⁰ *Id.* P 111.

⁵¹ *Id.* P 127.

allocation of these positive deviation charges based on any increased Real-Time Load Obligation caused by the posturing operation.⁵²

58. Filing Parties state that the risk of NCPC deviation charges gives market participants an incentive to bid and offer in the day-ahead market, and to follow real time dispatch instructions. Filing Parties state that it is a primary concern that this incentive not be subverted.⁵³ Filing Parties further state that energy buyers or virtual purchasers with positive Real-Time Load Obligations during an operating reserve shortage are helping to reduce the magnitude of the shortage, and thus the deviation amount should not be used to allocate NCPC deviation charges to the buyer.⁵⁴

59. Filing Parties state that Order No. 719 requires that any proposal for local allocation of costs of customer demand reductions be accompanied by an explanation of when costs would be spread across the entire RTO region and when applied locally, how the local area would be determined, and why local cost recovery is justified. Filing Parties contend that positive Real-Time Load Obligation Deviations are to be eliminated and reallocated only during periods when demand resources are dispatched or when Operating Procedure No. 4 or No. 7 has been implemented for the system or for any affected Load Zone. Filing Parties contend that to the extent demand resources are dispatched or an emergency condition exists within or solely affects a particular Load Zone, only positive Real-Time Load Obligation Deviations within that Load Zone will help to reduce the magnitude of the shortage.

60. Filing Parties request that changes to ISO-NE's market rules to eliminate deviation charges during operating reserve shortages be made effective with notice from ISO-NE, on or after June 1, 2010.

ii. Protests and Comments

61. None was filed.

iii. Commission Determination

62. The Commission finds that Filing Parties are in compliance with the Order No. 719 requirement to eliminate deviation charges to buyers that take less energy in the real-time market than was scheduled in the day-ahead market during reserve shortages. We

⁵² ISO-NE April 28, 2009 Compliance Filing at 33.

⁵³ *Id.*

⁵⁴ *Id.* at 34.

find that the changes Filing Parties have proposed to Market Rule 1, Appendix F Section 3.1 are consistent with Order No. 719's requirements. Additionally, Filing Parties have adequately explained and justified the circumstances in which the costs of customer demand reductions would be locally allocated.

c. Aggregation of Retail Customers

63. Order No. 719 required RTOs and ISOs to amend their market rules as necessary to permit an ARC to bid demand response on behalf of retail customers directly into the RTO's or ISO's organized markets, unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate. The Commission determined that allowing an ARC to act as an intermediary for many small retail loads that cannot individually participate in the organized market would reduce a barrier to demand response participation.⁵⁵

64. The Commission directed RTOs and ISOs to submit compliance filings to propose amendments to their tariffs or otherwise demonstrate how their existing tariffs and market rules comply with the Final Rule.⁵⁶ The Commission indicated that tariff revisions are to be made in accordance with certain specified criteria and flexibilities:

(1) The ARC's demand response bid must meet the same requirements as a demand response bid from any other entity, such as a load-serving entity. For example:

- Its aggregate demand response must be as verifiable as that of an eligible load-serving entity or large industrial customer's demand response that is bid directly into the market;
- The requirements for measurement and verification of aggregated demand response should be comparable to the requirements for other providers of demand response resources, regarding such matters as transparency, ability to be documented, and ensuring compliance;
- Demand response bids from an ARC must not be treated differently than the demand response bids of a load-serving entity or large industrial customer.

(2) The bidder has only an opportunity to bid demand response in the organized market; it does not have a guarantee that its bid will be selected.

⁵⁵ *Id.* P 154.

⁵⁶ *Id.* P 163.

(3) The term “relevant electric retail regulatory authority” means the entity that establishes the retail electric prices and any retail competition policies for customers, such as the city council for a municipal utility, the governing board of a cooperative utility, or the state public utility commission.

(4) An ARC can bid demand response either on behalf of only one retail customer or multiple retail customers.

(5) Except for circumstances where the laws and regulations of the relevant retail regulatory authority do not permit a retail customer to participate, there is no prohibition on who may be an ARC.

(6) An individual customer may serve as an ARC on behalf of itself and others.

(7) The RTO or ISO may specify certain requirements, such as registration with the RTO or ISO, creditworthiness requirements, and certification that participation is not precluded by the relevant electric retail regulatory authority.

(8) The RTO or ISO may require the ARC to be an RTO or ISO member if its membership is a requirement for other bidders.

(9) Single aggregated bids consisting of individual demand response from a single area, reasonably defined, may be required by RTOs and ISOs.

(10) An RTO or ISO may place appropriate restrictions on any customer’s participation in an ARC-aggregated demand response bid to avoid counting the same demand response resource more than once.

(11) The market rules shall allow bids from an ARC unless this is not permitted under the laws or regulations of relevant electric retail regulatory authority.

i. Filing Parties’ Filing

65. Filing Parties contend that ISO-NE is already in compliance with Order No. 719’s requirements with regard to ARCs, and, therefore, no rule changes are required in order to comply with Order No. 719. Filing Parties note that Market Rule Appendix E, section 1.1, specifically provides the following core provision:

Load Response Program incentives are available to any Market Participant which, consistent with the requirements set forth herein, enrolls itself and/or one or more retail customers (Demand Resources) to provide a reduction in their electricity consumption in the New England Control Area during peak demand periods.

66. Filing Parties contend that ARCs are permitted by the current provisions of Market Rule 1 to aggregate retail customers for the purposes of participating in the ISO-NE demand response programs and in the FCM. They state that ARCs are the most substantial contributor of demand resources in the ISO-NE markets. They argue that the New England market rules encourage the participation of ARCs in the wholesale markets, noting that ARCs are not required to be load-serving entities in order to aggregate customers for participation in the demand response programs of the FCM.

67. In addition, Filing Parties state that in the New England region, information is provided to municipal utilities and cooperative utilities that they can use to ensure that their customers are not improperly enrolled in a demand response program administered by ISO-NE, should they desire to prohibit participation by their retail customers. They contend that under existing procedures, ISO-NE, upon request, will provide informational reports to local distribution companies that identify all demand response program resource assets in their metering domain and the enrolling participant that registered the asset.⁵⁷

ii. Protests and Comments

68. Public Systems argues that ISO-NE's processes are not sufficient to comply with Order No. 719's goal of permitting demand response aggregation without imposing undue burdens on relevant electric retail regulatory authorities. They contend that currently, ISO-NE allows ARCs to enroll customers in demand response programs without regard for whether such registration is consistent with the laws or regulations of a relevant electric retail regulatory authority. They contend that ISO-NE merely provides after-the-fact notice of such enrollment. Public Systems argues that ISO-NE should require the submission of a certification of compliance, issued by the relevant retail authority, as part of ISO-NE's asset-registration process. They argue that such a certification process would facilitate compliance with applicable state or local laws and would encourage early coordination between ARCs and local distribution companies and/or state and local regulatory authorities.⁵⁸

Answers

69. In its answer, ISO-NE states that it does not necessarily oppose the suggestion for a certification requirement as raised by Public Systems. However, ISO-NE asserts that this suggestion was not raised during the stakeholder process and requests that Public

⁵⁷ ISO-NE April 28, 2009 Compliance Filing at 38.

⁵⁸ Public Systems May 16, 2009 Comments at 19.

Systems submit a proposal through the stakeholder process so that the details surrounding the program can be properly evaluated.⁵⁹

70. In its answer, Public Systems avers that the Commission should direct ISO-NE to submit a further compliance filing adopting a certification requirement, and would not object to a brief stakeholder process to discuss the details. Until a requirement is enacted, Public Systems requests that the Commission direct ISO-NE to remove assets that are not properly registered at the request of retail regulatory authorities.⁶⁰

iii. Commission Determination

71. Order No. 719 allows the RTO or ISO to specify certain requirements for demand response resources including, registration with the RTO or ISO, creditworthiness requirements, and certification that participation is not precluded by the relevant electric retail authority.⁶¹ However, nothing in Order No. 719 requires that the certificate be issued by the relevant retail regulatory authority as the Public Systems request in their comments on the Filing Parties' compliance filing. Therefore, we deny Public Systems' proposal. Because we deny Public System's proposal, we find Public Systems' additional request to remove assets which are not properly registered at the request of retail regulatory authorities to be unnecessary.

d. Market Rules Governing Price Formation During Periods of Operating Reserve Shortage

72. In Order No. 719, the Commission established reforms to remove barriers to demand response by requiring RTOs and ISOs to reform their market rules in such a way that prices during operating reserve shortages more accurately reflect the value of energy during such shortages. Order No. 719 required each RTO or ISO to reform or demonstrate the adequacy of its existing market rules to ensure that the market price for energy reflects the value of energy during an operating reserve shortage.⁶² As such, it stated that each RTO or ISO may propose in its compliance filing one of four suggested approaches to pricing reform during an operating reserve shortage, or develop its own

⁵⁹ ISO-NE June 15, 2009 Answer at 9.

⁶⁰ Public Systems July 2, 2009 Comments at 10.

⁶¹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158.

⁶² *Id.* at P 194.

alternative approach to achieve the same objectives.⁶³ Each RTO or ISO must address how its selected method of shortage pricing interacts with its existing market design.⁶⁴

73. Order No. 719 also required each RTO or ISO to provide adequate factual support for its compliance filing. To that end, the Commission outlined six criteria it will consider in reviewing whether the factual record compiled by the RTO or ISO meets the requirements of the rule.⁶⁵ The Commission allowed an RTO or ISO to phase in any new pricing rules over a few years, provided that this period is not protracted.⁶⁶ The phase-in period must be justified as part of the RTO's or ISO's overall proposal to change its pricing rules.

i. Filing Parties' Filing

74. Filing Parties contend that ISO-NE's existing rules meet the criteria specified by the Commission. They state that in October 2006, as part of the ASM Phase II project, New England implemented a real-time market that co-optimized the dispatch of resources to provide both energy and reserves. They state that the rules developed to support both

⁶³ The four approaches are: (1) RTOs and ISOs would increase the energy supply and demand bid caps above the current levels only during an emergency; (2) RTOs and ISOs would increase bid caps above the current level during an emergency only for demand bids while keeping generation bid caps in place; (3) RTOs and ISOs would establish a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short; and (4) RTOs and ISOs would set the market-clearing price during an emergency for all supply and demand response resources dispatched equal to the payment made to participants in an emergency demand response program. *Id.* P 208.

⁶⁴ *Id.* P 204.

⁶⁵ The six criteria are: (1) improve reliability by reducing demand and increasing supply during periods of operating reserve shortages; (2) make it more worthwhile for customers to invest in demand response technologies; (3) encourage existing generation and demand resources to continue to be relied upon during an operating reserve shortage; (4) encourage entry of new generation and demand resources; (5) ensure that the principle of comparability in treatment of and compensation to all resources is not discarded during periods of operating reserve shortage; and (6) ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages including, but not limited to, showing how demand resources discipline bidding behavior to competitive levels. *Id.* P 246-47.

⁶⁶ *Id.* P 258.

the Forward Reserve Market and the real-time reserve market are consistent with the third approach the Commission recommended, i.e., establishing a demand curve for operating reserves, which has the effect of raising prices in a previously agreed-upon way as operating reserves grow short.⁶⁷

75. Filing Parties contend that ISO-NE's existing market design, which uses a demand curve, satisfies the first criterion of improving reliability by reducing demand and increasing supply during operating reserve shortages. The demand curve sets energy and reserve prices that reflect the proper economic value of these products in the market when there is an operating reserve shortage. Filing Parties contend that high energy and reserve prices provide appropriate incentives for demand to lower consumption and supply to increase production during reserve shortages, and that the converse is also true. Filing Parties further state that ISO-NE's co-optimization of energy and reserve markets yields the least-cost means of meeting both the energy demand and the reserve requirements. They contend that a demand resource following real-time dispatch instructions maximizes total benefit/utility. Filing Parties further state that the non-performance penalties associated with the Forward Reserve Market provide incentives for resources that obtain obligations through the Forward Reserve Market to be available and deliver during shortage periods.⁶⁸

76. With respect to the second criterion of shortage pricing making investment in demand resource technologies worthwhile, Filing Parties state that since the implementation of the Standard Market Design markets in 2003, the New England region has experienced a significant investment in demand response technologies. They contend that the majority of the market participants offering demand response technologies and services have focused on participation in the demand response programs that target customers interested in providing load reductions during emergency conditions. Filing Parties contend that market participants that utilize the DARD infrastructure participate in the real-time wholesale market on a basis comparable to generating resources. With this infrastructure, operating reserves may be provided by any qualified resource that can respond to dispatch instructions. They explain that no demand resource, save the pumping loads associated with pumped-storage hydro facilities, has yet participated in the wholesale market as a DARD.⁶⁹

77. Addressing the third criterion, Filing Parties contend that existing market rules encourage existing generation and demand response resources to continue to be relied

⁶⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 208.

⁶⁸ ISO-NE April 28, 2009 Compliance Filing at 42-43.

⁶⁹ *Id.* at 43.

upon during an operating reserve shortage. They contend that high energy and reserve prices provide a natural incentive for existing demand to lower consumption and existing supply to increase production when reserves become scarce. Filing Parties further state that Forward Reserve Market non-performance penalties create an incentive for Forward Reserve Resources to perform during an operating reserve shortage to avoid the penalties.⁷⁰

78. Addressing the fourth criterion, Filing Parties contend that existing market rules encourage entry of new generation and demand resources. They contend that the Forward Reserve Market encourages entry of new resources by establishing a compensation mechanism that does not rely on prices during shortage events, but on the long-term maintenance and capital improvement costs associated with the new reserve capability. They argue that new resources are encouraged to take on obligations to provide operating reserves via the Forward Reserve Market, without having to rely solely on the high real-time prices during operating reserve shortages to recover their costs.⁷¹

79. Regarding the fifth criterion, Filing Parties argue that existing rules ensure that the principle of comparability is not discarded during periods of operating reserve shortage. They contend that the DARD class is integrated into the Energy Management System and real-time dispatch and pricing systems. And this infrastructure allows dispatchable demand resources the ability to participate in the energy market and both the forward and real-time reserve markets on a comparable basis to generating resources.

80. Addressing the last criterion, Filing Parties argue that existing market rules ensure market power is mitigated and gaming behavior is deterred during periods of operating reserve shortages. They argue that in addition to the standard monitoring and mitigation procedures currently used by the ISO-NE Internal MMU, Reserve Constraint Penalty Factors also serve to limit the exercise of market power. Filing Parties explain that the Reserve Constraint Penalty Factor is the maximum price used when redispatching resources, and sets the price for reserves when a constraint is violated.⁷² They explain that because the Reserve Constraint Penalty Factor acts as a cap on reserve clearing prices, it limits the gains possible from attempts to artificially increase the real-time reserve price by withholding reserve supply. Filing Parties also state that the infrastructure of DARDs allows a market participant to respond to energy prices and dispatch instructions in real-time, which also disciplines the bidding behavior of generators. Filing Parties state that the DARD class, which is fully integrated into the

⁷⁰ *Id.* at 43-44.

⁷¹ *Id.* at 44.

⁷² *Id.* at 45.

market as a demand-side resource, makes the real-time demand curve more elastic, by reflecting the DARD's willingness to forego energy purchases at high prices. Filing Parties assert that by improving demand curve elasticity, the DARD class will reduce the effectiveness of attempts to raise prices by withholding supply.⁷³ Filing Parties also provide the following explanation of how Dispatchable Asset Related Demand can mitigate market power during shortage conditions:

Upon a contingency, the operators select the next least expensive resources to restore energy balance and begin recovering ten-minute and thirty-minute reserves. Most frequently, the resources called on are relatively expensive peaking generators. To the extent that load, as a Dispatchable Asset Related Demand is willing to reduce consumption for a cost lower than dispatching a peaking resource, the system operators would be able to manage the contingency and ensure secure system operations for a lower overall cost than otherwise. The existence of the Dispatchable Asset Related Demand puts competitive pressure on generators to submit offers that reflect their true opportunity cost of production, else forego potential profit-making opportunities. This structure, in and of itself, mitigates market power.⁷⁴

81. As required by Order No. 719, Filing Parties provide factual data regarding the interaction of supply and demand during operating reserve shortages. This data includes tables showing real-time reserve prices and compensation during operating reserve shortages, and payments and penalties to reserve resources by month.⁷⁵ Filing Parties include charts showing the patterns of energy and reserve prices during four days when operating reserve shortages occurred (February 2, 2007, August 2, 2007, and two separate periods on September 8, 2007) showing that reserve constraint penalty factors in the operating reserve demand curve were employed to limit the rise of operating reserve prices during shortages.⁷⁶ Filing Parties present a figure showing the frequency of positive operating reserve prices from October 2006 to February 2009 by zone, stating that the real-time reserve clearing prices were above \$50/MWh in 1.33 percent of hours.⁷⁷ Filing Parties present a table displaying results from the past Forward Reserve Auctions, noting that the supply of resources has continued to increase. Filing Parties state that the

⁷³ *Id.* at 45-46.

⁷⁴ *Id.* at 46.

⁷⁵ ISO-NE April 28, 2009 Compliance Filing, Attachment 6, at 2.

⁷⁶ *Id.* at 3-6.

⁷⁷ *Id.* at 6.

past five Forward Reserve Auctions have fully satisfied local requirements only twice, and that the Forward Reserve Market clearing price has been set to the ceiling price of \$14,000/MW-month when there is a shortage. Filing Parties state that the Forward Reserve Market ceiling price provides incentives for investment in demand resources, and notes that the Forward Reserve Market was modified in 2006 to allow demand resources to participate.⁷⁸ Filing Parties provide a chart showing that demand response program enrollment has increased from 260 MW in 2004 to over 2,000 MW which currently participate in Load Response Programs. Filing Parties note that the growth accelerated in December 2006 with the introduction of FCM transition payments, and further note that over 2,500 MW of demand resources cleared in the first Forward Capacity Auction for the delivery year starting June, 2010.⁷⁹

ii. Protests and Comments

82. The ISO-NE Internal MMU states that it supported the initial implementation of the demand curve for shortage pricing in ISO-NE, as it sets the reserve clearing price at the opportunity cost of providing reserves and does not rely on the exercise of market power to set prices during shortages.⁸⁰

83. Potomac Economics (the independent market monitor for ISO-NE) states that the demand curve approach to shortage pricing allows the price of energy and operating reserves to include the economic value of reserves in shortage, and that this approach is most effective when energy and reserves are co-optimized, as they are in ISO-NE. Potomac Economics states that the use of a demand curve in co-optimized markets is an approach that will set efficient shortage prices when an RTO or ISO must sacrifice operating reserves to provide energy.⁸¹

84. However, Potomac Economics is of the opinion that demand curves are not sufficient alone, because they do not ensure efficient prices when the ISO or RTO takes other emergency actions to maintain reliability (such as using emergency demand response, which is not integrated with the market and does not set market prices). As an example, Potomac Economics points to a load curtailment event in Maine in December 2007 in which real time clearing prices did not reflect the cost of demand response resources that were activated to maintain reliability. Potomac Economics believes that

⁷⁸ *Id.* at 7-8.

⁷⁹ *Id.* at 9.

⁸⁰ ISO-NE April 28, 2009 Compliance Filing at 47.

⁸¹ Report on Shortage Pricing of Potomac Economics at 8.

some form of the Commission's fourth approach (set the market clearing price equal to the payment made to emergency demand response resources) would be needed to set efficient shortage prices in such situations.⁸²

85. Thus, while Potomac Economics states that the ISO-NE demand curves for energy and operating reserve prices during reserve shortages should comply with the requirements of Order No. 719, they note that prices may not reflect high cost emergency actions taken that cause the system not to be short of operating reserves, including calling emergency demand response, emergency energy purchases, export curtailments, voltage reductions, and other emergency actions outside of the market. Potomac Economics believes that these actions should be included in pricing, allowing prices to be set at the marginal cost of the emergency action taken, and notes that ISO-NE is considering changes to market rules and pricing methodologies to address these issues.⁸³

86. In its protest, CDRI submitted as an attachment "Defining the Product: Market Theory for an Essential Service and the Proper Role of Demand Response." CDRI contends that shortage pricing (scarcity, or Value of Lost Load pricing as it is referred to in the paper) is efficiently pricing the wrong product. CDRI argues that scarcity and its economic costs should be prevented, as these administratively determined pricing strategies introduce volatility and create inefficiencies in the market. CDRI argues that granting suppliers the opportunity to invoke value of lost load pricing amounts to a "protection money" racket. Instead, CDRI believes that a policy of maximizing consumer surplus must be in the forefront of any analysis to determine when and to what extent short term volatility should be used in electricity market design.⁸⁴

iii. Commission Determination

87. The Commission finds that Filing Parties are in compliance with the Order No. 719 requirements for price formation during periods of operating reserve shortages. The use of a demand curve in a market that co-optimizes energy and reserves is consistent with the third approach advocated in Order No. 719. Further, Filing Parties have provided support for how ISO-NE's market rules meet each of the six criteria set forth by the Commission in Order No. 719 with respect to avoiding periods of operating reserve shortage and reducing demand and increasing generation during periods of operating reserve shortage. In addition, as required by Order No. 719, Filing Parties have provided

⁸² *Id.* at 9-10.

⁸³ *Id.* at 13.

⁸⁴ CDRI May 26, 2009 Protest, Attachment at 32.

data demonstrating the interaction of supply and demand during periods of operating reserve shortages and the resulting effects on market prices.

88. The Commission agrees with the Internal MMU's analysis that the operating reserve demand curve avoids reliance on market power to set prices during periods of operating reserve shortages. The Commission also agrees with the analysis of Potomac Economics that the use of a demand curve is an effective way to reflect the economic value of reserve shortages in energy and reserve prices in a co-optimized energy and ancillary services market. With respect to Potomac Economic's discussion of pricing of out-of-market actions that avoid shortages prior to their occurrence, the Commission encourages ISO-NE to work with its stakeholders to develop the best method for pricing the marginal cost of these out-of-market actions to avoid sending inefficient price signals during such occurrences.

89. The Commission rejects CDRI's protests on the topic of shortage pricing. CDRI asserts that shortage pricing (i.e., scarcity, or Value of Lost Load) is pricing the wrong product, and that a policy of maximizing consumer surplus must be used to determine when volatility should be used in market design. We conclude that re-defining the product of electricity, as well as re-defining the objective of electricity markets, are outside the scope of Order No. 719. With respect to CDRI's argument that administratively determined pricing strategies create market inefficiencies and volatility, we conclude that the use of a demand curve in a co-optimized market will set efficient energy and reserve prices during periods of shortage. While these values are administratively determined, we note that they limit opportunities to exercise market power by limiting the rise in prices during operating reserve shortages. We further believe that Filing Parties have adequately demonstrated that positive reserve clearing prices have historically been triggered infrequently, and have reached values above \$50/MWh even less frequently.

e. **Reporting on Remaining Barriers to Comparable Treatment of Demand Response Resources**

90. Order No. 719 required each RTO and ISO to assess and report on any remaining barriers to comparable treatment of demand response resources that are within the Commission's jurisdiction, and to submit its findings and any proposed solutions to the Commission, along with a timeline for implementation.⁸⁵ The Commission required RTOs and ISOs to identify all known barriers, to provide an in-depth analysis of those that are practical to analyze in the compliance time frame given, and to supply a time frame for analyzing the remainder, including, but not limited to, technical requirements

⁸⁵ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 274.

and performance verification limitations.⁸⁶ Finally, Order No. 719 required RTOs and ISOs to identify any significant minority views in its report.

i. Filing Parties' Filing

91. Filing Parties identify a number of barriers to demand resources providing reserves. First, Filing Parties identify commercial and business barriers, which may result from the business relationship between the parties providing a product or service. Filing Parties state that the lack of payment for load reductions through the wholesale market for DARDs is one such barrier.

92. Next, Filing Parties identify technical and market barriers, which may result from specific product requirements such as quality, performance, measurement, verification or communications imposed by either the buyers of the product or parties involved in its delivery. These barriers include: (1) the 5 MW peak load requirement for DARDs; (2) the requirement that DARDs be associated with a single retail customer; (3) the local distribution companies' (LDC) back-office infrastructure; (4) the definition of peak hours for the Forward Reserve Market; (5) the lack of automation and communication systems; and (6) the lack of uniformity in rules and procedures across ISO/RTO regions.

93. Filing Parties also identify economic and financial barriers, which may result from the costs associated with producing or delivering a product or the revenues available from its sale. Such barriers include: (1) the requirement that retail customers remain as a DARD for 12 months; (2) the lack of supply-side treatment for DARDs in the FCM; (3) the price volatility of the day-ahead and real-time energy markets; and (4) the costs of installing and maintaining advanced metering.

94. However, Filing Parties explain that ISO-NE cannot address certain barriers to demand resources providing reserves. For example, while ISO-NE believes that the DARD infrastructure could accommodate resources smaller than 5 MW, as well as multiple customers at the same node, Filing Parties state that the local distribution companies are responsible for performing administrative work related to DARD registration, and ISO-NE cannot remove these barriers unilaterally. Additionally, Filing Parties state that two of the barriers identified by stakeholders – providing reserves outside of normal business hours, and the requirement to remain as a DARD for 12 months – are technical requirements for the provision of reserves.

95. Addressing possible solutions to the barriers that they have identified, Filing Parties state that ISO-NE is actively working with market participants to implement a new lower-cost dispatch and communication system for FCM resources that will lower

⁸⁶ *Id.* P 275.

barriers to entry for all resources. Also, while Filing Parties assert that the lack of ubiquitous automation and the lack of uniformity across different RTO regions are outside of ISO-NE's control, Filing Parties note that ISO-NE participates in initiatives for national demand response and smart grid standards, and it endeavors to seek consistency across regions and encourages the installation of cost effective advanced metering and communication infrastructure.

96. Filing Parties also identify barriers to demand resources providing price-responsive demand.⁸⁷ As detailed elsewhere in this order, Filing Parties explain that there is currently a stakeholder process underway to determine the most appropriate way to achieve price-responsive demand in the energy market, and state that ISO-NE will file a report with the Commission on or before July 31, 2009 to describe the results of that stakeholder process, areas of consensus, and specific proposals considered by stakeholders on the future of price-responsive demand.⁸⁸ Additionally, ISO-NE has proposed to stakeholders that its current Real-Time Price Response Program and Day-Ahead Load Response Program be extended to May 31, 2011.⁸⁹

97. Finally, Filing Parties state that ISO-NE has addressed a barrier to demand resources participating in the FCM. Specifically, the market rules governing the FCM developed in 2006 anticipated an "all or nothing" dispatch of active demand resources by load zone. Given that there are now over 2,000 MW of active demand resources, ISO-NE believes that this "all or nothing" approach could jeopardize system reliability. Accordingly, ISO-NE, working with its stakeholders, has modified the market rules so that it can dispatch only the quantity of active demand resources needed to maintain operating reserves in specific geographic locations. Filing Parties state that the infrastructure needed to implement this dispatch methodology is expected to be in place by June 1, 2010.

⁸⁷ Such barriers include lack of retail customer awareness, lack of information and training, limited product availability, bounded rationality, lack of money or financing, high transaction costs, unaccounted for societal benefits, uncertainty and risk avoidance, and the transitory nature of programs.

⁸⁸ July 31 Report.

⁸⁹ ISO-NE April 28, 2009 Compliance Filing at 57. On September 23, 2009, ISO-NE and NEPOOL submitted a filing to extend the expiration date of the Real-Time Price Response Program and Day-Ahead Load Response Program to May 31, 2012, and the Commission accepted the filing by delegated letter. *See ISO New England Inc.*, Docket No. ER09-1737-000 (unpublished letter order, Oct. 29, 2009).

ii. **Protests and Comments**

98. While Demand Response Supporters state that they continue to be supportive of the initial progress and efforts ISO-NE has made toward addressing demand response resource issues, Demand Response Supporters assert that “too many barriers to demand response persist and too much work remains to allow ISO-NE’s claim of compliance to go unanswered.”⁹⁰ According to Demand Response Supporters, there are several market barriers created by the rules governing DARD eligibility. Noting that a DARD must be 5 MW or greater and that resources of less than 5 MW are not permitted to aggregate, Demand Response Supporters assert that ISO-NE’s market rules impose significant barriers to the participation of smaller demand resources, without sufficient justification.

99. Further, Demand Response Supporters contend that despite identifying numerous barriers to comparable treatment, ISO-NE’s compliance filing does not commit to reporting any ongoing analysis regarding remaining barriers to comparable treatment.⁹¹ Demand Response Supporters request that ISO-NE be required to conduct a stakeholder process and report, by a date certain, on the affirmative steps that will be taken in order to foster the increased participation of demand resources in ISO-NE.

100. Demand Response Supporters also contend that the May 31, 2010 expiration of the current price-responsive demand response programs constitutes a barrier to entry that must be addressed and resolved through a stakeholder process.⁹² Demand Response Supporters request that ISO-NE be required to file, by February 1, 2010, either a proposal for the continuation of existing programs in their current form or modifications and continuation of the existing programs. Additionally, Demand Response Supporters contend that a generic proceeding should be established to address issues that are common across all RTOs related to comparability of demand response resources. They argue that achieving common outcomes among the RTOs on comparability issues will facilitate demand response participation in organized markets.

101. ELCON also argues that the ISOs should be compelled to actively pursue nationwide uniformity. It contends that the lack of demand response protocols imposes significant costs on the large industrial consumers who will likely provide the bulk of demand response resources in the near term.⁹³

⁹⁰ Demand Response Supporters May 26, 2009 Comments at 2.

⁹¹ *Id.* at 14.

⁹² *Id.*

⁹³ ELCON May 26, 2009 Comments at 9.

102. CDRI does not believe that ISO-NE's current demand response programs address the most significant barriers to demand response, but notes that the ongoing price-responsive demand stakeholder process is developing specific alternative proposals.⁹⁴

103. Regarding the Demand Response Supporters concerns that the DARD rules are unduly restrictive, ISO-NE replies that it plans to begin stakeholder discussions in the coming months to resolve issues associated with specific barriers to increased participation of demand resources in the New England markets.⁹⁵ ISO-NE asks that the Commission refrain from imposing any artificial deadlines on implementing demand response-related changes.

104. Likewise, NEPOOL urges the Commission to allow the region to use the stakeholder process to examine the integration of demand response resources in New England. Additionally, regarding requests for greater uniformity among RTO and ISO regions, NEPOOL urges the Commission not to predetermine or otherwise condition its efforts in New England through any national effort without taking into account the many varied and complex factors that have given rise to some of those differences or without giving individual regions the opportunity to respond.⁹⁶

105. NEPGA disagrees with Demand Response Supporters' claims that barriers continue to stifle demand response participation. NEPGA points out that, since ISO-NE began operation, demand resource capability has grown from 100 MW to over 2,500 MW.⁹⁷

iii. Commission Determination

106. Filing Parties have identified barriers to demand response, consistent with Order No. 719's requirements. And, Filing Parties have explained that ISO-NE will address many of these issues through its current stakeholder process. As such, we will not establish a separate deadline for ISO-NE to report on steps that will be taken to remove barriers to comparable treatment of demand response resources in ISO-NE, as ISO-NE is already making progress on these issues. We note that ISO-NE and NEPOOL filed a report on the progress of their stakeholder process to achieve price-responsive demand on July 31, 2009 in Docket No. ER08-830-002. ISO-NE and NEPOOL report that

⁹⁴ CDRI May 26, 2009 Comments at 3.

⁹⁵ ISO-NE June 15, 2009 Answer at 7.

⁹⁶ NEPOOL June 10, 2009 Answer at 12.

⁹⁷ NEPGA Comments at 6.

stakeholder discussions have largely focused on the development of potential design approaches to achieve price-responsive demand in the energy market, whether through a “supply-side approach” or through a “demand-side approach.” ISO-NE has proposed a schedule that would result in market rules being filed with the Commission no later than June 1, 2010, with such rules to become effective June 1, 2012.⁹⁸ Additionally, we note that, after discussions with stakeholders, ISO-NE and NEPOOL have submitted proposed tariff revisions that would extend the Real-Time Price Response Program and Day-Ahead Load Response Program until May 31, 2012.⁹⁹

107. We agree with the commitment by Filing Parties to continue to work with stakeholders to resolve demand response barriers, as well as to continue coordinating with other ISOs and RTOs to develop nationwide uniformity where possible on demand response. Comprehensively addressing the barriers to demand response identified will require the cooperation of many parties, including ISO-NE, NEPOOL, their stakeholders, local distribution companies, and other RTOs and ISOs. We note that Filing Parties’ report and the comments and answers filed in this proceeding will provide information that will be considered by the Commission staff in its evaluation of remaining barriers to demand response participating in ISO-NE’s wholesale markets.

2. Long-Term Power Contracting in Organized Markets

108. In Order No. 719, the Commission required each RTO and ISO to dedicate a portion of its website for market participants to post offers to buy and sell electric energy on a long-term basis.¹⁰⁰ The Commission did not mandate any specific form for the website, but instead allowed each RTO or ISO to work with its stakeholders to implement the website. This discretion includes decisions over the type and amount of data to be posted by participants, whether participants must include a proposed price in their posting, and password and security requirements.¹⁰¹ Order No. 719 directed each RTO or ISO to explain in its compliance filing the actions it has taken to comply with these

⁹⁸ The July 31 Report notes that NEPOOL has not taken a formal position on this schedule.

⁹⁹ *See supra* n.89.

¹⁰⁰ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 277. The Commission defined “long-term” as one year or more, but stated that RTOs and ISOs may include offers for contracts of less than a year on their websites as well. *Id.*

¹⁰¹ *Id.* P 303.

requirements and to provide information on the bulletin board that it has chosen to implement.¹⁰²

a. Filing Parties' Filing

109. Filing Parties contend that ISO-NE will comply with this Order No. 719 requirement;¹⁰³ however, ISO-NE's resources and systems will not be able to start on this initiative until the second quarter of 2010 due to its existing commitments in support of the FCM and Demand Response Integration Projects. Filing Parties state that the target implementation date for this website will be the first quarter of 2011.

110. Filing Parties state that ISO-NE has discussed with NEPOOL participants the general information that may be posted on this portion of ISO-NE's website.¹⁰⁴ Filing Parties also state that information posted on the website will be for informational purposes only, and ISO-NE will not be held liable for any posting made, or arrangement made as a consequence of any information posted.

b. Protests and Comments

111. NEPOOL ICC argues that ISO-NE should utilize PJM's website, or at least justify not pursuing this option. NEPOOL ICC notes that in its Order No. 719 compliance filing, PJM proposed to establish an electronic bulletin board on its website on or about September 1, 2009. Further, NEPOOL ICC states that PJM would offer the use of its bulletin board to all other RTOs who are members of the ISO/RTO Council at no cost, with the limited condition that if annual operating expenses exceed \$20,000, the other RTOs must decide within six months whether to reimburse PJM for the increased costs on a pro rata basis, or develop their own alternative solutions. Given the cost-effectiveness of using the PJM website, NEPOOL ICC asserts that there is no reason for the ISO to delay development of its own website application until 2011 and to invest the time and resources to do so.

112. Mass. DPU submitted comments in support of ISO-NE's proposal, noting that Massachusetts has promoted the use of long-term contracts as a means of supporting

¹⁰² *Id.* P 309.

¹⁰³ ISO-NE notes that PJM offered to host a website for itself and other RTOs and ISOs.

¹⁰⁴ This information includes Type (bid/offer), Product or Service Type, Company, Contact Information, Location or Sub-Group, Schedule/Duration, Contract Size, Indicative Price, Attachments, Posted Date, and Expiration Date.

financial investment in renewable resources and their associated development costs, and that ISO-NE's proposal will enhance access to information regarding long-term contracts.

113. ISO-NE answers that it is unnecessary for it to utilize the PJM bulletin board. ISO-NE states that it has made more progress in creating its own bulletin board than initially expected, and it recently issued a Request for Proposal to retain a vendor to create such a bulletin board. ISO-NE now estimates that its bulletin board could be operational by the fourth quarter of 2009. Further, ISO-NE asserts that its bulletin board will include additional features not included in the PJM-operated bulletin board. If the Request for Proposal responses are not satisfactory or do not result in significant added functionality, ISO-NE states that it will reconsider participation in the PJM-operated bulletin board.

c. Commission Determination

114. We find that Filing Parties' proposal to create a bulletin board satisfies the Commission's directives in Order No. 719. However, we encourage ISO-NE to consider the benefits of utilizing the PJM-operated bulletin board.

115. If ISO-NE decides to use the PJM-operated bulletin board, we direct Filing Parties to submit, within 90 days of the date of this order, an informational filing so notifying the Commission.

3. Market Monitoring Policies

a. Structure and Tools

116. In Order No. 719, the Commission declined to mandate a specific structure for the MMU. Instead, it required each RTO or ISO, through its stakeholder process, to decide on its own MMU structure – external, internal, or hybrid.¹⁰⁵ Additionally, Order No. 719 required RTOs and ISOs to include provisions in their tariffs: (1) obliging them to provide their MMUs with access to market data, resources and personnel sufficient to enable them to carry out their duties; (2) granting MMUs full access to the RTO or ISO database; and (3) granting MMUs exclusive control over any MMU-created data.¹⁰⁶

¹⁰⁵ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 326.

¹⁰⁶ *Id.* P 328.

i. Filing Parties' Filing

117. ISO-NE's market monitoring provisions are largely centralized in Appendix A to Market Rule 1. Filing Parties contend that, for the most part, ISO-NE's existing market monitoring practices are in compliance with Order No. 719. However, Filing Parties propose numerous revisions to Appendix A to ensure that Appendix A reflects the requirements of Order No. 719. Filing Parties assert that ISO-NE is maintaining its hybrid structure of an Internal MMU and an Independent, or External, Market Monitor (External MMU). Filing Parties explain that the functional reporting relationship of the Internal MMU directly with the Markets Committee of the ISO-NE Board of Directors (ISO-NE Board) provides the Internal MMU with independence that is vital to its ability to serve as an objective monitor of the competitive wholesale markets and to perform its obligation to inform regulators of any problems that require attention. Filing Parties further state that the External MMU serves as an additional check on this independence by verifying and supplementing the market monitoring performed by the Internal MMU.

118. Additionally, Filing Parties have included tariff language in Appendix A, consistent with the Commission's regulations, to oblige the ISO to provide the Internal MMU and External MMU with access to all market data, resources, and personnel necessary to perform their market monitoring and mitigation functions. The revisions also grant the Internal MMU and External MMU full access to the ISO's electronically generated information and databases and exclusive control over any data they create. Additionally, Filing Parties revise Appendix A to clarify that the Internal MMU and External MMU may share any data they created with the ISO, which shall maintain the confidentiality of such data.

ii. Protests and Comments

119. Connecticut DPUC requests that the Commission establish hearing procedures to determine necessary reforms that will effectively protect New England's competitive markets. Specifically, Connecticut DPUC argues that, despite assurances in the compliance filing, a recent filing submitted by ISO-NE proposing changes to the capacity market rules related to capacity imports¹⁰⁷ demonstrates that ISO-NE's market

¹⁰⁷ See Docket No. ER09-873-000 (Competitive Imports Rules Filing). This filing was submitted by ISO-NE on March 20, 2009, and amended on April 24 and May 20, 2009. Testimony submitted with this filing by the Internal MMU incorrectly stated that from January 2005 to January 2009, the ISO requested high-priced energy associated with capacity imports during a total of 108 hours, and that on none of these occasions was the requested energy delivered. The testimony also stated that New England electricity customers 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

(continued...)

monitoring function requires far more comprehensive revisions to meet the Commission's objectives in Order No. 719. The Connecticut DPUC states it does not oppose retaining a hybrid structure, but the Internal MMU's role should be confined to nondiscretionary tasks such as administration of automatic mitigation procedures and the External MMU's role must be strengthened considerably to act as an independent, aggressive advocate for fair and competitive markets.¹⁰⁸ The Connecticut DPUC argues that the proposed hybrid organizational structure shifts the weight of responsibilities almost entirely to the Internal MMU.

120. Connecticut DPUC asserts that ISO-NE's form of hybrid market monitoring structure will not foster independence, transparency, vigilance, and accountability. Connecticut DPUC asserts that because the Internal MMU is inseparable from ISO-NE, the Internal MMU is vulnerable to conflicts of interest.¹⁰⁹ Further, Connecticut DPUC contends that the External MMU cannot provide the oversight necessary for a critical review of the Internal MMU's work because the Internal MMU has no direct reporting requirement to the External MMU, and the External MMU has been removed from day-to-day operations. Connecticut DPUC asserts that the Independent Market Monitoring Unit Services Agreement, a contract between ISO-NE and the External MMU also limits the External MMU's independence by providing that ISO-NE may terminate the agreement for any reason with 30 days written notice.

December 2006 through January 2009. (An order accepting the rule change in this proceeding was issued on June 11, 2009. *See ISO New England Inc.*, 127 FERC ¶ 61,235 (2009)). In response to the Internal MMU's testimony, Connecticut DPUC, Connecticut AG, and Connecticut OCC (collectively, the Connecticut Parties) filed complaints against ISO-NE to determine which capacity importers had failed to deliver energy when requested and to disgorge the ICAP Payments they received. *See* Docket Nos. EL09-47-000 and EL09-48-000. (On August 24, 2009, the Commission issued an order establishing hearing procedures and consolidating the proceedings. *See Richard Blumenthal, Attorney General for The State of Connecticut v. ISO New England Inc., et al., and The Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel v. ISO New England Inc., et al.*, 128 FERC ¶ 61,182 (2009)).

¹⁰⁸ CT DPUC May 26, 2009 Comments at 15.

¹⁰⁹ CT DPUC May 26, 2009 Comments at 18-19.

121. Connecticut DPUC asserts that ISO-NE must implement more comprehensive reforms to comply with Order No. 719.¹¹⁰ Connecticut DPUC recommends that the External MMU be fully independent from ISO-NE and have principle authority, with the Internal MMU reporting directly to the External MMU. Connecticut DPUC believes keeping market monitoring functions separate from ISO-NE's business operations would assure independence for the "market watchdog." Additionally, Connecticut DPUC suggests that the Commission substantially curtail the ISO-NE Board's ability to control the market monitoring function. For example, Connecticut DPUC states that the External MMU should report to an independent committee of the ISO-NE Board, whose oversight is limited to (1) reviewing the budget of the External MMU contractor, (2) requesting Commission approval to modify the External MMU's scope of work, terminating the External MMU for cause, renewing the External MMU contract for another term, or replacing the External MMU with another contractor, and (3) reviewing the reports of the External MMU. Further, Connecticut DPUC states that ISO-NE's OATT should clearly provide that no member of the ISO-NE Board, management, or counsel should have the right to review, screen, alter, delete, or exercise editorial control over the External MMU's reports.¹¹¹

122. Connecticut DPUC also suggests that, along with providing independent advice and opinions in Commission and NEPOOL forums, the External MMU chair a Market Monitoring Advisory Committee to enhance communications between the External MMU and interested parties, such as stakeholders, representatives of state regulatory agencies, and other authorized government representatives. Additionally, the External MMU should meet regularly with NECPUC and provide studies or reports upon the request of NECPUC or individual state commissioners. Finally, Connecticut DPUC urges that the External MMU improve the quality of its analyses and reports and ensure that all materials are timely published on its website or a dedicated page of ISO-NE's website.¹¹²

¹¹⁰ CT DPUC suggests that an External MMU structure like the model used by PJM would assure greater independence, transparency, and effectiveness. *Id.* at 25 (citing Settlement Agreement and Explanatory Statement of the Settling Parties, *Allegheny Electric Cooperative, Inc. v. PJM Interconnection, L.L.C.*, Docket Nos. EL07-56-000, *et al.*, EL07-58-000, *et al.* (filed December 19, 2007) (PJM Settlement)).

¹¹¹ CT DPUC May 26, 2009 Comments at 25-27.

¹¹² *Id.* at 29.

123. The Connecticut OCC and Connecticut AG filed comments indicating that they agree with the comments filed by Connecticut DPUC.¹¹³

124. The Mass. DPU supports ISO-NE's proposed changes, indicating that the changes boost the independence of and reporting by the Internal and External MMUs.¹¹⁴ However, referencing the CT Parties' complaint in Docket Nos. EL09-47-000 and EL09-48-000, the Mass. DPU notes that these other proceedings may reveal the need for further changes, such as those proposed by Connecticut DPUC.

125. In its answer, ISO-NE states that the protests are based on a fundamental misunderstanding of how the Internal MMU and External MMU function as a market monitoring unit. ISO-NE asserts that its compliance filing simply preserves the existing division of functions as documented in the ISO-NE Participants Agreement. Specifically, while the Internal MMU performs mitigation, market performance analysis and investigatory functions, the External MMU also plays a critical role in ensuring competitive markets, and in monitoring market efficiency as well as the effectiveness of the market rules. Thus, ISO-NE asserts that its compliance filing does not remove the External MMU from day-to-day involvement in market monitoring.¹¹⁵ Further, ISO-NE disagrees that the Independent Market Monitoring Unit Services Agreement prevents the External MMU from acting independently. ISO-NE states that the Independent Market Monitoring Unit Services Agreement permits termination of the External MMU only with Commission approval, which ISO-NE asserts is the ultimate form of protection against undue influence on the External MMU.¹¹⁶

126. ISO-NE states that its actions with respect to the Competitive Imports Rules Filing and the subsequent complaints filed by the CT Parties have no bearing on whether its compliance filing satisfies Order No. 719.¹¹⁷ ISO-NE asserts that neither the commission of human error in a single piece of testimony nor any alleged and unsupported claims of delay in developing the Competitive Imports Rules Filing warrants market monitoring restructuring. Further, ISO-NE contends that there is no reason to believe that the development of the Competitive Imports Rules Filing would have been accelerated if

¹¹³ Connecticut OCC May 26, 2009 Comments at 3; Connecticut AG May 26, 2009 Comments at 5.

¹¹⁴ Mass DPU May 26, 2009 Comments at 7.

¹¹⁵ ISO-NE June 15, 2009 Answer at 15.

¹¹⁶ *Id.* at 16, n.39, *citing* Order No. 719 at P 344.

¹¹⁷ *Id.* at 16.

more responsibility was transferred to the External MMU.¹¹⁸ ISO-NE notes that the CT Parties failed to raise any of their suggestions or criticisms during ISO-NE's stakeholder discussions on Order No. 719 compliance, and objects to the CT Parties' attempt to avoid the stakeholder process here.

127. Regarding the purported deficiencies and proposals put forth by CT Parties, ISO-NE states that these deficiencies and proposals have already been addressed in Order No. 719. ISO-NE further states that, in many instances, the Commission expressly declined to include, as an Order No. 719 mandate, the recommendation that the CT Parties now assert is necessary for compliance with Order No. 719, and therefore the CT Parties' opposition constitutes a prohibited collateral attack on Order No. 719.¹¹⁹

128. Specifically, ISO-NE notes that the Commission explicitly rejected in Order No. 719 suggestions to prohibit the Internal MMU from carrying out the core market monitoring functions. Instead, the Commission determined that if the Internal MMU carries out any or all of the core market monitoring functions, independence can be achieved by requiring the Internal MMU to report to the ISO-NE Board.¹²⁰ ISO-NE also states that the proposed reforms on data control and reports are unnecessary. ISO-NE asserts that the External MMU has control over its analyses and conclusions and has discretion to determine what input to solicit and what input to incorporate. ISO-NE states that Order No. 719 does not mandate that the External MMU have exclusive control over the data it creates. ISO-NE believes that it is beneficial for the External MMU and Internal MMU to share exclusive control over data.¹²¹

129. Further, ISO-NE states that the reforms relating to the External MMU's communications with stakeholders, states, and the Commission were not mandated by Order No. 719. ISO-NE notes that its compliance filing provides the New England states more access to the Internal and External MMUs than required by Order No. 719.¹²² Finally, ISO-NE states that there is no evidence that the Internal MMU's reports or External MMU's reports have been untimely or of poor quality.¹²³

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.* at 22-23.

¹²⁰ *Id.* at 23-24 (citing Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 341).

¹²¹ *Id.* at 26-27.

¹²² *Id.* at 27-28.

¹²³ *Id.* at 30-31.

130. Likewise, NEPOOL urges the Commission to reject the attempt by the CT Parties to effectively overhaul the entire MMU structure. NEPOOL states that CT Parties' proposed solutions to problems relating to the role of the Internal MMU as the primary market monitor would effectively externalize virtually all significant market monitoring and mitigation in a manner similar to PJM's new market monitoring arrangement. NEPOOL opposes CT Parties' assertion that the market monitoring structure agreed to in PJM is appropriate for New England, noting that the PJM Settlement arose from allegations by the PJM market monitor of interference by PJM management with his independence and that no such suggestion has been made in the ISO-NE Order No. 719 compliance filing.¹²⁴ Further, NEPOOL states that ISO-NE's current market monitoring arrangements were negotiated by New England stakeholders and approved by the Commission.¹²⁵ NEPOOL states that the compliance changes relating to market monitoring were considered by the NEPOOL Markets and Participants Committee throughout the months of December 2008 and March 2009 and that there was never any discussion of or any question as to the Internal MMU's ability to effectively execute its mission in those meetings.¹²⁶

131. NEPOOL notes that, as a result of the Competitive Imports Rules Filing and the CT Parties' complaints, ISO-NE has committed to an independent audit of the facts surrounding the Competitive Imports Rules Filing and the Internal MMU arrangements and committed to continued discussions among interested parties and the ISO-NE Board. NEPOOL concludes that the NEPOOL stakeholder process is the correct and more appropriate and efficient forum in which to determine whether changes to the Internal MMU arrangements (or any other New England regional arrangements) are needed and, if so, what those changes should be.¹²⁷

iii. Commission Determination

132. We have reviewed Filing Parties' proposed revisions regarding market monitoring structure and tools, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719. Below, we address the comments filed in response to these proposed tariff changes.

¹²⁴ NEPOOL June 10, 2009 Answer at 15-16 (citing PJM Settlement at P 24, 28-55).

¹²⁵ *Id.* at 17 (citing *ISO New England Inc.*, 106 FERC ¶ 61,280, at P187 (2004)).

¹²⁶ *Id.* at 18 (citing ISO-NE Order No. 719 Compliance Filing at 7-8).

¹²⁷ *Id.* at 18-19.

133. We believe that the CT Parties' recommended reforms go beyond what was required by Order No. 719. We note that ISO-NE argues in its answer that, to the extent some of the protesters' proposals are contrary to Order No. 719, they constitute a collateral attack on Order No. 719, and we agree. Since none of the proposed reforms are required for compliance with Order No. 719, we will not require Filing Parties to implement such reforms, as this is not the appropriate forum to alter the provisions of Order No. 719.¹²⁸

134. Specifically, while CT Parties asserts that the External MMU should have principal authority, Order No. 719 stated that each RTO or ISO should decide for itself the structural relationship it desires for its market monitoring unit.¹²⁹ ISO-NE has chosen to retain its hybrid structure of an Internal MMU that performs mitigation, market performance analysis and investigatory functions, and an External MMU that plays a critical role in ensuring competitive markets, and in monitoring market efficiency as well as the effectiveness of the market rules. Because ISO-NE's tariff assigns the Internal MMU responsibility for carrying out the core MMU functions, consistent with Order No. 719, ISO-NE's Internal MMU will report to the ISO-NE Board to ensure independence from management. We find that ISO-NE's hybrid structure is consistent with Order No. 719's requirements.

135. Additionally, CT Parties suggests a number of other reforms, which it contends are necessary to comply with Order No. 719.¹³⁰ However, our review of Filing Parties' tariff revisions with respect to these issues indicates that ISO-NE is in fact in compliance with Order No. 719. None of the CT Parties' proposed reforms are directed by Order No. 719. Furthermore, CT Parties have provided no evidence that the ISO-NE Board, management, or counsel have tampered with the market monitor's reports, nor have CT Parties provided any evidence that the External MMU's analyses and reports are untimely or of poor quality.

136. Further, we find the CT Parties' reference to the PJM Settlement that established PJM's current MMU structure to be inapplicable here. As Order No. 719 noted, the provisions of that agreement were specific to one RTO, and represented a negotiated balancing of interests. And, it would be inappropriate to impose the specifics of that

¹²⁸ See *Acadia Power Partners, LLC*, 106 FERC ¶ 61,215 (2004) (collateral attacks on Commission orders may not be made through protests to compliance filings).

¹²⁹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 326.

¹³⁰ See *supra* P 121-22.

settlement on all other RTOs and ISOs, especially without notice and the opportunity to comment.¹³¹

137. Briefly stated, we do not support requiring further restructuring of ISO-NE's market monitoring policies absent such restructuring being fully vetted by all affected parties in New England. In their answers, both ISO-NE and NEPOOL contend the protesters had the opportunity to raise their concerns at stakeholder discussions of the Order No. 719 reforms, but chose not to do so. It should also be noted that other stakeholders in New England have not joined in the objections of the protesters. ISO-NE has committed to an independent audit of the facts surrounding the Competitive Imports Rules Filing and has also committed to continued discussions with interested parties. We agree that in this case, the NEPOOL stakeholder process is the correct and more appropriate forum in which to determine whether changes to the Internal MMU arrangements, or any other New England regional arrangements, are needed. Therefore, parties should raise their concerns in the NEPOOL stakeholder process.

b. Oversight

138. Order No. 719 required MMUs, for purposes of supervision over their market monitoring functions, to report to its RTO's or ISO's board of directors, rather than management, with management representatives on the board excluded from this oversight function. An RTO or ISO may permit its MMU to report to management for administrative purposes (e.g., pension management and payroll).¹³² For hybrid MMUs (i.e., MMUs with both an external and internal market monitor), the Commission stated that an internal market monitor may report to management, provided that if the internal MMU is responsible for carrying out any core MMU functions,¹³³ both it and the external market monitor must report to the board.¹³⁴

i. Filing Parties' Filing

139. Filing Parties have included tariff language, consistent with the Commission's regulations, to document that both the Internal MMU and External MMU report to the ISO-NE Board. The Internal MMU also reports to the ISO Chief Executive Officer for

¹³¹ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 330.

¹³² *Id.* P 339.

¹³³ Core MMU functions include identifying ineffective market rules, reviewing the performance of the markets, and making referrals to the Commission.

¹³⁴ *Id.* P 341.

administrative purposes (i.e., payroll administration, expense reporting, and staffing and budget). ISO-NE's tariff language also states that members of the ISO-NE Board who perform management functions for the ISO will be excluded from oversight and governance of the Internal MMU and External MMU.

ii. Protests and Comments

140. None was filed.

iii. Commission Determination

141. We have reviewed Filing Parties' proposed revisions regarding oversight, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

c. Functions

142. Order No. 719 required each RTO and ISO to assign the following functions to its MMU in its tariff:

(1) evaluate existing and proposed market rules, tariff provisions and market design elements, and recommend proposed rule and tariff changes to the RTO or ISO, and also to the Commission's Office of Energy Market Regulation and to other interested entities (i.e., state commissions and market participants);

(2) review and report on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities (i.e., state commission and market participants);¹³⁵ and

(3) identify and notify the Commission's Office of Enforcement of instances in which a market participant's behavior, or that of the RTO or ISO, may require investigation, including suspected tariff violations, violations of Commission-approved rules and regulations, market manipulation, and inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.¹³⁶

¹³⁵ Order No. 719 provided that an RTO or ISO may require its MMU to submit its reports in draft form to the RTO or ISO for review, but may not alter the reports generated by the MMU or dictate its conclusions. Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 360.

¹³⁶ *Id.* P 354.

i. Filing Parties' Filing

143. Filing Parties have included tariff language, consistent with the Commission's regulations, to list the three core functions that the Internal MMU and External MMU perform: (1) evaluating and recommending changes to existing tariff provisions and market design elements, with the understanding that the Internal MMU and External MMU will not effectuate any proposed market designs, except as otherwise permitted by ISO-NE's rules and provisions; (2) reviewing and reporting on the performance of the market; and (3) identifying and notifying the Commission's Office of Enforcement of suspected violations. Appendix A also allocates responsibility for carrying out the three core functions between the Internal MMU and the External MMU, with the Internal MMU having principal responsibility for the core functions.

ii. Protests and Comments

144. None was filed.

iii. Commission Determination

145. We have reviewed Filing Parties' proposed revisions regarding functions, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

d. Mitigation and Operations

146. In Order No. 719, the Commission expressed concern that the unfettered conduct of mitigation by MMUs makes them subordinate to RTOs and ISOs and raises conflict of interest concerns. However, it also acknowledged that there were a number of advantages, such as expertise and impartiality, in retaining MMU input in the mitigation process. The Commission adopted a balanced approach that allows modified participation by the MMUs in mitigation, while protecting against the conflict of interest and subordination concerns inherent in their unfettered participation. Specifically, the Commission drew a distinction between prospective and retrospective mitigation, and directed that a sole internal or sole external MMU may only conduct retrospective mitigation, not prospective mitigation.¹³⁷ However, in the event an RTO or ISO employs a hybrid MMU structure, it may authorize its internal MMU to conduct either or both

¹³⁷ Prospective mitigation is that which can affect market outcomes on a forward-going basis, such as altering prices or physical parameters of offers (i.e., ramp rates and start-up times) at or before the time they are considered in a market solution. All other mitigation is retrospective. *Id.* at P 375.

types of mitigation, but only if it also assigns to its external MMU the responsibility and gives it adequate tools to monitor the quality and appropriateness of that mitigation.¹³⁸

147. Order No. 719 also provided that an MMU may be permitted to provide inputs to its respective RTO or ISO to assist the latter in conducting prospective mitigation, including determining reference levels, identifying system constraints, and cost calculations.¹³⁹ Further, Order No. 719 provided that purely administrative matters, such as enforcement of late fees, should be conducted by the RTO or ISO, not by the MMU, regardless of the MMU structure.¹⁴⁰

148. Finally, Order No. 719 directed RTOs and ISOs to specify in their tariffs which functions are to be performed by MMUs, and which by RTOs and ISOs. Also, it required RTOs and ISOs to review their mitigation tariff provisions (whether performed by the MMU or by the RTO or ISO) with a view to making them as non-discretionary as possible, and to reflect any needed changes in their compliance filing.¹⁴¹

i. Filing Parties' Filing

149. Filing Parties explain that, currently, the Internal MMU is the primary agent of both prospective and retrospective mitigation, while the External MMU performs an oversight function by evaluating the accuracy and sufficiency of the Internal MMU's mitigation decisions. Administrative functions (i.e., billing and calculation of payments and charges) are performed by ISO-NE settlements personnel. Filing Parties propose to revise Appendix A, consistent with the Commission's regulations, to clarify the Internal MMU's and External MMU's roles. Filing Parties also propose to remove the External MMU from the role of consulting daily with the Internal MMU on mitigation decisions, as this may interfere with the External MMU's ability to objectively review the quality and appropriateness of mitigation.

150. Additionally, Filing Parties state that ISO-NE has reviewed Appendix A to assess whether any of its mitigation-related provisions grant the Internal MMU or External MMU inappropriate levels of discretion in carrying out mitigation functions, and that it is satisfied that prior modifications to Appendix A removed this discretion by clearly defining the types of conduct subject to mitigation. Specifically, in a previous

¹³⁸ *Id.* P 374-75.

¹³⁹ *Id.* P 375.

¹⁴⁰ *Id.* P 377.

¹⁴¹ *Id.* P 379.

compliance filing submitted on February 11, 2005 in Docket No. ER04-116-012, ISO-NE completed a wholesale evaluation of Appendix A to limit ISO-NE's discretion in applying mitigation by more clearly defining, where necessary, "the types of conduct subject to mitigation in a manner that includes sufficiently clear, objectively quantifiable standards."¹⁴²

ii. Protests and Comments

151. None was filed.

iii. Commission Determination

152. We have reviewed Filing Parties' proposed revisions regarding mitigation and operations, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

e. Ethics

153. In Order No. 719, the Commission adopted minimum ethical standards for MMUs and its employees that RTOs and ISOs must include in their tariffs.¹⁴³ Under these standards, the MMU and its employees: (1) must have no material affiliation with any market participant; (2) must not serve as an officer, employee, or partner of a market participant; (3) must have no material financial interest in any market participant or affiliate, with potential exceptions for mutual funds and non-directed investments; (4) must not engage in any market transactions other than the performance of their duties under the tariff; (5) must not be compensated, other than by the Commission-approved RTO or ISO that retains or employs the MMU, for any expert witness testimony or other commercial services, either to the Commission-approved RTO or ISO or to any other party, in connection with any legal or regulatory proceeding or commercial transaction relating to the RTO or ISO or to its markets; (6) may not accept anything of value from a market participant in excess of a *de minimis* amount; and (7) must advise a supervisor in the event they seek employment with a market participant, and must disqualify themselves from participating in any matter that would have an effect on the financial

¹⁴² Appendix A provides market participants the right to make a section 205 filing with the Commission in the event they believe that mitigation imposed pursuant to Appendix A prevents the market participant from recovering its fuel and variable operating and maintenance costs for an operating day. (*ISO New England Inc.*, 129 FERC ¶ 61,008 (2009)).

¹⁴³ 18 C.F.R. § 35.28(g)(3)(vi) (2009).

interest of the market participants. RTOs and ISOs are free to propose more stringent ethics standards in their compliance filings.¹⁴⁴

154. Finally, Order No. 719 clarified that the minimum ethics standards do not prohibit employees of MMUs from performing independent monitoring for entities other than RTOs and ISOs. However, if the employing entity is a market participant in the RTO or ISO for whom the MMU performs market monitoring, the proposed work would entail the same conflict of interest as would any other consulting services. The Commission directed RTOs and ISOs to notify the Commission of such engagements in their respective compliance filing, and to propose a transition plan for dealing with conflicts in a manner consistent with Order No. 719.¹⁴⁵

i. Filing Parties' Filing

155. Filing Parties explain that, currently, ISO-NE's Code of Conduct broadly restricts employees from engaging in activities that would constitute a conflict of interest with the employee's duties and obligations. Filing Parties propose to revise Appendix A, consistent with the Commission's regulations, to expressly require all employees of ISO-NE and the External MMU that perform market monitoring and mitigation services to comply with the terms of the Code of Conduct and to execute an annual compliance certificate stating the same, as well as to incorporate the Code of Conduct into Appendix A. Additionally, Filing Parties propose to revise Appendix A to address two standards specified in Order No. 719 that are not fully addressed in the Code of Conduct. Specifically, the revisions would prohibit an employee of ISO-NE from serving as an officer, director, employee or partner of a market participant, and prohibit compensation, other than by ISO-NE or the External MMU, for any expert witness testimony or other commercial services in connection with any legal or regulatory proceeding or commercial transaction relating to ISO-NE. Further, Filing Parties' proposed revisions reaffirm that employees of the External MMU are also subject to the conduct standards set forth in the Independent Market Monitoring Unit Services Agreement.

156. Filing Parties note that ISO-NE's External MMU, Potomac Economics, provides independent monitoring services to two affiliates of ISO-NE's market participants, an affiliate of Duke Energy Corporation and an affiliate of Entergy. Filing Parties state that the Independent Market Monitoring Unit Services Agreement provides certain safeguards to protect ISO-NE from any potential conflict of interest, such as limiting the External MMU's engagements with market participants to a relatively small percentage of total revenues, requiring full disclosure of such engagements to ISO-NE, prohibiting the

¹⁴⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 384.

¹⁴⁵ *Id.* P 385.

External MMU from utilizing ISO-NE data for these engagements, and limiting the scope of the engagements. Therefore, Filing Parties propose that ISO-NE continue adherence to the terms of the Independent Market Monitoring Unit Services Agreement through the end of its January 2011 term. At that time, ISO-NE will reevaluate the terms of the Independent Market Monitoring Unit Services Agreement.

ii. Protests and Comments

157. None was filed.

iii. Commission Determination

158. We have reviewed Filing Parties' proposed revisions regarding ethics, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

159. With respect to Filing Parties' acknowledgement that ISO-NE's External MMU provides independent monitoring services to certain affiliates of ISO-NE's market participants, we note that in Order No. 719-A, the Commission has revised its approach to responding to these matters.¹⁴⁶ We will discuss this issue in the order addressing ISO-NE's Order No. 719-A compliance filing.

f. Tariff Provisions

160. Order No. 719 directed RTOs and ISOs to place all of their MMU provisions in one centralized location in their tariffs, and to include, in the introductory portion of that section, a mission statement setting forth the goals to be achieved by the MMU, including the protection of both consumers and market participants by the identification and reporting of market design flaws and market power abuses.¹⁴⁷ Under Order No. 719, MMU provisions may be duplicated elsewhere in the tariff if needed for clarity, but must contain a note that the provision in question is also found in the centralized MMU section. Also, Order No. 719 required RTOs and ISOs to include in their tariffs a provision stating that in the event of any inconsistency between provisions in the centralized MMU section and provisions set forth elsewhere, the provisions in the centralized MMU section control.¹⁴⁸

¹⁴⁶ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 164.

¹⁴⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 392.

¹⁴⁸ *Id.* P 393.

i. Filing Parties' Filing

161. Filing Parties propose to broaden the mission statement included in Appendix A to set forth the goals to be achieved by the MMU, including the protection of consumers and market participants by the identification and reporting of market design flaws and market power abuses. Additionally, in order to centralize market monitoring tariff provisions, Filing Parties propose to incorporate into Appendix A, or cross-reference, market monitoring related requirements located in other sections of Market Rule 1 and the Participants Agreement. The proposed revisions specify that in the event that any provision of any ISO-NE filed document is inconsistent with Appendix A, Appendix A shall control. Further, because ISO-NE and NEPOOL agreed that certain provisions should be maintained in the Participants Agreement, as well as included in Appendix A, Appendix A includes language stating that such provisions cannot be modified in either Appendix A or the Participants Agreement without a corresponding modification to the other document.¹⁴⁹

ii. Protests and Comments

162. None was filed.

iii. Commission Determination

163. We have reviewed Filing Parties' proposed revisions regarding tariff provisions, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

g. Enhanced Information Dissemination

164. Order No. 719 required each RTO or ISO to include in its tariff a requirement that the MMU prepare an annual state of the market report on market trends and the performance of the wholesale market, as well as less extensive quarterly reports. These reports must be disseminated to Commission staff, staff of interested state commissions, the management and board of the RTO or ISO, and market participants, with the understanding that dissemination may be accomplished by posting on the RTO's or ISO's website.¹⁵⁰ Also, Order No. 719 directed that MMUs be available for regular conference

¹⁴⁹ ISO-NE notes that it is also working on revisions to Appendix B to Market Rule 1 to clarify that the Internal MMU is responsible for carrying out sanctioning functions, and revisions to the Independent Market Monitoring Unit Services Agreement to clarify that the External MMU will not consult daily with the Internal MMU on mitigation decisions.

¹⁵⁰ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424.

calls, which may be attended by the Commission, state commissions, representatives of the RTO or ISO, and market participants. The information to be provided in the MMU reports and in the conference calls may be developed on a case-by-case basis, but is generally to consist of market data and analyses of the type regularly gathered and prepared by the MMU in the course of its business, subject to appropriate confidentiality restrictions.¹⁵¹

165. Additionally, Order No. 719 required RTOs and ISOs to release offer and bid data on a three-month lag. An RTO or ISO may propose a shorter lag time for the release of offer and bid data and provide accompanying justification. If the RTO or ISO demonstrates a potential collusion concern, it may propose a four-month lag period or some other mechanism to delay release of the data if it were otherwise to occur in the same season as reflected in the data.¹⁵² The identity of market participants must remain masked, although the RTO or ISO may propose a time period for eventual unmasking. Order No. 719 requires RTOs and ISOs to include in their compliance filings a justification of their policies on the aggregation (or lack of same) of offer and cost data, discussing participant harm, collusion and transparency.¹⁵³

i. Filing Parties' Filing

166. ISO-NE's Internal MMU provides quarterly reports and an annual market review of the operations of the New England Markets. These reports are filed with the Commission and posted on ISO-NE's website. The External MMU also publishes an annual assessment of the ISO-NE wholesale electricity markets, as well as a number of *ad hoc* reports regarding aspects of the New England markets. Consistent with the Commission's regulations, Filing Parties have revised Appendix A to more fully document the requirements pertaining to the content and dissemination of the reports. Additionally, Filing Parties have revised Appendix A to state that the Internal MMU will make one or more of its staff members available for regular conference calls to review the data gathered and prepared by the Internal MMU.

167. ISO-NE currently releases masked bid data under a three month lag. When ISO-NE makes offer/bid and cost data public, ISO-NE does not aggregate such data. Filing Parties state that ISO-NE has not encountered problems with market transparency, collusion, or participant harm due to its policy not to aggregate offer and cost data. In fact, Filing Parties state ISO-NE found that the non-aggregation of data adds

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

transparency. Filing Parties explain that misuse of bidding information is unlikely because New England has a workably competitive market structure, mitigation procedures are effective, and the data becomes stale due to seasonal variation in the load patterns, fuel prices, hydro availability, generator and transmission outages and environmental restrictions. However, Filing Parties state that if non-aggregation of data had a negative impact on the markets in the future, ISO-NE would promptly take the required steps to reconsider this policy.

ii. Protests and Comments

168. None was filed.

iii. Commission Determination

169. We have reviewed Filing Parties' proposed revisions regarding enhanced information dissemination, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

h. Tailored Requests for Information

170. In Order No. 719, the Commission stated that MMUs are to entertain state commissions' tailored requests for information regarding general market trends and performance of wholesale market, but not requests for information designed to aid state enforcement actions. The Commission noted that granting or refusing such requests is at the MMU's discretion, based on its agreements with the RTO or ISO and the states, or otherwise based on time and resource availability.¹⁵⁴ Order No. 719 also directs RTOs and ISOs to develop confidentiality provisions to protect commercially sensitive material that may be included in responses to tailored requests for information.¹⁵⁵

i. Filing Parties' Filing

171. Filing Parties' tariff revisions, consistent with the Commission's regulations, clarify that the Internal MMU and External MMU will entertain from state governmental entities information requests regarding market trends and performance, but will not entertain requests that are designed to aid enforcement actions of a state agency. Further, the proposed revisions clarify that if an information request is unduly burdensome, the Internal MMU or External MMU will work with the requesting agency to modify the request. Additionally, the tariff revisions clarify that if the Commission or a state agency

¹⁵⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 424, 459.

¹⁵⁵ *Id.* P 459.

makes a request other than pursuant to compulsory process, the request will be processed under the ISO-NE Information Policy. If confidential information is ultimately released to an authorized state agency, the market participant whose confidential data is the subject of the request has the opportunity to contest the information and to provide context to the data. Further, section 3.3 of the ISO-NE Information Policy allows a market participant whose data is the subject of an information request from an authorized state commission to participate in the process to protect the continued confidentiality of that information. If the Commission believes that section 3.3 goes beyond the requirements of Order No. 719, Filing Parties request waiver of Order No. 719 with respect to this issue.

ii. Protests and Comments

172. The NEPOOL ICC submitted comments in support of ISO-NE's proposal that requests for information from the Internal and External MMUs be subject to the additional protections afforded through the ISO-NE Information Policy. NEPOOL ICC notes that the Information Policy has already been approved by the Commission, and that ISO-NE is simply expanding the terms of the Information Policy to apply to its Internal and External MMUs. NEPOOL ICC asserts that ISO-NE's proposal provides market participants with a meaningful opportunity to protect their commercially sensitive information to the extent such information is subject to an inquiry by a state regulatory commission.¹⁵⁶

iii. Commission Determination

173. We have reviewed Filing Parties' proposed revisions regarding tailored requests for information, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719. Specifically, we find that Filing Parties' proposal to provide market participants with additional protections by allowing market participants whose data is the subject of an information request from an authorized state commission to participate in the process to protect the continued confidentiality of that information is acceptable under Order No. 719, as this proposal allows market participants to protect their commercially sensitive information. Further, if state commissions comply with the Commission's requirement that their requests be limited to information regarding general market trends and the performance of the wholesale markets, it seems unlikely that these additional protections will unduly delay the release of information.

¹⁵⁶ NEPOOL ICC May 26, 2009 Comments at 11.

i. Commission Referrals

174. Order No. 719 adopted protocols for referrals by MMUs to the Commission of suspected market violations and perceived market design flaws. These are set forth at 18 C.F.R. § 35.28(g)(iv)(v). By Commission rule, all information and documents obtained during the course of an investigation are non-public, and may not be released except to the extent the Commission directs or authorizes in a given instance, unless the material is already made public during an adjudicatory proceeding or disclosure is required by the Freedom of Information Act.¹⁵⁷

i. Filing Parties' Filing

175. Filing Parties' proposed revisions to Appendix A include new sections discussing "Protocol on Referrals to the Commission of Suspected Violations" and "Protocol on Referrals to the Commission of Perceived Market Design Flaws and Recommended Tariff Changes." Filing Parties have included language, consistent with the Commission's regulations, that the Internal MMU or External MMU will notify the Commission's Director of the Office of Energy Market Regulation, the Director of the Office of Enforcement, and the General Counsel if it has reason to believe that a market violation has occurred, or that market design flaws exist that could effectively be remedied by rule or tariff changes.

ii. Commission Determination

176. We have reviewed Filing Parties' proposed revisions regarding Commission referrals, and we find that the proposed revisions satisfy the Commission's directives in Order No. 719.

The Commission orders:

(A) Filing Parties' compliance filing is hereby accepted in part, as discussed in the body of this order.

¹⁵⁷ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 465 (citing 18 C.F.R. § 1b.9).

(B) Filing Parties are hereby directed to submit a compliance filing, within 90 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Norris voting present.

(S E A L)

Kimberly D. Bose,
Secretary.