UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc. and	**)**	**Docket No. ER11-2427-00_**
New England Power Pool, Inc.	**)**	
	)	

ANSWER IN OPPOSITION OF RETAIL ENERGY SUPPLY ASSOCIATION TO MOTION OF CAPACITY SUPPLIERS FOR SETTLEMENT CONFERENCE AND FURTHER PROCEDURES

Pursuant to Section 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.213 the Retail Energy Supply Association ("RESA")[1] hereby files this Answer to the Motion of the Capacity Suppliers for settlement conference and further procedures contained in Capacity Suppliers' request for rehearing filed March 21, 2011 in the above-referenced proceeding. In their request for rehearing, the Capacity Suppliers' move that the Commission commence settlement judge procedures in an attempt to end run around the Commission's rejection of their proposal to modify the 12-month rolling average methodology for calculating the Peak Energy Rent ("PER") rate. While embedded in their request for rehearing, as a motion, RESA is entitled to answer. RESA, therefore, files this limited Answer in opposition to the Capacity Suppliers' motion.[2] The Commission's rejection of the proposed six-month rolling average formula was clear. The

[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant Energy Northeast LLC and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

[2] RESA notes that, on April 1, 2011, Indicated Suppliers filed a Motion for Leave to Answer and Answer to Request for Rehearing of Indicated Suppliers. RESA supports Indicated Suppliers' Motion and Answer.

Commission's discussion of an alternative mechanism was dicta and, in any event, left the matter up to the stakeholder process. The Commission must reject the Capacity Suppliers' request. In support of this Answer, RESA submits as follows.

I.
BACKGROUND

The Filing Parties filed revised tariff sheets to revise substantively the PER feature of the Forward Capacity Market ("FCM") contained in Market Rule 1. The Filing Parties proposed to substantively modify the PER Strike Price and modify the averaging feature of the formula. In purported support of the filing, ISO-NE filed the testimony of Robert G. Ethier.

The Filing Parties proposed two substantive and fundamental changes to the PER mechanism. First, the Filing Parties filed to change the methodology by which ISO-NE calculates the PER Strike Price. The Filing Parties proposed to change the calculation of the fuel cost of the PER Proxy Unit by considering the ***higher of*** rather than the ***lower of*** the price of oil or gas.

The second change involved shortening of the 12-month rolling-average methodology employed to smooth out the adjustments resulting from the PER mechanism. The Filing Parties proposed to shorten the 12-month averaging to six months, starting in February 2011. Finally, the Filing Parties sought waiver of the sixty day filing requirement and implementation of the changes effective December 21, 2010.

On January 11, 2011, RESA filed a Motion to Intervene and Protest of the filing. In its Protest, RESA showed: (1) the proposed filing would not result in just and reasonable rates because the Filing Parties had not met their Section 205 burden; (2) the Filing Parties have

jumped to a conclusion and are hastily proposing a change to the PER mechanism without undertaking any study or engaging in a stakeholder process, leaving many substantial questions unanswered; (3) the proposed change will adversely affect the interests of LSEs such as RESA members without adequate notice that the mechanism would be changed; (4) elimination of the twelve-month rolling average is unjust and unreasonable and would constitute retroactive ratemaking; and (5) waiver of the 60-day notice period is not justified and the Filing Parties have not shown good cause for waiver.

On January 26, 2011, the Filing Parties and Capacity Suppliers filed Answers to RESA's Protest. On February 3, 2011, RESA filed an Answer to the Answers.

On February 17, 2011, the Commission issued an Order Accepting Tariff Revisions in Part and Rejecting Tariff Provisions in Part.[3] In the February 17 Order, the Commission accepted ISO-NE proposal to modify the PER Strike Price to reflect the lower of the price of oil or gas.[4] The Commission rejected the proposed Tariff revisions that would shorten the rolling average from 12-months to 6-months.[5] In doing so, the Commission recognized that LSEs offer fixed price contracts to their customers and recognized the important reliance interests that LSEs with these fixed price contracts have on the averaging feature of the PER mechanism.[6] The Commission stated,

> [w]hile shortening the rolling average period might expedite for generators the effect of the tariff changes that are accepted herein, it does not account for the above-mentioned interests of the LSEs. To that end, our rejection is without prejudice to the development of a different proposal. Because we reject the proposal to shorten the rolling average period, we do not need to address the arguments as to whether the proposal violates the File Rate Doctrine, or

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3 *ISO New England, Inc.*, 134 FERC ¶ 61,128 (2011) ("February 17 Order").

4 February 17 Order at P.24.

5 *Id.* at P.35.

6 *Id.* at P.39.

> constitutes retroactive ratemaking, or whether the stakeholder process was properly utilized in developing that proposal.[7]

In a footnote, the Commission noted that, with respect to the timing of the rejected modification of the rolling average methodology, ". . . the timing for the transition is particularly troubling, since it will transfer from load to generators all of the benefits of the PER mechanism for high cost summer months."[8] Thus, the Commission made its decision clear – it rejected the proposed 6-month rolling average methodology.

In its request for rehearing, the Capacity Suppliers again take issue with the Commission's decision to reject the Capacity Suppliers' proposed 6-month rolling average methodology. The Capacity Suppliers restate their arguments, this time making unsubstantiated claims of financial impacts on their interests resulting in the Commission's refusal to modify something that they, at the time the mechanism was designed, not only suggested, but insisted upon. In addition, Capacity Suppliers argue that the Commission erred when it found that the balancing of interests weighed in favor of rejection of the 6-month rolling average proposal and erred when the Commission accepted the valid reliance interests of LSEs on the market certainty and leveling effects of the 12-month rolling average mechanism. Finally, despite the fact that the Commission expressly did not reach the arguments raised by LSEs that modifying the 12-month rolling average mechanism would violate the filed rate doctrine, Capacity Suppliers pretend that the Commission reached the issue and then assert that the Commission erred.

As relevant to this Answer, Capacity Suppliers latch on to dicta in the February 17 Order where the Commission rejects the 6-month rolling average proposal yet notes that such rejection

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7 *Id.* at P.40.

8 February 17 Order at P.39, note 53.

is without prejudice to implementing a different mechanism, to argue that the stakeholder process will be unsuccessful. Therefore, Capacity Suppliers move that the Commission order settlement judge procedures with the intent of requiring modification of the 12-month rolling average methodology. RESA objects to this motion and the Capacity Suppliers' request to establish settlement judge procedures on a matter that the Commission affirmatively disposed of in its February 17 Order. The Commission must reject Capacity Suppliers' motion and affirmatively declare that the 12-month rolling average rate has not been shown to be unjust and unreasonable and remains the existing Tariff rate on file.

II.
ANSWER IN OPPOSITION

A. The 12-Month Rolling Average is Just and Reasonable; Capacity Suppliers' Motion to Establish Settlement Procedures Must Be Rejected

The Capacity Suppliers seek rehearing of the Commission's decision, alleging that the Commission erred: (1) when it recognized the effects of modification of the rolling average methodology on LSEs and; (2) that the balancing of interests weighed in favor of rejection of the proposal. RESA supports the findings in the February 17 Order and stands behind the arguments that RESA and others made in support of the justness and reasonableness of the 12-month rolling average methodology. RESA responds in this Answer to the alternative relief sought in the Capacity Suppliers' request for rehearing – a request that the Commission order a change in the 12-month methodology through a Commission-mandated settlement process and establishment of a refund effective date.[9] The Capacity Suppliers seek this unprecedented result based on dicta

[9] *See* Capacity Suppliers Request for Rehearing at 17.

in the February 17 Order that provides, "[t]o that end, our rejection [of the six month rolling average proposal] is without prejudice to the development of a different proposal."[10]

First, the Commission must not, on rehearing, turn this Federal Power Act ("FPA") Section 205 filing implementing changes to the PER mechanism into a FPA Section 206 proceeding based on the hysterical and unsubstantiated cries of generators who have now decided that the 12-month mechanism that they proposed at the time the PER was adopted be abandoned so that they can get their money faster at the expense of the Tariff, regulatory and stakeholder processes.

The Commission ***rejected*** the proposed modification to the rolling average methodology under FPA Section 205. The existing rate is just and reasonable. There is nothing new in the record (nor should there be on record in a request for rehearing) that would support the findings necessary for the Commission to exercise its discretion under FPA Section 206 to order a new change to the rolling average methodology. In fact, ordering a settlement process after rejecting the Capacity Supplier proposal is akin to requiring a change to the methodology, which unless the Commission grants rehearing would require Commission application of FPA Section 206.[11]

Second, the Commission, in its dicta suggests, but does not order, that the mechanism could be changed. The stakeholder process, which was ignored in deriving the 6-month rolling average proposal, is the proper place for addressing whether or not this aspect or other aspects of the PER should be changed. If, as the generators suggest there is no support for such a change, then there is no support for such a change. The existing rate is just and reasonable and the generators will see the results of the new PER Striker Price formula in due course, while

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[10] February 17 Order at P. 40.

[11] Capacity Suppliers present an either/or scenario – either the Commission grant rehearing and accept the 6-month rolling average methodology, or it establish settlement judge procedures and a refund effective date.

recognizing the importance of the 12-month rolling average in levelizing the increases and decreases resulting from application of the formula.

Importantly, in noting that the 12-month rolling average methodology could be changed, the Commission did so while ***rejecting*** the proposal. As the Commission recognized in its Order, LSEs have reasonably relied on the Tariff in place and the functioning of this averaging to price services to load. LSE's have used the historical values of the Monthly PER credit, published on a monthly basis by the ISO, including an 11 month history to estimate the future value of the PER credits in order to price the services offered to customers. Many of the RESA members' contracts are fixed price contracts. RESA showed in its Protest and supplemental pleading that modification of this 12-month rolling average feature, even shortening it to six months, would cause significant harm to LSEs such as RESA members.

Because the 12-month rolling average methodology levelizes fluctuations in price, LSEs are able to build these Tariff-imposed credits into their pricing for the benefit of load. Price spikes in either direction are levelized over a 12-month period, resulting in more cost certainty for all interested parties. The harm to LSEs such as RESA members with fixed price contracts is substantial in the short-term because some of the PER that has already been incurred and due to be paid back to load over the next 12 months by tariff would not be credited to LSE's as expected.

Third, claims made that LSEs are receiving a "windfall" and that the generators would have achieved a better result for themselves had they filed a complaint are just that – claims. LSEs are not receiving a windfall. Whatever the mechanism created in terms of credits are built into the fixed pricing for load and ***load*** receives the benefits of the PER mechanism. In fact, figures quoted by generators are overstated. For example, many generators have affiliated load

obligations, casting doubt on the veracity of the Capacity Suppliers' alleged "harm." In the short term, LSEs such as RESA members, have these fixed price contracts that provide these benefits to load via the credits that are reasonably assumed and estimated based on the effective ISO-NE tariff. A drastic modification in the levelizing mechanism has a direct and negative effect on RESA members with these contractual arrangements and the Commission appropriately recognized this in its February 17 Order.

As to whether the generators are now feeling (or whether they should be feeling) penalized for going through the stakeholder process and not filing a complaint, RESA rigorously disagrees that a complaint seeking to eliminate of the 12-month rolling average would have been successful. It is a waste of resources to consider these "what ifs". In any event, the generators did not go through the stakeholder process in seeking to eliminate the 12-month rolling average and should receive no self-serving "credit" for doing so. They sought to ram through an instant elimination of the rolling average methodology right before the December 2010 filing and then "settled" for something less at the last minute when it was clear that they would be unsuccessful.

Simply put, the 12-month rolling average methodology is working as intended and as the generators wanted initially – it levelizes the ups and the downs of the effects of the formula. Merely because the generators seek instant gratification when that result is to their benefit, does not support a showing that the current rate is unjust and unreasonable.

B. Settlement Procedures Must Be Rejected Because Modification of the 12-Month Rolling Average Methodology Would Constitute Retroactive Ratemaking

Settlement procedures, as the Capacity Suppliers propose them in their request for rehearing would cause the Commission to engage in retroactive ratemaking which is prohibited by the FPA. The Commission rejected the proposal to move to a 6-month rolling average

methodology and expressly did not reach the arguments of RESA and others that modification of the 12-month rolling average methodology would constitute retroactive ratemaking. The Commission stated, "[b]ecause we reject the proposal to shorten the rolling average period, *we do not need to address the arguments as to whether the proposal violates the File[d] Rate Doctrine*, or constitutes retroactive ratemaking, or whether the stakeholder process was properly utilized in developing that proposal."[12] Thus, Capacity Suppliers' final argument, that "to the extent [the Commission] accepted protestors' arguments that the proposal would violate the filed rate doctrine" the Commission erred (Capacity Suppliers rehearing at 17) must be rejected outright since the Commission expressly did not reach those issues. RESA can only assume that Capacity Suppliers spent four pages in their request for rehearing attempting to discredit those arguments because the only way that they can obtain relief in a Commission-ordered settlement is to overcome the strong filed rate doctrine arguments put forth by RESA and others. However, as RESA and others persuasively argued, modification of the 12-month rolling average *would* constitute retroactive ratemaking and *would* violate the filed rate doctrine. In its Protest (at 16), RESA stated:

> Elimination or modification of the 12-month rolling average without agreement of all parties would result in a prohibited "increased price for past services" – a fundamental tenant of the Commission's prohibition against retroactive ratemaking.[13] By shortening the 12-month rolling average to a 6-month rolling average, ISO-NE would prevent PER generated in previous months from being credited to load. This is because PER generated in a single month is credited back to load over the next 12 months. Shortening this time period prevents the full credits banked from flowing through the formula to load. PER accrued pursuant to the Tariff in the summer of 2010 (whether the level was appropriate or not) is a rate collected for service and the rate is not finally reconciled until the following 12-month period has expired. Moving to a 6-month rolling average coupled with, at a minimum, a very steep reduction of the PER

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[12] February 17 Order at P.40 (emphasis added).

[13] *See Sithe New England Holdings LLC v. FERC*, 308 F.3d 71, 78 (1st Cir. 2003).

> will redistribute dollars to generators that should have been distributed to load. Thus, the Filing Parties' proposal violates the filed rate doctrine and, at a minimum, the proposal to move to a 6-month rolling average must be rejected.

Thus, the Capacity Suppliers' attempts to show that an attempted forced "settlement" at the Commission would not pose retroactive ratemaking issues (the only reason that RESA can think of for raising the issue when the Commission clearly and explicitly did not reach the issues), are not only misplaced, but must be rejected because the Commission ***did not reach the issues*** in its February 17 Order and any forced settlement process at the Commission would only ignore the stakeholder process again.

III.
CONCLUSION

RESA submits that the Capacity Suppliers' motion to institute settlement procedures at the Commission and establish a refund effective date must be rejected. There is ample support in the record that the Commission did not err when it rejected the 6-month rolling average methodology. There is no reason for the Commission to order settlement discussions. The stakeholder process has been ignored thus far and, if any changes are to be made to this methodology, it is there where the discussion should take place.

WHEREFORE, RESA respectfully requests that its Motion in Opposition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **MOTION IN OPPOSITION** via e-mail on each person listed on the Commission's official service list.

Dated in Washington, DC this 5th day of April, 2011.

/s/Elizabeth Whittle___
Elizabeth W. Whittle