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

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| **ISO New England, Inc. and New England Power Pool, Inc.** | ) ) ) ) | **Docket No. ER11-2427-000** |

**MOTION TO INTERVENE AND PROTEST OF THE RETAIL ENERGY SUPPLY ASSOCIATION**

Pursuant to Sections 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. §§ 385.211 and 214, and the Commission's Combined Notices of Filings dated December 21, 2010, the Retail Energy Supply Association ("RESA")[1] hereby files this Motion to Intervene and Protest of the ISO New England Inc. ("ISO-NE") joined by the New England Power Pool Participants Committee ("NEPOOL") (together, the "Filing Parties") December 21, 2010 filing of revised tariff sheets to revise substantively the Peak Energy Rent ("PER") feature of the Forward Capacity Market ("FCM") contained in Market Rule 1. The Filing Parties propose to substantively modify the PER Strike price and modify the averaging feature of the formula.

Attached in purported support of the filing, and submitted only on behalf of ISO-NE, is the testimony of Robert G. Ethier. Mr. Ethier's lukewarm, at best, support for this proposal should confirm what RESA has suggested all along in before the ISO-NE Markets and Participants Committees – this is a proposal forced through the ISO-NE without proper stakeholder consideration and analysis with the sole intent of reducing or eliminating the PER

[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; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant Energy Northeast LLC. 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.

feature of the FCM. Not only is it bad precedent to make a substantive change without proper stakeholder review, it is bad precedent to react to what ISO-NE claims in support of its proposal could be a short-term market anomaly.

As will be shown below, the Filing Parties propose to change a rate formula that they assert is invoked too often to one that will rarely be invoked (and is uncertain as to how it will work in the future), all while retaining the mechanism and not abandoning the rationale for it. Clearly, with this filing, the Filing Parties seek to make substantive changes to one part of a mechanism that cannot be changed in a vacuum without adversely and substantially harming load serving entities ("LSEs") like RESA's members.

Moreover, this change is being proposed to address a "problem" whose cause, if there is, indeed, a problem, has not been determined or vetted through the stakeholder process and on reasoned consideration of the PER feature within the FCM as a whole. The proposed change has not been shown to be just and reasonable and is, in fact, unjust and unreasonable and must be rejected. Waiver of the sixty-day filing requirement should be denied. In support of this Motion to Intervene and Protest, RESA submits as follows:

## I. MOTION TO INTERVENE

### A. <u>Correspondence and Communications</u>

Correspondence and communications regarding this matter should be addressed to the following person(s), and the same should also be designated for service on the Commission's official list for this proceeding:


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RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity. RESA and its members are actively involved in retail electricity markets throughout the United States, including retail markets in each of the Commission-approved RTO/ISOs. Many of RESA's members are active in ISO-NE markets.

**B. Interests of RESA**

With members as participants in ISO-NE and purchasers of capacity and energy and participants in the forward capacity market in the ISO-NE, RESA has an interest in this proceeding that cannot be represented by any other party. Its Motion to Intervene is in the public interest and RESA respectfully moves that its Motion to intervene be granted.

## II. BACKGROUND

**A. The PER Mechanism**

The Peak Energy Rent mechanism is "intended to remove the incentive to raise prices in the Real-Time Energy Market by offsetting high real-time prices (above the PER Strike Price) with reductions in capacity payments, and in the same manner, it is intended to act as a hedge for load against high prices in the energy market."[2] The calculation of PER is a multi-step process. ISO-NE calculates the PER Strike Price and, for each hour in which the Real-Time Locational Marginal Price ("LMP") exceeds the PER Strike Price, the ISO will calculate an Hourly PER value. The Hourly PER values, the difference between the Real-Time LMP and the PER Strike Price, as adjusted, are summed for each month to establish the Monthly PER value. ISO-NE then calculates the Average Monthly PER, defined as the average of the Monthly PER values for

[2] ISO-NE filing letter at 5.

the 12 months prior to the Obligation Month. A capacity resource's monthly capacity payment is reduced by the product of the Average Monthly PER and the resource's Capacity Supply Obligation. That reduction results in a corresponding credit to load to reflect the reduced capacity price.

The PER Strike price is equal to the heat rate of the PER Proxy Unit times the fuel cost of that same PER Proxy Unit. As specified in the Tariff, the heat rate for the PER Proxy Unit is 22,000 Btu/kWh and the fuel cost is the lower of the price of (i) ultra low-sulfur no. 2 oil measured at New York Harbor plus transportation; or (ii) day-ahead natural gas measured at the Algonquin City Gate. The lower of determination is made on a daily basis.

The PER mechanism was a critical component of the FCM Settlement which implemented the FCM in ISO-NE ("FCM Settlement").[3] This fact is reflected not only in the settlement itself[4], but in the testimony filed in support of the settlement.[5] In ISO-NE's subsequent filing to implement the settlement, filed in Docket No. ER07-547, ISO-NE expressly stated:

> The proposed rules include a reduction in payments for capacity (except for self-supplied capacity) equal to the PER that would be expected to be received from a hypothetical proxy unit during the Capacity Commitment Period…In addition, the

[3] *Devon Power LLC*, 111 FERC ¶ 63,063 (2005), 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006).

[4] *See Devon Power LLC, et al.*, Docket No. ER03-563-000, Explanatory Statement In Support of Settlement Agreement of the Settling Parties and Request for Expedited Consideration and Settlement Agreement Resolving All Issues, submitted March, 6, 2006. Discussion of the mechanism is included in the Explanatory Statement at p. 26 ("[k]ey design elements of the FCM include (1) an auction format to derive competitive prices approximating the cost of new entry. . . (7) deductions for PER. . . .") It appears in the Settlement Agreement at Section 11, Part V.B.2.

[5] *See, e.g.*, Affidavit of Peter Cramton, Ph.D on behalf of ISO-NE, at 5-6 ("[t]he FCM relies on two instruments for performance incentives: Shortage Hour Availability (SHA) and a Peak Energy Rent (PER) hedge. SHA restores some of the incentives for resource mix and better operation that have been lost to price capping. Of at least equal importance, the PER hedge, though it provides no performance incentives beyond the spot energy market, mitigates market power in the energy market and reduces risk for both load and supply by shifting a large portion of compensation during times of scarcity from the spot energy market to the FCM"); Affidavit of Miles O. Bidwell, Jr., Ph.D on behalf of The Connecticut Department of Public Utility Control, at pp. 2-3.

> PER is converted to a 12-month rolling average and is subtracted from capacity resources' monthly capacity payments. The rolling average smoothes month-to-month PER variations to stabilize Generating Capacity Resources' revenue streams from the FCM over a year. The PER deduction will act as both a disincentive for suppliers to raise prices in the energy market and a hedge for load against energy price spikes.[6]

LSEs, such as RESA members, include the credits, which because of the averaging mentioned above, are known, and use the credits to reduce the over all rates paid for services. LSEs, such as RESA members, often offer fixed price contracts to customers, which can be either customers purchasing services as part of a state retail access program or customers served via the local utility provider of last resort solicitations. The PER credits to load are relied upon in pricing the services in these often long-term arrangements. Thus, in either case, a sudden change in or elimination of the credit will have devastating effects on LSEs with these fixed price contracts serving customers or POLR load pursuant to utility solicitations.

### B. ISO-NE's Proposed Changes to the PER Mechanism of the FCM

The Filing Parties propose two substantive and fundamental changes to the PER mechanism. First, the Filing Parties seek to change the methodology by which ISO-NE calculates the PER Strike Price. The Filing Parties propose 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. According to ISO-NE, because there has recently been a divergence of oil and gas prices (whether this is an anomaly or a long-term trend, no one knows), using the *lower of* pricing in the Tariff the PER Strike Price has been invoked more often than ISO-NE states it would be expected, resulting in additional reductions in capacity payments to generators and increased credits to load. The Filing Parties propose to address the market anomaly by permanently

6 ISO-NE Filing letter at p.178-79.

changing the PER Strike Price to base it on the *higher of* the price of oil and gas. Modifying this aspect of the PER Strike Price requires other conforming Tariff changes as well.[7]

The second change involves shortening of the 12-month rolling-average methodology employed to smooth out the adjustments resulting from the PER mechanism. ISO-NE asserts that once the PER Strike Price is changed use of the twelve month rolling average methodology will make it take too long for the changes to be felt in increased prices to the generators. Thus, the Filing Parties propose to shorten the 12-month averaging to six months, starting in February 2011. The Filing Parties attempt to show that this proposal is somehow reasonable by alleging that, in the limited meetings held on the topic, generators wanted to eliminate the averaging altogether, to speed the effects of the PER Strike Price change. Essentially, the Filing Parties seek to address what the Filing Parties perceive as a too-often invoked PER mechanism to a formulation of the mechanism where it will rarely be a factor. All without proper stakeholder consideration and the weighing of various ways to address the concerns of the generators and all interested market participants.

The Filing Parties also seeks waiver of the sixty day filing requirement and implementation of the changes effective December 21, 2010.

In support of its proposal, ISO-NE submitted the testimony of Mr. Ethier. While hardly a supportive document, and certainly not one that meets the Commission's Part 35 requirements in support of a rate filing, what Mr. Ethier does acknowledge is that there are other features of the PER mechanism that may require modification, noting that a future stakeholder process would be instituted to look at those other issues.[8]

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7 *See* Filing letter at 9.

8 Ethier Testimony at p.5.

### C. Procedural Deficiencies of the Process

The issue of the PER Strike Price, among other issues involving the FCM, has been discussed internally at ISO-NE on a number of occasions. In November 2009, the generator segment proposed in an amendment in connection with other changes under discussion relating to the FCM. At that time, the proposal would have been to modify the PER Strike Price by implementing a *higher of* formulation. There was no discussion of modifying the 12-month rolling average methodology. Such a change was not adopted. When certain FCM redesign changes were voted out of committee in February 2010 that became the FCM proposal filed in Docket No. ER10-787-000, the proposal to adopt a *higher of* pricing was not part of the more comprehensive FCM redesign.

To show the speed with which this proposal moved through ISO-NE and the corresponding lack of due process at ISO-NE and the lack of stakeholder consideration, the PER Strike Price issue was not raised after November 2009 (when the generator segment attempted to modify the PER Strike Price in the context of the comprehensive FCM changes filed with the Commission) at the Committee level until December 7-8, 2010, two short weeks prior to the Filing Parties' filing in this docket. As indicated by the Filing Parties in the filing letter (at 12), on December 7, 2010, a stand alone proposal was presented by a group of generators to the Markets Committee to immediately change the PER Strike Price and eliminate the 12-month rolling average feature. The matter was voted on at the Participants Committee a mere two days later, on December 10, 2010, and eventually modified to permit a 6 month rolling average feature, all over the objection of a large number of LSEs. The Filing Parties made their filing on December 20, 2010.

RESA is not saying that the PER mechanism, among other features of the FCM, could not and should not be improved. What concerns and affects adversely RESA and its members, is the way by which these significant changes are being forced upon the market and the timing of implementation of the changes which cause significant harm to LSEs with fixed price contracts and who have reasonably relied upon the PER credits in pricing services to load. If changes should be made to the PER mechanism, all changes should be considered in the stakeholder process and no one proposal, especially one that will cause direct and immediate harm to LSEs should be elevated and pushed through on a piecemeal basis. In short, the Commission should reject the ISO-NE filing, find that the changes are unjust and unreasonable and direct ISO-NE and all stakeholders to address more globally the issues involving the PER mechanism. If the Commission accepts the filing, it should deny ISO-NE's request for waiver of the 60-day filing requirement, suspend the filing and set the matters raised for evidentiary hearing. At a minimum, any changes made must be prospective and the 12-month rolling averaging feature of the PER mechanism must be retained.

## III.
## ARGUMENT

The Filing Parties' filing is unjust and unreasonable. The Filing Parties are proposing to change one feature of a complex formula included as a package of formulae contained in the initial FCM settlement, merely because of what may turn out to be anomalous summer conditions in New England. The sole beneficiary of this change is one segment – generators – and those directly harmed are LSEs and ultimately load. LSEs have reasonably relied upon the PER mechanism to price their services; generators have relied on the same mechanism in pricing their service offerings. Changing this mechanism provides a clear windfall to generators.

Removing the 12-month rolling average not only adversely affects LSEs, but this proposal constitutes retroactive ratemaking. Finally, waiver of the sixty day filing requirement is not justified. If not rejected outright, the Commission should make any changes prospective only and make the changes effective at the start of the next capability year.

### A. The Proposed Modifications to the PER Strike Price are Unjust and Unreasonable

The Filing Parties seek to make a knee-jerk reaction to a recent increase in the credit derived by use of the PER mechanism. Rather than assess the factors present in the market and outside of the market that led to the seemingly anomalous PER Strike Prices, the Filing Parties make a 180 degree change in the formula, creating a situation where the PER mechanism will rarely result in a credit to load, thus thwarting the very purpose of the mechanism as a "disincentive for suppliers to raise prices in the energy market and a hedge for load against energy price spikes." To be sure, there are a number of FCM-related market improvements that have been discussed at ISO-NE, the PER mechanism is one of them. However, the sheer lack of transparency and the speed with which the proposal was made and approved shows an utter lack of due process and illustrates that the proposal will not result in just and reasonable rates.

Pursuant to the Federal Power Act, the Commission cannot approve a rate unless it is just and reasonable. When a filing party initiates a filing pursuant to FPA Section 205, the "initial burden of showing that the tariff proposal is just and reasonable is on the party making" the filing.[9] Thus, the Filing Parties must "show that its proposed changes are just and reasonable. . . "[10] a showing that they simply have not made.

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9 *See, e.g., California Independent System Operating Corporation*, 119 FERC ¶ 61,076 at P.14 (2007).

10 *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.,* 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

What is the support for the filing? The Filing Parties submit short-term data on the divergence of oil and gas prices to show that the PER rate is lower than would be expected or intended.[11] However, from January 2008 – May 2010, there are seemingly no complaints about the operation of the mechanism.[12] While there was a spike in the PER in the summer, corresponding to a spike in the spot market, the PER rate seems to be declining.[13] Note that the 12-month averaging appears to be working as intended – it is smoothing the PER so the spike in the PER in the summer will track through the formula over the 12-month averaging mechanism. Correspondingly, during time periods where the PER is not triggered as a credit to load it would not show up immediately in the rate due to the same averaging. Operation of the PER over the last two years does not support the rate change and does not support a change to the 12-month averaging.

ISO-NE states in the filing letter (at 7) that it "believes" that the "unintended outcomes" are "largely" the result of the *lower of* formulation in the PER Strike Price. Has ISO-NE undertaken any study of the issue? Apparently not. Their witness in support of the filing does not acknowledge any study. Figure 2, submitted to show that there has been a divergence of gas and oil prices shows a considerably mixed bag of divergence and convergence of oil and gas prices over time. Certainly not support for a wholesale change of a formula that *will* increase the rates to load and maybe render the PER meaningless as either a hedge or a disincentive as intended. ISO-NE must work with all stakeholders, explore whether the PER mechanism should be changed, how it should be changed and what transition measures should be put in place to implement that change. RESA is not saying that, at the end of the day, moving to a ***higher of***

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11 Filing Letter at 8.

12 *See* Filing Letter at 6, fn. 23.

13 *Id.*

pricing in the PER Strike Price will not be the right result. However, there may be other factors at play and other features of the PER that should be modified to go along with that change. Until the issues can be vetted, the Filing Parties have not shown that the rate is just and reasonable.

A number of substantial issues of material fact exist. For example, why did the PER Strike Price reach the level that it did this summer (which has apparently created the urgency of generators in effectuating a change to this one part of the PER mechanism)? Was it the divergence of oil and gas as ISO-NE suggests? Was it the result of the abnormally hot summer in New England, coupled with an outage of the largest quick start unit in the region (Northfield Mountain)? Were the increased costs of generators resulting from the increased deduction for the PER Strike Price also coupled with higher than usual generator profits resulting from these same summer and outage conditions? Were generators really harmed as they suggest or did the PER mechanism work as intended? These are critical substantial issues of material fact that ISO-NE has ignored in its rush to bring the generator's proposal to the Commission for quick approval.

The testimony filed purportedly in support of the filing is also deficient and does not show that the proposed change is just and reasonable. Mr. Ethier's main focus in his testimony is the pricing in the PER Strike Price. While he notes that the PER Strike Price is not operating as intended, his sole rationale for this view is the focus on the pricing in the market, not on whether the mechanism is operating as a mitigation mechanism as intended. His sole "fix" for the problem is to modify the PER Strike Price calculation to consider the *higher of* rather than the *lower of* the gas and oil prices. While this change may superficially address what ISO-NE sees as the fundamental problem with the formula – the recent divergence in oil and gas prices – what happens when the market corrects and/or reverses? Is there a better way to address the concerns raised with respect to the functioning of the PER mechanism? We don't know – the proposal and any alternatives have not been vetted in the stakeholder process. This one "fix" was presented and rushed through the ISO-NE Committee process.

Mr. Ethier apparently is not so sure of this "fix" either. He states in his testimony that "[t]his ***should*** ensure that the PER Strike Price is ***more*** consistent with the design intent." Use of "should ensure" and "more consistent" are hardly endorsements of a just and reasonable tariff change. A proper stakeholder process with appropriate studies of the issues that considers all factors that may have led to any anomalies and that that garners consensus around any fix found necessary the PER mechanism will ensure that the intent of the mechanism and the result of the calculation are just and reasonable.

Mr. Ethier concludes his testimony by acknowledging: (1) the complexity of the formula; and (2) that "the ISO is aware of other concerns about its design and functioning that warrant consideration. For that reason, the ISO and NEPOOL have agreed to undertake a stakeholder process to review all aspects of the PER mechanism."[14] In short, Mr. Ethier's testimony does not support the justness and reasonableness of this filing. He supports RESA's view that the filing is unjust and unreasonable, not supported and should be subjected to further stakeholder discussions that address the PER mechanism on a more comprehensive basis through the stakeholder process.

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[14] Testimony at 5, ll5-8.

### B. LSEs Were Not on Notice that the PER Mechanism Would Be Changed

As noted above, the PER mechanism was a critical component of the FCM Settlement, supported directly by testimony included with the FCM Settlement.[15] This mechanism has been in place as a feature of the FCM and, in February 2010, when the last FCM redesign changes were submitted to the Commission, the changes proposed by the Filing Parties to the PER were not included. Generators were on notice of the PER and its features and participated actively in the FCM design and settlement processes. In contrast, with respect to the Filing Parties' proposed changes to the PER at issue here, LSEs were not on notice that this mechanism might change and change effective December 21, 2010. A change in the PER mechanism requires deliberation by all stakeholders. That deliberation did not occur. LSEs were not on notice that the generators and ISO-NE were working on a proposal and were not on notice that ISO-NE would seek to remove the 12-month rolling average feature of the PER mechanism.

In direct contrast to the tentative and tepid endorsement of the Filing Parties' proposal by ISO-NE, LSEs have reasonably relied on the PER Strike Price calculation as the *lower of* gas and oil prices. LSEs understood the PER Strike Price calculation and relied reasonably on the Tariff in pricing their services to load. Had LSEs been on notice of the change, they would have priced their services differently.

In this filing, the Filing Parties want to change the Tariff at the last minute to shift money from load to generators. However, the Filing Parties ignore that LSEs will have no opportunity to recover the additional costs to the extent that they entered into fixed price contracts with their customers. If the change were made through the stakeholder process, taking into consideration a transition to whatever mechanism is determined to be appropriate, then LSEs would have the

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[15] *See notes 4-5* .

ability to price in the change. However, LSEs had no notice, no indication from ISO-NE and no reason to believe that this change would occur effective December 21, 2010, and these LSEs relied on the existing Commission-approved Tariff provisions to develop pricing, lock in contracts with end use customers, and provide offers for default supply obligations.

### C. The ISO-NE Proposal to Modify the 12-Month Rolling Average Is Unjust and Unreasonable and Will Cause Harm to LSEs

The 12-month rolling average feature is a critical component of the PER mechanism. 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 which are fixed price contracts, modification of this 12-month rolling average feature, even shortening it to six months, will cause significant harm to LSEs such as RESA members.

RESA members have reasonably relied on the existence of the ISO-NE Tariff in pricing services to load. The 12-month rolling average is a critical component of the PER Tariff mechanism. Because it levelizes fluctuations, 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 will not be credited to LSE's as expected.-. Without the 12 month rolling average provision the money would have already been paid back to load. In the long-term, all load will suffer as either: (1) PER will rarely be invoked; or (2) the credits, if any, are not reliable or capable of quantification. In any case, load will almost certainly pay more for capacity.

Prior to December 2010, removal of the 12-month rolling average was never discussed at the ISO-NE committee level, even during the FCM redesign discussions held in late 2009 – early 2010. The proposal to remove it completely and the eventual Filing Parties' proposal to implement a 6-month rolling average appears to be yet another knee jerk reaction to the summer 2010 price spikes in ISO-NE and the desire of some market participants to see the result of the reduction of PER more quickly. This is hardly a rationale for a rate change that *will* adversely affect LSEs. No studies have been performed to show the justness and reasonableness of this proposal, there is NO support in either the filing letter or the testimony for the 6-month rolling average.[16] RESA members were not presented the proposal to modify the PER Strike Price calculation and to modify the 12-month rolling average feature until two weeks before the filing was made. LSEs with fixed price contracts will have no means to recover costs eliminated for the remaining term of their contracts.

The purpose of the 12-month rolling average feature is to even out fluctuations in the PER results. It would seem that this feature is just what is required to mitigate the harm caused by ISO-NE's proposal to modify the PER Strike Price in such a way that it will rarely be invoked. Even if the PER Strike Price were modified (a result not supported by RESA), retaining the 12-month rolling average will less drastically affect LSEs who have relied upon this PER mechanism in pricing their long-term, fixed price contracts to serve load.

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16 The Filing Parties' statement in the filing letter (at 10) that a 6-month rolling average is better than what the generators wanted – elimination of the rolling average methodology is not support sufficient to support the justness and reasonableness of the rate.

### D. Elimination of the 12-month Rolling Average and Replacement with a 6-Month Rolling Average Methodology Constitutes Retroactive Ratemaking

Elimination of the 12-month rolling average will constitute retroactive ratemaking. The Commission's rule against retroactive ratemaking does not permit the elimination of the 12-month averaging mechanism. 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.[17] 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 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.

### E. Waiver of the Sixty-Day Filing Requirement Should Be Denied

In addition to proposing drastic and substantive changes to the PER mechanism, the Filing Parties seek immediate implementation of the change and waiver of the sixty-day filing requirement of Section 35.11. The Filing Parties' request must be denied.

As acknowledged by the Filing Parties, in order to obtain waiver of the 60 day filing requirement, the applicant must show good cause. The Filing Parties have not shown good cause

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

in support of their request. The Commission's standard for waiver are contained in *Central Hudson Gas & Electric Corp*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992). In that order, the Commission found that it would grant waiver for (1) "uncontested filings that do not change rates"; (2) "filings that reduce rates and charges"; and (3) "filings that increase rates when the rate change and the effective date are prescribed by contract."[18] The Commission also provided that it would "deny requests for waiver of notice for rate increases that do not implement a contract requirement."[19] The Commission has consistently denied waiver when the rate to be imposed will cause a rate increase for Tariff customers.[20] Here, the proposed Tariff change will result in an increase in rates to LSEs. The change in the PER Strike Price will result in, at a minimum, the sharp reduction of monthly PER. If this change is implemented on a 6-month rolling average despite the fact that this component would violate the prohibition against retroactive ratemaking, the result of accelerated elimination of the credit will cause rates to increase and, importantly, LSEs with fixed price contracts with load will not be able to recover these costs without notice. In short, the Filing Parties have not shown that good cause exists and their request for waiver of the sixty-day filing requirement of 36.11 must be denied.

## IV.

## CONCLUSION

The FCM is a complex program. The PER is and has been a critical component of the FCM since the parties reached the comprehensive settlement that established the FCM in 2006. While comprehensive and/or deliberate changes to the FCM that result from the stakeholder

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18 *Central Hudson* at P.61,339.

19 *Id*.

20 *See e.g.*, *Xcel Energy Services Inc. v. FERC*, 510 F.3d 314 (D. C. Cir. 2007); Carolina *Power & Light Company*, 95 FERC ¶ 61,429 (2001).

process are inevitable and should be undertaken, the changes proposed by the Filing Parties are simply not the result of a deliberative stakeholder process and the changes are not supported by any study of the PER or the features of the PER. The Filing Parties are merely reacting to a spike in the PER that, upon further review, may have been caused by the summer price spike resulting from the outage of a generating unit and higher than normal temperatures.

Without a stakeholder process and careful examination of all factors present at the time of the anomalous activity it is impossible to know whether the proposed fix – modification of the PER Strike price calculation from the ***lower of*** to the ***higher of*** the price of oil and gas – will be effective and will result in a just and reasonable rate. In short, the rate has not been shown to be just and reasonable.

The Filing Parties' proposal to remove the 12-month averaging feature and replace it with a 6-month rolling averaging feature is similarly unjust and unreasonable. There is no support for this proposal, other than a claim by ISO-NE that it was less drastic than complete elimination of the rolling average methodology proposed by the generators. LSEs were not on notice that this mechanism would change and LSEs have relied reasonably on the rolling average to best price their services to the benefit of load. The 12-month rolling-average methodology serves as it is intended to – it evens out the fluctuations in the rate – both when the rate is high and when the rate is low. Moreover, the proposal to move to a 6-month rolling average will result in prohibited retroactive ratemaking.

Finally, the Commission must not grant waiver of the sixty-day filing requirement. The rate shock caused by this proposal will be substantial and will adversely affect LSEs such as RESA members. Good cause and Commission precedent clearly support denial of waiver.

WHEREFORE, RESA respectfully moves to intervene in this proceeding and respectfully requests that its Protest be considered and the Filing Parties' filing be rejected by the Commission in this proceeding.

Respectfully submitted,

/s/Elizabeth W. Whittle
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Dated: January 11, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion to Intervene and Protest via e-mail on each person listed on the Commission's official service list.

Dated in Washington, DC this 11th day of January, 2011.

/s/Elizabeth Whittle___
Elizabeth W. Whittle