UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

ISO New England, Inc. and
New England Power Pool

Docket No. ER07-219-000

ORDER ACCEPTING AND SUSPENDING TARIFF REVISIONS AND
ESTABLISHING REPORTING REQUIREMENT

(Issued January 12, 2007)

1. On November 14, 2006, ISO New England, Inc. (ISO-NE) and the New England Power Pool Participants Committee (NEPOOL) jointly submitted amendments to Market Rule I (section III of ISO-NE's tariff), pursuant to section 205 of the Federal Power Act (FPA),[1] to eliminate the Peaking Unit Safe Harbor (PUSH) mechanism. This order accepts and suspends the proposed tariff revisions for five months, to be effective June 19, 2007, subject to refund and to further order, and establishes a reporting requirement for ISO-NE, as discussed below.

I. Background

2. In 2002, the Commission approved a new market design for New England energy markets.[2] New England's new market design created Designated Congestion Areas (DCA) for chronically constrained regions, and provided mechanisms to address scarcity pricing in the capacity market and appropriate compensation for reliability units in constrained regions. Generators in DCAs were permitted to bid up to a "safe harbor"

[1] 16 U.S.C. § 824d (2000).

[2] *See New England Power Pool and ISO New England Inc.*, 100 FERC ¶ 61,287 (*Market Rule 1 Order*), *order on reh'g and compliance*, 101 FERC ¶ 61,344 (2002) (*Market Rule 1 Rehearing*).

level without triggering mitigation. The safe harbor bid cap was based on a pre-specified combustion turbine proxy price (CT Proxy), representing the cost of operating a hypothetical peaking unit.[3] The new market design also contemplated using Reliability Must Run (RMR) agreements as a backstop for RMR units in DCAs that might not be adequately compensated under the safe harbor bid cap.[4] The Commission expected ISO-NE to exercise vigilance to ensure that only those units needed to ensure reliability received RMR contracts, and that those contracts not remain in effect indefinitely, but only during the limited periods when ISO-NE needed the units for reliability.[5]

3. In 2003, the Commission rejected certain RMR agreements proposed for constrained areas of New England, explaining that RMR agreements should be a last resort and that the proliferation of these agreements is not in the best interest of the competitive market for electricity.[6] The Commission also directed ISO-NE to remove the CT Proxy mechanism[7] and to institute, in its place, revised bidding rules -- called Peaking Unit Safe Harbor (PUSH) bidding -- to give low-capacity factor generating units operating in DCAs the opportunity to recover their costs through the market.[8] The Commission indicated that using PUSH bidding as a means for low-capacity factor generators to recover their fixed and variable costs was an interim solution. The Commission directed ISO-NE to develop and file by March 1, 2004 a permanent mechanism to implement a location-based or deliverability requirement in the installed

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[3] Though the Commission approved the new market design, it expressed concern as to the effectiveness of the CT Proxy pricing mechanism, stating that "obtaining a scarcity price under this mechanism may give generators an incentive to depart from a competitive marginal cost bidding strategy." *Market Rule 1 Rehearing* at P 20; *see also Market Rule 1 Order* at P 44-45.

[4] *Market Rule 1 Order* at P 17; *see also id.* at P 50.

[5] *Market Rule 1 Rehearing* at P 33.

[6] *See e.g., Devon Power LLC,* 102 FERC ¶ 61,314 (2003) (*Devon I*) and *Devon Power LLC*, 103 FERC ¶ 61,082 (2003) (*Devon II*), *reh'g granted in part and denied in part*, 104 FERC ¶ 61,123 (2003) (*Devon III*); *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,085*, reh'g granted in part and denied in part*, 105 FERC ¶ 61,324 (2003) (*PPL Wallingford*).

[7] *Devon II* at P 36.

[8] *Devon II* at P 33; *Devon III* at P 25-31. A low-capacity factor generating unit is a unit with a capacity factor of ten percent or less during 2002.

capacity (ICAP) or resource adequacy market,[9] so that capacity located in DCAs would be appropriately compensated for reliability.[10]

4. In response to this directive, ISO-NE filed a proposed locational installed capacity (LICAP) mechanism. As proposed, the LICAP mechanism would have added a locational element to the then-existing ICAP markets by establishing four regions with separate ICAP requirements and prices: Maine, Connecticut, Northeast Massachusetts/Boston, and the remainder of New England. This proposal would have established transfer limits on the amount of capacity that a load serving entity could procure from outside its region to meet its capacity obligation. In an order issued on June 2, 2004, the Commission found that, while the proposal was conceptually sound, additional revisions were necessary and issues needed to be resolved before it could be implemented. Accordingly, the Commission set the matter for hearing.[11]

5. Meanwhile, ISO-NE filed a report on December 4, 2003 that provided an assessment of the operation of PUSH bidding since its implementation on June 1, 2003.[12] The *PUSH Report* stated that units operating under the PUSH mechanism did not significantly affect locational marginal prices (LMP) because they were dispatched for operating reserves and, as a result, did not receive their compensation through the energy market. The report further stated that, in aggregate, PUSH units were only able to recover 35 percent of the fixed costs included in their PUSH bid levels, which was well below the estimated going forward costs.

6. Taking into account the lack of effectiveness of PUSH bidding described in the *PUSH Report*, the Commission accepted several RMR agreements in 2004 and early 2005, and conditioned them to terminate the day a location-based capacity or deliverability requirement was implemented pursuant to the Commission's directive in

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[9] ICAP obligations are imposed on load serving entities, requiring them to procure a specified amount of ICAP each month to ensure that there is sufficient capacity to supply system peak load under various contingencies.

[10] *Devon II* at P 37.

[11] *Devon Power LLC,* 107 FERC ¶ 61,240 at P 1-2 (*Devon V*), *order on reh'g*, 109 FERC ¶ 61,154 (2004) (*Devon VI*), *order on reh'g*, 110 FERC ¶ 61,313 (2005); *order on reh'g*, 110 FERC ¶ 61,315 (2005).

[12] *See A Review of Peaking Unit Safe Harbor (PUSH) Implementation and Results* (*PUSH Report*), filed December 4, 2003 in Docket No. ER03-563-025.

Devon II.[13] The Commission reasoned that accepting the RMR agreements for a limited term was appropriate, given that the units covered by the contracts were aging, low capacity factor units that were performing poorly under the PUSH bidding rules.[14] The Commission also approved limited-term RMR agreements for newer, baseload facilities needed for reliability that demonstrated an inability to earn sufficient revenues to keep generation available to provide reliability services.[15] In other cases, the Commission conditionally approved and set for hearing the issue of whether certain proposed RMR agreements were needed.[16]

7. On June 16, 2006, the Commission approved a settlement in the LICAP proceeding that adopted an alternative to LICAP in the form of a market mechanism called the Forward Capacity Market (FCM).[17] The FCM establishes annual auctions for capacity and the capacity product will be sold on a per-megawatt of deliverable capacity basis.[18] According to the FCM settlement, payments will be made to all generators providing installed capacity during a transition period that began December 1, 2006 and ends at the beginning of the first commitment period of the FCM, June 1, 2010, which is when capacity will be procured via auction. The currently applicable RMR agreements in New England are scheduled to terminate upon the implementation of a LICAP mechanism. However, the FCM settlement provides that the RMR agreements will terminate at the beginning of the first commitment period of the FCM.

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[13] *See e.g., Devon Power LLC*, 106 FERC ¶ 61,264 (2004) (*Devon IV*); *PSEG Power Connecticut LLC*, 110 FERC ¶ 61,020 (2005), *order on reh'g*, 111 FERC ¶ 61,441, *order denying reh'g*, 113 FERC ¶ 61,210 (2005).

[14] *Devon IV* at P 18.

[15] *See e.g., Milford Power Company, LLC*, 110 FERC ¶ 61,299 (2005), *order on reh'g*, 112 FERC ¶ 61,154 (2005).

[16] *See e.g., Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 (2005), *order on reh'g*, 113 FERC ¶ 61,311 (2005), *reh'g denied*, 114 FERC ¶ 61,265 (2006); *Berkshire Power Company, LLC*, 112 FERC ¶ 61,253 (2005), *reh'g denied*, 114 FERC ¶ 61,099, *reh'g denied*, 115 FERC ¶ 61,253 (2006).

[17] *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (*FCM Settlement Order*), *order on reh'g*, 117 FERC ¶ 61,133 (2006).

[18] *FCM Settlement Order* at P 16.

II. **ISO-NE's and NEPOOL's Filing**

8. ISO-NE and NEPOOL filed jointly under FPA section 205 seeking elimination of the PUSH mechanism. In support, ISO-NE and NEPOOL explain that the PUSH mechanism was intended to be temporary. ISO-NE and NEPOOL state that PUSH bidding is ineffective in achieving its intended goals of compensating generators with resources in DCAs and providing investment signals for new resources. New market design solutions are in place to further the same goals, including the implementation of a Locational Forward Reserves Market (LFRM)[19] and a Real-Time Reserve Market (RTRM),[20] and the transition to the FCM. ISO-NE and NEPOOL assert that absent modification of the PUSH mechanism, generators owning eligible PUSH units may receive excess revenues due to these new market design solutions.

9. ISO-NE and NEPOOL state that the LFRM was implemented on October 1, 2006. They note the locational aspect of LFRM and explain that the LFRM is intended to result in payments that more accurately reflect the marginal cost of supply determined under competitive market conditions. As a result of the first LFRM auction, generating units in constrained areas that provide reserves are being paid $14.00/kW-month. ISO-NE and NEPOOL assert that traditional off-line peaking units will provide the bulk of these resources; therefore, peaking resources are the most likely beneficiaries of LFRM. The RTRM was also implemented by ISO-NE on October 1, 2006. ISO-NE and NEPOOL state that this system provides for the co-optimization of energy and reserves and, as a result, LMPs now reflect additional costs associated with re-dispatching the system to provide real-time reserves in constrained areas.

10. Further, ISO-NE and NEPOOL state that the FCM will provide generators with additional revenues. During the transition period beginning on December 1, 2006 and ending on June 10, 2010, fixed payments will be made to all installed capacity in amounts increasing from $3.05 to $4.10/kW-month.

11. According to ISO-NE and NEPOOL, NEPOOL's Markets Committee failed to recommend that NEPOOL support the elimination of the PUSH mechanism. NEPOOL approved the elimination of the PUSH mechanism by a 60.79 percent vote at its November 3, 2006 meeting. ISO-NE and NEPOOL note that market participants opposing these revisions proposed a number of alternatives to the outright elimination of

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[19] *ISO New England Inc.,* 115 FERC ¶ 61,175 (2006).

[20] *Id.*

PUSH; however, ISO-NE did not support these alternatives, nor did any alternative have sufficient support within NEPOOL to pass.

12. ISO-NE and NEPOOL request that the PUSH mechanism be eliminated effective January 19, 2007. However, they state that ISO-NE and market participants will need several business days after the issuance of an order to adjust mitigation thresholds and supply offers.

III. Notice of Filing and Responsive Pleadings

13. Notice of ISO-NE's and NEPOOL's filing was published in the *Federal Register*, 71 Fed. Reg. 68,597 (2006), with interventions, comments, and protests due on or before December 5, 2006. Timely motions to intervene were filed by the Mirant Parties,[21] the Dominion Companies, [22] and Northeast Utilities Service Company on behalf of the Northeast Utilities Companies.[23] EPIC Merchant Energy, LP (EPIC Merchant) filed a motion to intervene out-of-time.

14. The Connecticut Department of Public Utility Control (CT DPUC) filed a notice of intervention and motion for expedited order. NRG Companies[24] filed a timely motion to intervene and answer in opposition to CT DPUC's motion for expedited order. NRG Companies also filed a protest and supplemental protest. United Illuminating Company (United Illuminating) filed a timely motion to intervene and protest.

15. Timely motions to intervene and comments were filed by Connecticut Municipal Electric Energy Cooperative (CMEEC), NEPOOL Industrial Customer Coalition (NICC), the New England Conference of Public Utilities Commissioners, Inc. (NECPUC), and NSTAR Electric & Gas Corporation (NSTAR).

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[21] The Mirant Parties are: Mirant Energy Trading, LLC, Mirant Canal, LLC, and Mirant Kendall, LLC.

[22] The Dominion Companies are: Dominion Energy New England, Inc. and Dominion Energy Marketing, Inc.

[23] The Northeast Utilities Companies are: Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire.

[24] The NRG Companies are: Connecticut Jet Power LLC, Devon Power LLC, Middleton Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC.

16. NRG Companies, NEPOOL, ISO-NE, CT DPUC, and CMEEC filed answers.[25] Richard Blumenthal, the Attorney General for the State of Connecticut (CT AG), filed a motion to intervene out-of-time and an answer.[26]

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), 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 EPIC Merchant's and the CT AG's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NRG Companies', NEPOOL's, ISO-NE's, CT DPUC's, CMEEC's, and the CT AG's answers because they have provided information that assisted us in our decision-making process.

IV. Comments, Protests, and Answers

A. Support for Proposal to Eliminate PUSH

19. NSTAR, NICC, CMEEC, and NECPUC filed comments supporting removal of the PUSH mechanism from ISO-NE's tariff. Commenters agree that the presence of LFRM, RTRM improvements, and FCM transition payments address the concerns that originally led to the adoption of the PUSH mechanism, thus obviating the need for it. NSTAR and NICC state that maintaining the PUSH mechanism would only lead to eligible PUSH units receiving excess revenues. NSTAR and CMEEC point out that the PUSH mechanism was meant to be a short-term measure.

20. NICC notes that the PUSH mechanism raises the LMP for all generators in a constrained area regardless of whether the generators are recovering their revenue requirements and whether they are needed to preserve system reliability, and that retail customers ultimately bear the burden of these increased costs.

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[25] NRG Companies filed an answer on January 3, 2007, in addition to the earlier November 28, 2006 answer in opposition to CT DPUC's motion for expedited order. CMEEC's answer supports CT DPUC's answer.

[26] The CT AG's answer supports CT DPUC's motion for expedited order, and supports and adopts CMEEC's comments.

21. NICC also points out that the PUSH mechanism is fundamentally inconsistent with generators' use of market based rate authority, and that elimination of the PUSH mechanism comports with the notion that holders of market-based rate authority are not entitled to assurances of cost recovery. CMEEC states that while it understands the need for a market design that includes adequate incentives, it is neither just nor reasonable to require CMEEC or its member systems to pay for more incentive arrangements than are absolutely necessary.

22. NSTAR preemptively responded to any generator who might argue that PUSH should not be eliminated because doing so would result in the generator deferring to an RMR agreement to adequately recover its costs. NSTAR states that movement toward RMR agreements will not occur because, even with elimination of the PUSH mechanism, generators will have means for adequate cost recovery.

B. Motion for Expedited Order

23. CT DPUC requests that the Commission issue an expedited order, waiving the 60-day review period and establishing an effective date of December 1, 2006, or as soon as possible thereafter, for the elimination of the PUSH mechanism. CT DPUC states that the Commission generally finds good cause for granting waiver of the 60-day prior notice requirement for filings that reduce rates and charges.[27] CT DPUC points out that the PUSH mechanism was intended to be temporary until replaced by a locational capacity market, and that with the LFRM and FCM markets in place, this condition is satisfied. CT DPUC contends that there is good cause to grant waiver: ISO-NE and NEPOOL recently learned that transition payments would commence on December 1, 2006;[28] NEPOOL stakeholders voted on the proposal to eliminate PUSH on November 3, 2006, whereafter ISO-NE and NEPOOL worked quickly to file the proposal on November 14, 2006; and, without elimination of the PUSH mechanism, generators owning PUSH units will receive excess revenues.

24. NRG Companies responded to CT DPUC's motion, stating that they are adversely affected by the proposed elimination of the PUSH mechanism and should not be denied a full and fair opportunity to review the submittal and to provide the Commission with their

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[27] CT DPUC Motion for Expedited Order at 3-4, citing *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

[28] On October 31, 2006, the Commission denied rehearing on its June 16, 2006 Order approving the FCM settlement, including the capacity transition payments.

views of the proper disposition of the filing. NRG Companies explain that ISO-NE and NEPOOL did not seek to shorten the review period or prior notice requirements and, instead, requested a normal review period and a January 19, 2007 effective date consistent with the Commission's prior notice requirements. NRG Companies contend that the CT DPUC has not provided a basis to implement the proposal earlier than requested and the prospect of an expedited order circumvents the Commission's prior notice requirements and prejudices the ability of interested parties to meaningfully respond.

25. NRG Companies state that CT DPUC supports its request by relying on *Central Hudson*, in which NRG Companies contend the Commission found that waiver of the 60-day prior notice was appropriate where the seller itself requests the waiver and the filing reduces rates and charges.[29] NRG Companies assert that in such cases, granting waiver may be appropriate because there is no substantial risk that any party will be prejudiced. NRG Companies argue that in the instant filing, the seller is not the movant, nor is the seller the filing public utility, but rather the sellers are other public utilities like certain NRG Companies that are authorized to engage in PUSH bidding in order to recover their Commission-approved cost of service. NRG Companies explain that in this proceeding, the customers request that sellers' rates be reduced despite the near-unanimous objection of generators, who would be adversely affected by elimination of the PUSH mechanism. Additionally, NRG Companies explain in detail in their protest, as discussed below, that the PUSH mechanism can and should continue to serve its intended purpose of providing a market-based alternative to RMR agreements.

26. CMEEC, NECPUC, and CT DPUC agree that the 60-day notice period should be waived to facilitate early termination, and PUSH bidding should be terminated effective December 1, 2006 or as soon as possible thereafter.

27. In its answer, NEPOOL states that it cannot support an effective date ahead of the requested January 19, 2007 effective date, since there was no such request raised in the stakeholder process. NEPOOL states that the Federal Power Act (FPA) contemplates requests for waiver made by a "filing public utility,"[30] and as a third party, CT DPUC does not have the requisite authority to move for waiver of the notice period by requesting an earlier effective date. NEPOOL contends that CT DPUC can only seek changes to the filed rate ahead of the requested effective date through initiation of a complaint proceeding under FPA section 206.

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[29] NRG's Answer to Motion for Expedited Review at 3.

[30] NEPOOL Answer at 6, citing 18 C.F.R. § 35.11.

C. **Opposition to Proposal to Eliminate PUSH**

28. NRG Companies and United Illuminating oppose ISO-NE's and NEPOOL's effort to eliminate the PUSH mechanism and state that termination of the PUSH mechanism is inconsistent with prior Commission orders. United Illuminating contends that early termination of PUSH (before a capacity market mechanism is fully implemented) is likely to increase costs for United Illuminating, and its customers, and that ISO-NE and NEPOOL have not met their burden of showing that elimination of the PUSH mechanism would result in United Illuminating and its customers paying just and reasonable rates. United Illuminating contends that the Commission ruled that the PUSH mechanism should remain in place until the New England market was fixed by adoption of "a mechanism that implements location or deliverability requirements in the ICAP or resource adequacy market…"[31] Likewise, NRG Companies argue that the Commission has consistently maintained that PUSH bidding is essential to preserving just and reasonable rates in New England until a locational capacity market is implemented.

29. Additionally, NRG Companies and United Illuminating assert that several generating units continue to use the PUSH bidding system successfully. NRG Companies argue that the filing contains no facts regarding how the PUSH mechanism performed over the more than three-year period since the *PUSH Report* was filed. NRG Companies cite Norwalk Harbor Units 1 and 2 as an example of generators that are operating efficiently under the PUSH mechanism and state that PUSH bidding provided the Norwalk Harbor units the opportunity to recover their fixed costs, which would not have been possible under the New England markets.[32] NRG Companies also contend that the PUSH mechanism has been working as a scarcity price signal for investment in constrained areas, stating that the Norwalk Harbor units do set the energy clearing price.

30. Further, NRG Companies and United Illuminating disagree that the new market mechanisms -- the LFRM, RTRM, and the FCM -- justify early elimination of the PUSH mechanism. NRG Companies state that although LFRM compensates fast-start units[33] and units that are on-line and can be ramped up quickly to provide reserves from

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[31] United Illuminating Protest at 5, citing *Devon II* at P 37.

[32] NRG Companies note that the Norwalk Harbor units are located on a critical point on the integrated transmission grid and are the termination point for Phase I and Phase II of the Southwest Connecticut Reliability Project 345 kV transmission project; thus, compensation for their locational value is reasonable.

[33] Fast-start units are units that can start-up in 30 minutes or less.

unloaded capacity, LFRM will not benefit all PUSH units; certain PUSH units can neither start up in 30 minutes, nor economically run for the purpose of being available to participate in that market. Additionally, NRG Companies state that the RTRM is unlikely to benefit PUSH units because it compensates only units that are already on-line, but PUSH units are not likely to be on-line during the few hours when reserve revenues are earned, unless they are committed for reliability.

31. NRG Companies and United Illuminating comment that in the FCM Settlement Order, the Commission did not require termination of RMR agreements prior to full implementation of FCM, nor did it require RMR generators to reapply for new RMR agreements. NRG Companies and United Illuminating state that the Commission found that "the June 2010 termination date of RMR agreements is consistent with the express terms of the RMR agreements and the Commission's intent that those contracts terminate when a capacity market mechanism is fully implemented."[34] United Illuminating comments that the same market issues that formed the basis for approval of RMR agreements also supported the Commission's adoption of the PUSH mechanism. Thus, United Illuminating asserts that just as the Commission did not require termination of RMR agreements until June 2010, the Commission should not approve termination of the PUSH mechanism prior to that time. Similarly, NRG Companies assert that there is no basis to consider the commencement of the non-locational transition payments to be implementation of a locational capacity mechanism for purposes of PUSH bidding.

32. United Illuminating states that regarding the FCM settlement, the Commission approved transition payments to generators prior to implementation of the FCM, but that unlike PUSH bidding, the transition payments do not reflect a market mechanism, nor do they have a locational component. Therefore, United Illuminating contends that the transition payments are not likely to account for all of the revenues lost by generators that currently take advantage of the PUSH mechanism. United Illuminating argues that, if the Commission were to approve termination of the PUSH mechanism, some or all of the generators that have taken advantage of the PUSH mechanism would seek full cost of service RMR agreements, until ISO-NE implements the FCM.

33. United Illuminating states that pursuant to Connecticut law, it recently completed a request for proposals (RFP) process to purchase power to supply standard offer and provider of last resort service during 2007 and 2008, and that the PUSH mechanism was part of the market structure at the time bids were developed and submitted pursuant to the RFP.[35] United Illuminating asserts that the bidders factored the costs of the PUSH

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[34] *FCM Settlement Order* at P 166.

[35] United Illuminating Protest at 6-7.

mechanism into the energy prices and United Illuminating has already contracted to pay the successful bidders. If the PUSH mechanism is eliminated, United Illuminating and its customers would pay twice for the same benefit: first, for the benefit of the PUSH mechanism that has been factored into the prices United Illuminating will pay for power, and then for the costs of the additional RMR agreements. Therefore, United Illuminating contends that consistent with the Commission's prior orders, the PUSH mechanism should stay in place until ISO-NE implements the FCM in 2010.

34. Regarding the Norwalk Harbor units, NRG Companies state that these units are unlikely to benefit from the LFRM or the RTRM because they are not fast-start units, and they are unlikely to be on line during real-time reserve events. NRG Companies also state that FCM transition payments will not cover the Norwalk Harbor units' facility costs.[36] NRG Companies state that Norwalk Harbor has asked ISO-NE to confirm that the Norwalk Harbor units are needed for reliability, as a prelude to filing an RMR agreement for these units, should the PUSH mechanism be eliminated. However, NRG Companies note that it could take as long as 90 days for ISO-NE to review the request for a reliability determination, and an additional 90 days to negotiate an agreement.[37] Therefore, the Norwalk Harbor units would not have a mechanism to recover their fixed costs, if the PUSH mechanism was terminated prior to the time needed to put an RMR agreement in place.

35. NRG Companies suggest that instead of eliminating PUSH, ISO-NE and NEPOOL could instead modify the PUSH adder to account for revenues earned under the recent market rule changes. NRG Companies propose to adjust the fixed cost element of the PUSH adder formula by substituting the annual capacity transition payment for the annual ICAP payment to be subtracted from the PUSH unit's fixed costs. Also, NRG Companies recommend that the use of a PUSH bid be precluded for any operating day in which a unit was designated as providing LFRM service.[38]

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[36] Facility costs are costs ordinarily necessary to keep a facility available. *See Bridgeport Energy, LLC*, 112 FERC ¶ 61,253 at P 35 (2004).

[37] In its supplemental protest, NRG Companies submitted ISO-NE's determinations that both of the Norwalk Harbor units are needed for reliability. The determinations were issued December 12, 2007, seven days after NRG Companies filed their protest in this proceeding, and 35 days after Norwalk Power LLC sent its November 7, 2006 letter requesting the determination.

[38] NRG Companies state that this proposal was supported by 51 percent of NEPOOL during its November 3, 2006 Participants Committee meeting.

36. NRG Companies' answer echoes these arguments in favor of retaining PUSH to rebut NEPOOL's, CT DPUC's, and ISO-NE's answers, summarized below.

D. <u>Responses to Opposition</u>

37. CMEEC notes that NRG Companies urged in the LICAP settlement proceeding that PUSH bidding be continued until PUSH units were eligible to receive compensatory operating reserve payments through any new locational reserve markets and co-optimized energy and reserve markets. CMEEC asserts that NRG Companies' conditions have been met, and NRG Companies should not be allowed to argue here that the PUSH mechanism must remain in place. CMEEC addresses the argument that the event triggering the termination of PUSH bidding has yet to occur because the commencement of the FCM "transition payments" does not constitute the implementation of a locational capacity regimen referenced in its earlier pleading. CMEEC states that this claim should be rejected; whether called "locational" or otherwise, the FCM capacity payments constitute a significant and new source of revenues for all generation resources, including those that are PUSH-eligible, and are presumably far more effective than PUSH at putting revenues in the pockets of the region's generators. Moreover, according to CMEEC, nothing in the FCM settlement precludes a finding that the initiation of "transition payments" is an event that triggers the termination of the PUSH bidding regimen.

38. NEPOOL asserts that the possibility that NRG Companies may file at least two additional RMR agreements does not change the need to eliminate the PUSH mechanism. NEPOOL states that it has never claimed, and does not purport to claim in this proceeding, that the combination of LFRM, RTRM, and FCM transition payments eliminates the need for RMR agreements, and notes that it is clear they will not. Regarding NRG Companies' proposed alternative, NEPOOL states that it does not matter if this alternative might be reasonable, NEPOOL has already considered and rejected it.

39. In its answer, CT DPUC urges the Commission to approve ISO-NE's and NEPOOL's filing, effective no later than January 19, 2007. CT DPUC contends that neither NRG Companies nor any other generator has suggested that any units other than the Norwalk Harbor units might be unable to recover their costs without PUSH. Thus, termination of PUSH would affect only the Norwalk Harbor units. CT DPUC states that the Norwalk Harbor units will not be harmed if PUSH is eliminated because they may still recover their costs through an RMR agreement. CT DPUC contends that maintaining the PUSH mechanism would allow the Norwalk Harbor units to pick and choose from an array of market supplements. Further, CT DPUC also contends that NRG Companies have provided no reliable data to support their assertions that the Norwalk Harbor units will not be able to recover their Facility Costs without PUSH bidding.

40. CT DPUC argues that any price signals created by the Norwalk Harbor units' PUSH bids will only enhance revenues for existing generation, not stimulate new generation. CT DPUC states that the PUSH mechanism will not stimulate new generation because until Phase II of the Southwest Connecticut Reliability Project is completed in late 2009, the transmission infrastructure will not be in place to support significant new generation, and any prospective investor in new generation knows that the price signals PUSH sends are only temporary. Further, CT DPUC contends that if the Norwalk Harbor units set the clearing price in Southwest Connecticut, NRG Companies' other resources are likely to benefit.

41. CT DPUC states that nothing in NRG Companies' protest justifies preserving the PUSH mechanism beyond the proposed termination date of January 19, 2007. Although the FCM settlement expressly provided that existing RMR agreements will not terminate when transition payments begin, no such provision was included to preserve PUSH. CT DPUC reasons that the parties did not intend to lump RMR agreements and PUSH together for purposes of determining when they would end. Additionally, CT DPUC states that PUSH was a "temporary" mechanism that was never intended to continue indefinitely. CT DPUC contends that the D.C. Circuit "sealed the fate of PUSH in 2005 when it held that the Commission acted arbitrarily and capriciously in requiring PPL Wallingford to rely on PUSH instead of approving an RMR agreement."[39]

42. In its answer, ISO-NE echoes the argument that the Commission explicitly designed the PUSH mechanism "to provide *temporary rules* to provide an adequate *opportunity* to recover costs."[40] ISO-NE states that NRG Companies too narrowly construe the Commission's order establishing the PUSH mechanism, and ISO-NE stresses the word "opportunity" -- the market changes implemented since 2003 (LFRM, RTRM, and FCM transition payments) provide a realistic opportunity for cost recovery. ISO-NE states that its proposal does not rely on a showing that every generating unit in New England is guaranteed to recover its costs through LFRM or other mechanisms.[41] ISO-NE also notes that NRG Companies' focus on establishment of a locational capacity

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[39] CT DPUC's Answer at 16, citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 at 1200 (D.C. Cir. 2005).

[40] ISO-NE Answer at 3.

[41] ISO-NE also points out that LRFM does provide flexibility for suppliers, such as NRG, to use their judgment regarding when it is appropriate to satisfy reserve obligations by self-committing units with long start times so that they can be on-line and ready to provide reserves in real time.

market as the condition for removal of the PUSH mechanism in effect advocates an inflexible test that does not account for the market changes that have been implemented since the PUSH mechanism was in place.

43. ISO-NE emphasizes that the PUSH mechanism has not achieved the goals set by the Commission; it neither combats RMR agreement proliferation, nor does it encourage entry by new generators. ISO-NE states that the public record clearly demonstrates that, on both accounts, the PUSH mechanism has failed. ISO-NE points to the three RMR agreements that became effective on January 17, 2004 and the D.C. Circuit decision referenced by CT DPUC above.[42] Also, ISO-NE states that between the time the PUSH mechanism was implemented and prior to recent implementation of the LRFM and FCM transition payments, it received interconnection requests for few generation projects compared with the number of requests since the new market changes have been implemented (five requests in 2004, nine in 2005, compared with 30 in 2006).

44. Finally, ISO-NE addresses United Illuminating's "pay-twice" theory, stating that it is premised on a single fact – that RFP bidders have factored PUSH mechanism costs into their bids. ISO-NE states that United Illuminating has provided no evidence, other than mere assertion, that this in fact took place. In addition, no evidence was offered that NRG included a PUSH "adder" in the formulation of an RFP bid. ISO-NE avers that without such information, the Commission should not countenance United Illuminating's claims.

V. Discussion

45. The Commission agrees with ISO-NE and NEPOOL that it is appropriate to terminate the PUSH mechanism; however, as described below, we want to ensure that parties are provided a reasonable opportunity to make arrangements to prepare for the elimination of PUSH. Therefore, we will accept the filing and suspend it for five months, to be effective June 19, 2007, subject to refund and to further Commission order. We also direct ISO-NE to report to the Commission within 90 days of the date of this order on the status of requests it has received from parties seeking RMR agreements in anticipation of the elimination of PUSH.

46. In an effort to improve ISO-NE's market design since its inception, the PUSH mechanism, as a replacement for the CT Proxy, was intended as a temporary means of ensuring reliability in the region's constrained areas. The rationale behind the PUSH

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[42] ISO-NE Answer at 6, citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194.

mechanism was to raise the bid caps of high-cost, seldom-run units (but not other units) so that energy prices paid to all suppliers would increase to reflect supply scarcity during peak periods when demand presses on total capacity. This system was also meant to ensure that energy prices in off-peak periods would be lower, reflecting marginal operating costs.[43] The PUSH mechanism has, for the most part, not worked as intended, as evidenced in the Push Report and market participants' movement toward RMR agreements after only six months of PUSH operation. Often, PUSH bids have not set the energy price because PUSH suppliers often have not been eligible to set the energy price. Moreover, PUSH suppliers have frequently produced less energy than was forecast in establishing their PUSH bids, and thus recovered less than their targeted revenues. As evidenced by the proliferation of RMR agreements after PUSH was placed into effect, PUSH did not have the intended effect on the market as originally perceived in the *Devon* orders (i.e., PUSH has not reduced the need for out-of-market RMR agreements or resulted in locational price signals to attract location specific investment). Since the vast majority of PUSH eligible generators do not continue to rely on PUSH bidding, PUSH is not having its intended effect. The proposal to eliminate the PUSH mechanism has also received widespread support in the New England market: stakeholders voted the proposal through the NEPOOL process;[44] state officials in New England have expressed their support;[45] and ISO-NE believes the new market mechanisms, without PUSH, will ensure adequate and appropriate incentives for supply, but not more than are needed.

47. In the past several years, as the Commission directed, ISO-NE has developed market mechanisms to provide more effective price signals and ensure adequate resources to support reliability. For example, while the PUSH mechanism often failed to establish higher prices during periods of supply scarcity, the RTRM provides a mechanism for ensuring that energy and the price of reserves in a location automatically rise to reflect scarcity whenever reserve shortages arise in that location. In addition, the LFRM provides a forward mechanism for pricing reserves on a locational basis, so as to reflect the differing cost and supply/demand balances in differing locations. We agree that the LFRM, RTRM, and the FCM transition payments provide a more stable array of

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[43] *See Devon II* at P 34-35.

[44] While stakeholders approved the proposal to eliminate PUSH with a 60.9% vote, NRG Companies' alternative proposal was considered and rejected by NEPOOL Participants.

[45] CT DPUC expresses strong support, as does NECPUC, which represents the public utility commissioners of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

market mechanisms that will collectively accomplish the goals for which the PUSH mechanism was intended in the interim. Therefore, elimination of the PUSH mechanism is appropriate.[46]

48. Though elimination of PUSH may be appropriate, we find that the proposed effective date of January 19, 2007 is not just and reasonable. While the newly-developed market mechanisms such as the LFRM and RTRM create more effective price signals on a locational basis, we note that there may remain a need for RMR contracts in certain instances.[47] For example, it is preferable for market participants, rather than ISO-NE, to make investment and operating decisions, based on market signals, that will result in adequate service to customers and opportunity for sellers to earn compensatory revenue. However, this is not always the case. In the instances where market participants are not induced by price signals to voluntarily arrange for sufficient capacity to ensure reliability, and a generator needed for reliability is not earning adequate revenues through the market, the provisions of current Market Rule 1, including the opportunity to apply for an RMR contract, are available as a remedy. If PUSH is eliminated effective January 19, 2007, as proposed, units needed for reliability that currently rely on the PUSH mechanism would not be provided sufficient time to seek an RMR contract.[48]

49. Additionally, an extended time period should accommodate parties, such as United Illuminating, claiming that customer prices under recently entered standard offer service contracts may be affected by the elimination of PUSH bidding. While United Illuminating has not provided specific evidence that its customers would be adversely affected, we believe that United Illuminating and other similarly situated customers

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[46] Further, since PUSH is both temporary and not effective, the Commission does not find it is necessary to spend time modifying it, as NRG Companies propose.

[47] The need for RMR contracts in certain instances does not obviate their status as a temporary solution until the FCM is functional. The Commission has repeatedly expressed that RMR contracts should be temporary, especially in light of the transition payments approved in the FCM Settlement Order. *See Devon V* at P 72; *FCM Settlement Order* at P 166.

[48] We note that eliminating PUSH and moving to RMR contracts will provide ISO-NE with the flexibility to terminate RMR agreements should ISO-NE determine that the units under these agreements are longer needed for reliability. Under PUSH, termination is not an option.

should have additional time to make any necessary arrangements for the elimination of PUSH.

50. We agree that both the existence of new market mechanisms and PUSH's failure to achieve its intended results justify elimination of the PUSH mechanism. However, neither of the requested effective dates, December 1, 2006 nor January 19, 2007, permit sufficient time for the administrative and practical processes that any party that has been relying on the PUSH mechanism may need to undertake to prepare for its elimination. We therefore accept and suspend the proposed tariff revisions for five months, to be effective June 19, 2007, subject to refund and to further order, as discussed above. We also direct ISO-NE to report to the Commission within 90 days of the date of this order on the status of requests it has received from parties seeking RMR agreements in anticipation of the elimination of PUSH.

The Commission orders:

The Filing Parties' proposed tariff revisions are accepted and suspended for five months, to be effective June 19, 2007, subject to refund and to further order, as discussed above. ISO-NE is hereby directed to report to the Commission within 90 days of the date of this order on the status of requests it has received from parties seeking RMR agreements in anticipation of the elimination of PUSH.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.