UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Devon Power Company	Docket Nos. ER03-563-002
Middletown Power LLC	ER03-563-003
Montville Power LLC	ER03-563-004
Norwalk Power LLC	ER03-563-005
NRG Power Marketing Inc.	ER03-563-006
	ER03-563-007
	ER03-563-008
	ER03-563-009
	ER03-563-010

ORDER ON REHEARING AND COMPLIANCE

(Issued July 24, 2003)

1. In this order, the Commission grants, in part, certain requests for rehearing and motions for clarification and rejects, in part, other requests for rehearing and or motions for clarification of the Commission's March 25[1] and April 25[2] Orders, as described below. The Commission also accepts, in part, and denies, in part, the compliance filings of Devon Power LLC , Middletown Power LLC, Montville Power LLC, Norwalk Power LLC (collectively Applicants) and ISO-New England, Inc. (ISO-NE), which Applicants and ISO-NE filed as directed by the March 25 and April 25 Orders.

2. The Commission is retaining the Peaking Unit Safe Harbor (PUSH) bid mechanism to give generators with capacity factors of 10 percent or less in 2002 a reasonable opportunity to recover their fixed and variable costs. The PUSH bid is intended to permit selected high cost but seldom run units in Designated Congestion Areas (DCAs) to have an opportunity to recover their fixed and variable costs through market bids. PUSH safe harbor bids exceed marginal cost by a net annual fixed cost component, which includes both sunk and going forward costs. These cost elements reflect our judgment on establishing the PUSH safe harbor bid as an interim measure.

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[1]Devon Power LLC, et al., 102 FERC ¶ 61,314 (2003) (March 25 Order).

[2]Devon Power LLC, et al., 103 FERC ¶ 61,082 (2003) (April 25 Order).

The order clarifies that it was not the Commission's intention to change the existing market rules that limit bids to $1000 per MWh nor to change the conditions under which units can set Locational Marginal Pricing (LMP). In this context, we emphasize that the PUSH mechanism will only be in effect until ISO-NE implements a locational Installed Capacity (ICAP) or deliverability requirements mechanism by the Summer of 2004.[3] Additionally, the Commission is in the process of reviewing its policies on pricing for RMR type units. The Commission will require that ISO-NE address the location or deliverability requirements in the ICAP or resource adequacy market by March 1, 2004, and that ISO-NE address the role of scarcity pricing therein.

3. The order accepts the PUSH bid levels submitted by the Applicants, subject to certain cost recalculations we are requiring. It thus gives guidelines for other generators in ISO-NE filing for PUSH mechanism treatment. The cost support data filed by other generators will be subject to further Commission action.

Background

4. On February 26, 2003, pursuant to Section 205 of the Federal Power Act, Applicants and NRG Power Marketing Inc. (NRG) filed with the Commission, rates and four separate agreements (February 26 Filing). In the February 26 Filing, Applicants requested Reliability Must-Run (RMR) contracts that recover the full costs for the Devon, Montville, Norwalk Harbor, and Middletown generating stations (collectively, the Facilities) located in the Connecticut and Southwest Connecticut load zones of the New England Power Pool (NEPOOL).

5. In the March 25 Order the Commission responded to a Joint Emergency Motion filed by the Applicants on March 12, 2003 and accepted for filing, and made effective as of February 27, 2003, Section 5.1.3, the Reliability Cost Tracker provision, of the proposed agreements. That order permitted ISO-NE to begin collecting amounts to enable the Applicants to perform certain maintenance on the generating units to ensure availability for the summer 2003 peak season. The Commission directed ISO-NE to hold the amounts collected in escrow and to disburse the funds to the Applicants as the maintenance is performed. The Commission deferred ruling upon the remainder of Applicants' rate filing in order to provide itself with more time to review the protests filed in this proceeding.

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[3] In an order issued contemporaneously with this one, the Commission is accepting ISO NE's scarcity pricing proposal. ISO New England, Inc., Docket No. ER03-854-000, et al.

6. The April 25 Order denied requests filed by Applicants and NRG for RMR contracts that recover full costs, and instead permitted RMR agreements to recover only certain maintenance costs that were allowed by the March 25 Order. The April 25 Order further instructed ISO-NE to establish temporary bidding rules that permit selected peaking units (units with capacity factors of 10 percent or less during 2002) operating within DCAs to raise their bids so as to allow them the opportunity to recover their fixed and variable costs through the market (PUSH), and change, as necessary, the market rules to allow these bids (when accepted) to set the energy clearing price. The Commission stated that these temporary rules are to replace the existing CT (combustion turbine) Proxy mechanism of Market Rule 1.

7. The April 25 Order required ISO-NE to make a compliance filing to revise Market Rule 1 to effect the PUSH mechanism, revise the Proxy CT mitigation measures contained in Market Rule 1, and to develop PUSH bid ceilings for applicable generating units. The April 25 Order also directed Applicants to make a compliance filing to demonstrate that they revised their cost agreements to recover only costs related to the reliability projects.

Docket ER03-563-003 - Errata to February 26 Filing

8. On May 13, 2003, the Applicants filed an errata to the February 26, 2003 application. The Applicants state that "this errata corrects typographical and other errors" to that filing. This filing was made after the Commission issued its April 25 Order on the February 26 Application, and we therefore reject it.

Docket ER03-563-004 - April 25 Order Requests for Rehearing or Motions for Clarification

9. Timely requests for rehearing or motions for clarification of the April 25 Order were filed by Applicants, the Connecticut Department of Public Utility Control (CT DPUC), Connecticut Municipal Electric Energy Cooperative (CMEEC), National Grid USA (National Grid), Northeast Utilities (NUSCO), NSTAR Electric & Gas Corporation (NSTAR), PPL Wallingford Energy and PPL EnergyPlus (PPL Parties), PSEG Energy Resources & Trade LLC (PSEG), New England Consumer-Owned Entities (NE COE), Massachusetts Municipal Wholesale Electric Company (MMWEC) and ISO-NE. Select Energy, Inc. (Select Energy) filed a motion to intervene out of time, and the Applicants filed a joint motion to file comments out of time (with comments included). The Commission will grant Select Energy's motion to intervene out of time and Applicants' joint motion to file comments out of time (with comments included) given both parties' interests in this proceeding and the absence of any undue prejudice or delay. CMEEC

and MMWEC filed a response to the Applicants' joint motion, which we will also accept.

1. Existing Market Rules

10. NSTAR seeks clarification from the Commission that the PUSH bid mechanism will be the sole remedy during the summer of 2003 to fund reserve resources that may not be adequately compensated through normal market operations. NSTAR goes on to describe the scarcity pricing proposal and the circumstances under which ISO-NE filed that proposal with the Commission and concludes that the Commission should use the PUSH bid mechanism rather than having two solutions in place.

11. NE COE, NUSCO and NSTAR ask the Commission to clarify its April 25 Order to ensure that the current $1000/MWh bid cap remains in place in NEPOOL. If this is not the case, NE COE asks that the Commission rehear and reverse this decision. NSTAR argues that the bid cap remains necessary to protect customers from possible dramatic energy price swings and further requests that the Commission specify in great detail how the safe harbor price is to be calculated. NUSCO asks that should bids above the $1,000 bid cap be allowed, that amounts above this level be collected as uplift rather than through the market clearing price.

12. CT DPUC states that the Commission should clarify that scarcity bids only set the clearing price when appropriate under existing market rules. NUSCO also argues that the Commission should ensure that hours when PUSH units set LMP is in accordance with current market rules. NUSCO states that PUSH units set LMP based on existing Market Rule 1 procedures, specifically Sections 2.2(b), 2.4, and 2.6, and that PUSH units should not receive any special exception. CT DPUC submits that these market rules are the product of lengthy process between the ISO and participants. CT DPUC further asks that the Commission clarify that the clearing price is only set for that node or nodes that are impacted by the “scarcity” [PUSH] bid and only to the degree they are impacted. PPL Parties however, argue that the Commission should clarify that when PUSH eligible units run to provide energy or spinning reserves they are eligible to set LMP.

13. PSEG argues that the Commission should clarify that where a PUSH unit provides RMR Operating Reserves while operating at its economic minimum limit, ISO-NE must allocate any additional costs to network load within New England.

14. In its answer, filed June 6, 2003, ISO-NE agrees that the operating reserve issue requires further consideration. ISO-NE committed itself to examining a range of issues concerning operating reserves at the June 17, 2003 meeting of the NEPOOL Markets

Committee.[4] ISO-NE expects to pay particular attention to how the PUSH mechanism impacts operating reserve charges incurred by virtual trades in the Day-Ahead Market. The ISO respectfully requests that the Commission defer to the NEPOOL stakeholder process as the appropriate forum for examining and seeking consensus on allocation of these costs. Unless the Commission directs otherwise, the ISO will submit a report to the Commission in this proceeding regarding the outcome of the stakeholder discussions on the allocation of Operating Reserves.

15. **Commission Response.** The purpose of the PUSH mechanism is to provide units that run infrequently with a reasonable opportunity to recover their costs. It was not the Commission's intent to change the existing market rules that limit bids to $1000 per MWh nor to change the conditions under which units can set LMP. We clarify that the $1,000 per MWh bid cap that applies generally in NEPOOL would also apply to PUSH units because we are concerned that allowing accepted PUSH bids to exceed $1,000 to set LMP may interfere with the mitigation measures that NEPOOL has in place. Additionally, if PUSH bids were allowed to exceed $1,000 and not set LMP, collecting these amounts through the operating reserve uplift charge could greatly increase this charge. We believe that this will balance the conflicting concerns of participants during this transition period while the PUSH mechanism is in place until it can be replaced with a redesigned ICAP and scarcity pricing mechanisms. With this clarification, NUSCO's request for rehearing is moot.

16. The PUSH bid mechanism was authorized because New England did not have a satisfactory market mitigation mechanism for high cost suppliers in DCAs or a location-specific capacity requirement to give them a reasonable opportunity to recover costs. Our decision concerning the PUSH mechanism is not intended to predetermine the outcome of the proceeding in which we are considering the ISO-NE scarcity pricing proposal.[5] To the extent that ISO-NE believes that the PUSH bid mechanism may require changes to accommodate a scarcity pricing mechanism in the future, it should file such changes at that time. NSTAR's request for clarification with respect to the scarcity pricing proposal is denied.

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[4]Those issues as listed by ISO-NE are concerns about the impact of implementation of the PUSH mechanism on Operating Reserve payments, the appropriateness of current allocation methodologies for Operating Reserve costs associated with DCA Peaking Units, and possible unintended consequences of any increased Operating Reserve costs.

[5]Docket No. ER03-854-000.

17. In response to PSEG, we clarify that we did not intend to change the existing rules that allocate uplift associated with operating reserves.

2. PUSH Mechanism

18. NE COE is concerned that the ISO intends in its compliance filing to propose a PUSH mechanism for units in addition to those of the Applicants. NE COE states that neither is there a record in this proceeding nor in the April 25 Order that provides a basis on which to make calculations for a PUSH mechanism for any units other than those of the Applicants. NE COE asks the Commission to clarify that ISO-NE was not required to submit a PUSH mechanism for all potential peaking units and to make them effective on June 1, 2003.

19. NE COE also raises questions regarding the PUSH mechanism process. NE COE argues that: (1) the methods to identify eligible units and collect data are unclear and uncertain; (2) there are questions as to whether the capacity factor applies to individual units or to total complexes which contain multiple units. NE COE argues that the PUSH bid mechanism is set based on unit-specific costs and these costs have only been submitted for the Applicants. Thus ISO-NE should not allow the PUSH mechanism to become effective on other units without refund protection where no data have been presented. NE COE argues that PUSH bids should be set within a process through which data can be provided to the Commission and that reference levels for non-Applicant units should become effective only after review and comment from market participants.

20. CT DPUC argues that the Commission should reconsider allowing bids based on full cost recovery to set the clearing price for all sellers. CT DPUC asserts that numerous units are already amply compensated through the clearing price and that recovering costs through the market clearing price is inappropriate. Rather than allowing specific "old" and "inefficient" units to establish the price level, CT DPUC urges the Commission to retain the peaking unit concept embodied in the CT Proxy. The CT DPUC submits that the scarcity bid level for units in DCAs (expected to operate 10% or less of the time) would be the level necessary to recover the full costs for a new and efficient peaking unit at a capacity factor of 10 percent. Any RMR contract allowed under such a scenario should only recover any shortfall in expected market revenues given the “scarcity” bidding needed to maintain a unit’s ongoing viability.

21. CT DPUC also argues that the April 25 Order "over-rewards" peaking units in ensuring recovery of full costs. CT DPUC argues that units deemed necessary for reliability should be granted only the support necessary to recover costs vital to their

ongoing operational and economic viability. CT DPUC submits that it is inappropriate for the Commission to consider allowing energy bids that make generating units whole.

22. CT DPUC and NE COE argue that permitting certain units' "scarcity" bids creates incentives for participants to limit the availability of other units in order to allow PUSH-eligible units to set the clearing price.

23. PPL Parties provide two complementary proposals to modify the PUSH mechanism. First, replace a unit's market bid with its marginal cost plus PUSH bid whenever the unit is required to run for reliability.[6] PPL Parties assert that this approach would (1) encourage bids closer to marginal cost; (2) provide eligible units an opportunity to recover costs during non-constrained hours; (3) reduce the possibility that eligible units will undercut each other's bids during reliability constraints. Second, PPL Parties suggest revising the PUSH bid formula to eliminate the previous year's MWh production as the denominator, in favor of a more realistic going forward production level. PPL Parties assert that PUSH eligible units are likely to maintain going forward capacity factors below the level upon which the PUSH bid is based and thus the Commission should direct on rehearing that PUSH bid adders be calculated based on a more accurate estimate of expected operations.

24. NUSCO proposes several measures to the PUSH mechanism, arguably to protect customers because the mechanism has not been tested on the peak demand period. These include: delay implementation until September 1, 2003 to give parties an opportunity to review and comment on the mechanism to establish a standard procedure to review generator fixed costs and applicable offsetting revenues; limit the time period for units to use PUSH bids only until they recover fixed costs; and include a provision that allows ISO-NE to suspend the PUSH mechanism.

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[6] PPL Parties provide an example: If an eligible unit with a maximum PUSH bid of $100/MWh bid into the market at $50/MWh but is required to run for reliability, the $100/MWh PUSH bid would be substituted for the unit's submitted market bid, and would remain eligible to set LMP. However, if the same eligible unit bid at $100/MWh, but the overall market cleared at $150/MWh or higher, it would receive the LMP market clearing price.

25. **Commission Response.** The Commission intends to review the PUSH bid levels for each generator in the DCAs under Section 205 of the FPA. Additionally the Commission clarifies that the capacity factor of 10 percent or less applies to units rather than complexes.

26. The Commission will deny CT DPUC's rehearing proposal to use the cost of a new generator operating at a 10 percent capacity factor as a proxy to set the PUSH level. The Commission finds that it is appropriate to use the costs of specific units to set the PUSH levels rather than a proxy cost. In the context of ISO-NE's bid-based market design (and taking into account all of the elements of that market design, including mitigation), we are particularly interested whether there are both adequate incentives to attract as well as retain needed investment and rates that are not excessive.

27. The Commission also rejects CT DPUC's arguments concerning alleged "over-rewarding." As we have explained previously, the PUSH bid mechanism gives a generator a reasonable opportunity to recover its costs. No "over-rewarding" will occur.

28. The Commission will not revise the PUSH bid mechanism as described by PPL Parties. There is no basis on which to conclude that their suggestions are superior alternatives to accomplishing the goals of the PUSH mechanism described in the April 25 Order or that PUSH units will not have a reasonable opportunity to recover their costs under the PUSH mechanism. PPL Parties may present their proposals in the stakeholder process, however. With regard to using 2002 production levels, the Commission believes that this is the most useful and readily available estimate of going forward production levels, and PPL Parties have not shown how a more accurate estimate could be developed and implemented.

29. We will deny NUSCO's request that the PUSH mechanism be delayed. The PUSH mechanism is intended to take the place of RMR contracts and the CT Proxy method proposed by ISO-NE. We believe that changes are needed in the existing rules to provide peaking units that are needed for reliability a reasonable opportunity to recover their costs. Additionally, the mechanism is temporary to be replaced with the implementation of scarcity pricing and locational ICAP or a regional deliverability solution. NUSCO also requests that parties should have an opportunity to review, in a formal proceeding, other revenues to ensure that other sources are included in the adjustments to the fixed cost adder and PUSH bid. As discussed below, the PUSH bid levels submitted by ISO-NE in Docket No. ER03-563-007 are accepted, effective June 1, 2003. This concern is met by the requirement that PUSH levels for individual generators must be filed with the Commission for review under Section 205 of the FPA and will be effective prospectively.

30. NUSCO states that units should be allowed to bid using the PUSH mechanism only until they recover their fixed costs, and not be allowed to over-recover their fixed costs. We deny this request, as the risk of cost recovery by eligible peaking units can go both ways. Because the PUSH bid for each unit is based on the previous year's operating hours and an estimate of costs, it is just as likely that these units could under recover their costs as over recover them.

31. Regarding NUSCO's request that ISO-NE have suspension authority over the PUSH mechanism, we note that in compliance with the April 25 Order, ISO-NE removed this authority (Section 1.3 of Appendix A to Market Rule 1). Should stakeholders find it desirable that ISO-NE should retain this authority, ISO-NE could submit a Section 205 filing to institute such a rule change.

3. Section 206 Authority

32. NUSCO, NE COE and the PPL Parties contend that the revision of Market Rule 1 in the April 25 Order was an improper exercise of the Commission's statutory authority. Thus, the PPL Parties assert that the Commission fell short of finding the proposed RMR Agreements unjust, unreasonable, and unduly discriminatory, the necessary prerequisites to taking action under Section 206 of the FPA. They further argue that the Commission violated that provision by failing to provide a record to support the new rate it was establishing as just and reasonable, and thus failed to meet its requisite burden of proof. NUSCO claims that the June 1, 2003 implementation date denies parties the meaningful opportunity to comment guaranteed by Section 206. Similarly, NE COE alleges that the April 25 Order contravenes Section 206 by giving notice that the Commission was changing Market Rule 1 simultaneously with its decision making the change.

33. **Commission Response**. While the Commission denies the requests for rehearing on these issues, we do find it appropriate to clarify certain matters raised by the parties. Section 206 of the FPA requires that if the Commission on its own motion determines that any rate, charge or classification charged or collected by a public utility is unjust, unreasonable, or unduly discriminatory or preferential, the Commission can determine the just and reasonable rate, charge or classification and can "fix the same by order."[7] Our discussion in the April 25 Order concerning the extensive disruption to the market caused by RMR contracts was intended to show that we found that Market Rule 1, in view of the measures proposed by ISO-NE, created an unjust and unreasonable result, requiring a

[7] 16 U.S.C. § 824e (a).

revision in the rule to solve these problems.[8] To the extent that we did not formally indicate that we were making such a finding in that order, we do so now. Additionally, we find that the record presented in this and related proceedings[9] was more than sufficient to demonstrate the problems caused by RMR contracts and the need to take a different approach. In view of these findings, the Commission concludes that it has fully complied with the requirements of Section 206.[10]

34. We also reject the parties' claim that our procedure here did not provide sufficient notice or opportunity to comment. As our March 25 Order indicated, time is of the essence in this proceeding. In any event, those entities with interests affected by the April 25 Order were parties to the proceeding and have had an opportunity to make their views known, just as have the parties seeking rehearing. The Commission has fully considered all of the comments and arguments made by the parties. Under the circumstances, our procedure here has provided legally sufficient notice and opportunity to comment.

4. Cost Adjustments and Specific Cost Issues.

35. This case presents a unique set of circumstances which require the Commission to apply cost recovery principles to provide Applicants with the opportunity to recover their costs in the market As a result, rates established herein are not intended to establish a precedent for cost recovery.

36. **Salvage Value**: The Applicants submit that one of the adjustments made by the April 25 Order – the elimination of negative salvage value – was incorrectly applied. Applicants request that the Commission issue an expedited order that corrects the error no later than June 1, 2003. Applicants state that they did not include salvage value in the rate base but rather proposed to amortize those amounts over the same 6.6-year depreciation period for the depreciable plant.

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[8] April 25 Order at P 28-31.

[9] See New England Power Pool, et al., 103 FERC ¶ 61,079, on reh'g, 103 FERC ¶ 61,304 (2003).

[10] Under the circumstances presented, there is no need to establish a refund effective date, in that our action taken under Section 206 is prospective in nature.

37. The CMEEC opposes Applicants' request for rehearing with regard to the adjustment for negative net salvage value, arguing that the Commission appears to have made the adjustment in the Commission's cost analysis, released May 9, 2003.[11]

38. After further review of the Applicants' negative salvage (removal) costs, the Commission finds that it is reasonable to allow the proposed removal costs since Applicants' depreciation study supports these cost of removal levels. However, the Applicants' removal costs include a 15% contingency which is not supported. Therefore, the Commission has revised their costs to reflect removal costs, but without the 15% contingency.

39. **Reliability Costs**: The April 25 Order directs modification of the Agreements to provide that reliability cost payments are credited against the fixed cost portion of the PUSH reference bid. However, Applicants state that the fixed charges listed in the April 25 Order are net of the reliability costs to be paid by NEPOOL under the Reliability Cost Tracker. Applicants request that the Commission clarify that the amounts set forth in the April 25 Order were determined after all reliability costs were deducted.

40. The Commission grants Applicants' request for clarification. We will clarify that the cost analysis establishing the PUSH bid levels did properly reflect the reliability cost payments.

41. **Depreciation**: NE COE argues that Applicants request a substantial increase in depreciation rates from the level apparently adopted by NRG upon acquisition of the units from CL&P. NE COE interprets the April 25 Order to grant this request. NE COE urges that the Commission grant rehearing on this issue, and reconsider and reverse its approval of the depreciation rates.

42. CT DPUC notes that the direct testimony of Applicants' depreciation witness indicates that the industry-wide service life of generating plants is 35.09 years; CT DPUC states that this figure is the most reliable to calculate depreciation. CT DPUC further notes that Applicants propose to use an average remaining service life of 6.6 years for all plants, regardless of age, and recommends that the Applicants be required to use the 35.09 years as the basis to calculate the remaining service life of their units. Based on CT DPUC's analysis, the Devon units would have 29.17 years left to depreciate.

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[11] 103 FERC ¶ 61,155 (2003).

43. While we agree with CT-DPUC that using the system-wide average remaining service life for all plants is inappropriate, we do not endorse CT DPUC's proposal to use an industry-wide service life. We recognize that some units may have a shorter life based on their design and will direct Applicants to file, within 10 days of the date of this order, revised depreciation rates and supporting workpapers, consistent with the type(s) of units and vintages owned by the Applicants.

44. **Interconnection Rights**: CT DPUC argues that the Applicants' cost analysis accelerates the amortization of interconnection rights at Middletown that they purchased in year 2000, and began to amortize in 2002. The CT DPUC requests that the Commission adjust Middletown's costs by reducing amortization expense for Interconnection Rights to more accurately reflect the useful life of those facilities using a 30-year period. The annual amortization cost is $866,667 per year, for an annual amortization rate of 3.33%. Applicants have calculated their amortization at 14.2%, reflective of a seven-year useful life, for an annual amortization of $3,679,394.

45. Under the circumstances set forth in this proceeding, the Commission rejects the request of CT DPUC to extend the amortization period for 30 years. However, the Applicants' seven year period based on the average remaining service life for all plants is also inappropriate. Rather, we find that the amortization period for the interconnection rights should be tied to the remaining service life of the Middletown Units, the only units to which these costs apply. Consistent with our ruling above, we direct Applicants to file, within 10 days of the date of this order, revised rates to reflect an interconnection rights amortization period consistent with the remaining service life of the units.

46. **A&G Costs**: NE COE asserts that certain A&G costs are overstated (restructuring costs; organization costs; corporate services; and rate case expenditures) and should be disallowed. The CT DPUC also requests that the Commission disallow corporate restructuring costs.

47. Upon further study, the Commission has made an adjustment to Applicants' A&G expenses. As a rule, A&G expenses for vertically integrated utilities, i.e., utilities providing production, transmission, and distribution services, are assigned to each of these three categories based on salaries and labor ratios. Since Applicants are not a vertically integrated utility and do not file FERC Form 1, allocation of their A&G expenses cannot be verified using FERC Form 1. Therefore, Commission staff used information from CL&P's 1999 FERC Form 1 as a proxy for purposes of assigning A&G expenses to the Devon units. Except for inflation, Applicants' production expenses are similar to those of CL&P because most of Applicants' employees who operate the units (the factor to which most of the A&G expenses are assigned) were similarly employed by CL&P. Commission

staff's analysis of CL&P's FERC Form 1 determined that about 18% of production demand related O&M expenses would be a reasonable proxy in assigning A&G expenses to the Applicants' units.

48. **Return on Equity**: CT DPUC and NE COE request that the Commission utilize a return on equity that is at the midpoint of the range found reasonable in the cost analysis performed by the Commission, which would reduce the cost of equity from 13.39% to 10.88%. CT DPUC states that this return on equity is consistent with the level measured for the proxy group, the 50% equity ratio and the nature of RMR contracts and PUSH Bids as designed in the Order. NE COE argues that the Commission should either adopt a return on equity at or close to the midpoint of the range calculated by the Staff, or provide for discovery and the creation of a record.

49. The Commission, as a general policy, employs the midpoint of the zone of reasonableness as the appropriate rate of return. In this case, this results in a rate of return of 10.88%.

50. **Turbine Lease Costs**: Applicants' filing included costs associated with the buyout of leases for the use of Devon Turbine Units 10-14. NE-COE contends that these turbines were leased by CL&P from General Electric Company, the costs of which were never placed into CL&P's rate base. NE COE argues that these costs should be removed from the rate based used to calculate the PUSH reference levels for these units.

51. The Commission finds that the fact that these costs were not included in CL&P's rate base is irrelevant. The turbine lease costs are costs which are typically recoverable.

5. Other Revenues

52. NUSCO asks the Commission to clarify the April 25 Order: that other revenues used to adjust the fixed cost adder for the PUSH bids include revenues from Standard Offer Wholesale Sales Agreements (SOS Agreements). NUSCO also asks the Commission to clarify the impact of the April 25 Order on the January 28, 2003 DCA filing made in Docket ER02-2330-008.

53. NE COE observes that the proposed PUSH bid ceilings will apparently cover Devon Units 11-14, whereas Devon 7, 8 and 10 operate under a separate RMR Agreement. Thus, NE COE argues, there is no way to know whether ratepayers would be paying twice through the implementation of PUSH bid ceilings based in part upon Devon unit costs already being recovered elsewhere. NE COE states that its concern is exacerbated because the Devon 7, 8 and 10 RMR Agreement filing (in Docket No. ER02-2463-000) was not

accompanied by information in support of the proposed rates. NE COE argues that Applicants are, in effect, attempting to recover a portion of the acquisition premium paid for the facilities and that the April 25 Order did not address the issue. NE COE asks that the Commission grant rehearing and provide appropriate relief.

54. **Commission Response**. Regarding the crediting of revenues in the development of PUSH bids, as the April 25 Order states in paragraph 53, all revenues received by the generating unit from all other sources should be credited against the PUSH bid. Therefore, there is a distinct relationship between costs of operating peaking units and the PUSH bid. Revenues that these units may earn outside of the market in which PUSH bidding is allowed need to be accounted for in the calculation of PUSH levels whether these revenues come from the installed capacity market, standard offer or other bilateral contracts, or from other sources.[12]

55. Regarding NUSCO's request that we clarify the impact of the April 25 Order on the January 28, 2003 DCA filing made by ISO-NE in Docket ER02-2330-008, the Commission addressed the use of the PUSH mechanism within the three DCAs proposed by ISO-NE. The PUSH bid mechanism does not alter the geographic scope of New England's DCAs but rather eliminates the CT Proxy mechanism.[13]

56. It was not the intent of the April 25 Order to allow units to use both PUSH bid and at the same time be subject to the financial guarantees of RMR agreements. This is an either/or situation as both mechanisms provide an opportunity for cost recovery. Therefore, NE COE's concern is moot since Devon Units 7, 8, and 10 are governed by a separate RMR agreement and are not eligible for PUSH treatment until such time as they are not. This issue was correctly addressed by ISO-NE in its compliance filing in docket ER03-563-007.[14] With regard to the acquisition premium issue, the Commission's cost analysis did not include recovery of an acquisition premium.

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[12]The ISO-NE Market Rule 1 changes filed in Docket No. ER03-563-007, at Appendix A, Exhibit 2, Section 2.2, states that certain revenues from the markets administered by ISO-NE are minimal and will not be included in PUSH bid development. We agree with ISO-NE's interpretation with regard to this aspect of the April 25 Order as the effort required to include revenues from these specific products will not appreciably influence the PUSH bid levels.

[13]See 103 FERC ¶ 61,304, NEPOOL and ISO-NE (2003).

[14]See Compliance filing of ISO-NE in Docket ER03-563-007 of May 30, 2003 at n.11.

6. Installed Capacity (ICAP)

57. NE COE asks that the Commission reconsider and reverse its requirement that ISO-NE file a locational ICAP or deliverability requirements mechanism no later than March 1, 2004. NE COE argues that the need for such a change has not been demonstrated. NE COE urges the Commission to allow the Standard Market Design regimen to operate as promised, providing incentives for responsive and responsible market behavior.

58. PSEG submits that ISO-NE has for several months expected to implement locational capacity by January 1, 2004, as directed in previous Commission orders.[15] PSEG submits that locational capacity design has been on the agenda at nearly all of NEPOOL's Power System Resource Adequacy Working Group's meetings since November 2002. PSEG thus requests rehearing to require a January 1, 2004 implementation. NUSCO asks the Commission to order ISO-NE to file its proposal in advance of the March 1, 2004 date to allow additional time for participants to evaluate and hedge financial risks associated with the required June 1, 2004 implementation date.

59. ISO-NE responds to PSEG's rehearing request, arguing that PSEG mischaracterizes ISO presentations at various NEPOOL meetings. ISO-NE states that it is currently devoting resources to the development of a "Resource Adequacy Rule" and may propose a phased implementation of additional locational ICAP product features that may not be ready for the initial implementation of the Resource Adequacy Rule on June 1, 2004 (i.e. a mechanism for export-constrained areas).

60. National Grid asserts that the Commission appears to favor a locational ICAP requirement in fixing a deadline to a locational ICAP or regional deliverability solution. National Grid seeks clarification that the Commission: (1) did not intend to express a preference; and (2) would accept implementation of a PJM-style regional deliverability regime over the course of a transition period while simultaneously phasing out the PUSH bid mechanism.

61. **Commission Response**. The Commission did not intend to express a preference between a locational ICAP or a deliverability requirements mechanism. Nor, until the April 25 Order, did the Commission require a timetable. The Commission believes that the eventual successor to the PUSH bid mechanism, whether locational ICAP or a

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[15] See, e.g., New England Power Pool and ISO-NEw England Inc., 100 FERC ¶ 61,287 at paragraph. 101 (2002); New England Power Pool and ISO-NEw England Inc., 101 FERC ¶ 61,344 at paragraph. 81 (2002).

deliverability requirement could effectively be implemented in conjunction with the start of the summer peak period and the capability year, which is why we required a filing date by March 1, 2004 and an implementation date prior to June 1, 2004. The Commission notes that ISO-NE has clearly stated that it cannot commit to a January 1, 2004 deadline as advocated by PSEG, and the Commission will not require the ISO to develop and implement a PUSH bid successor before the dates listed in the April 25 Order. Regarding concerns that Participants may desire additional time between the filing date and the implementation date, the directive in the April 25 Order does not preclude ISO-NE and NEPOOL from implementing a locational ICAP or regional deliverability solution prior to June 1, 2004 and also does not preclude ISO-NE and NEPOOL, through the stakeholder process, to make its filing sooner than directed.

7. Bankruptcy

62. CT DPUC argues that the Commission should either defer action on both the PUSH bid mechanism and the RMR contracts or factor new information into the formula as NRG has filed for bankruptcy, which significantly changes costs associated with those units.

63. **Commission Response**. The Commission denies rehearing on this issue as premature. If there is a significant change in costs associated the units in question as a result of NRG's bankruptcy filing, the parties should bring this to our attention.

8. Refund Authority

64. NE COE submits that the Commission erred in stating, without explanation, that it lacks the ability to implement the PUSH bid mechanism subject to refund and asks that it reconsider and reverse its indication in the April 25 Order that initial PUSH bid ceilings will not be subject to refund protection. NE COE maintains that refund protection will be required if ISO-NE is to implement "PUSH bid ceilings for all New England peaking units that operated at capacity factors below 10 percent during 2002," in which case it is "inevitable" that there will be protests requiring adjustments of significant magnitude.[16] Additionally, NE COE points to an assertion made on behalf of the Commission in court that the agency possesses the requisite ability to order refunds, notwithstanding impacts upon the "market price of electricity."[17]

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[16] NE COE Motion at 5-6 (emphasis in original).

[17] Id. at 6, citing Motion to Dismiss and Opposition to Emergency Motion for Stay (February 25, 2003) at 13, filed in Blumenthal v. FERC, D.C. Cir. No. 03-1032.

65. **Commission Response.** The Commission determined that the PUSH bids developed for the Devon units by Applicants using the cost levels accepted in the April 25 Order were interim and not subject to refund.[18] The requests for rehearing on this issue are denied. This is not a matter of agency authority, but because the parties' filings only set the level at which the PUSH bids will be made, it would be inappropriate to accept these filings subject to refund. The April 25 Order also invited parties to propose further adjustments to those levels and stated that those adjustments would be effective prospectively. Accordingly, the revised PUSH bid levels established in this order are effective the date this order issues.

Docket ER03-563-005 - NEPOOL Informational Filing on Escrow Arrangements

66. NEPOOL Participants' Committee filed, in accordance with the March 25 and April 25 Orders, an informational filing which notifies the Commission that NEPOOL, ISO-NE, and Devon, Middletown, Montville, and Norwalk each have entered into the executed escrow and trust arrangements as ordered by the Commission. These escrow and trust agreements establish a "bankruptcy remote" mechanism that ensures that all amounts paid to Applicants pursuant to the Reliability Cost Tracker are used to maintain the Facilities.

67. According to the filing, Applicants, NEPOOL and ISO-NE were able to reach agreement on most of the terms and conditions of the escrow and trust agreements; however, the parties were not able to reach an agreement on certain fee, late charge, and out-of-pocket cost matters. The parties "agreed to disagree" on the disputed matters, completed and executed the escrow and trust agreements, but expressly reserved the right of each party to raise the disputed matters for resolution by the Commission.

68. The Applicants state that the parties to the filed arrangements (Applicants, ISO-NE and NEPOOL) could not reach agreement on certain issues contained in the escrow agreements and ask the Commission to decide the issues. These issues include: the responsibility for payments to the escrow agent including agent fee and indemnification; the responsibility for payment of late charges, penalties or other assessments caused by failure of ISO-NE to pay costs in a timely manner not caused by the act or omissions of the Applicants; and the responsibility for payments of fees of the Delaware trustee under the trust agreements. The Applicants believe that the disputed fees should be recovered as a Reliability Cost under that mechanism because they are a direct result of the Commission's requirement that the escrow arrangement be used for Reliability Costs. The Applicants also

[18] April 25 Order at P 54.

ask the Commission to approve these arrangements to the extent that Commission Approval is required.

69. In Docket No. ER03-563-002, CMEEC filed a timely request for rehearing of the March 25 Order, and argued that the Commission reverse its determination that interest earned on funds placed in escrow accounts should be distributed to Applicants. CMEEC stated that NEPOOL Participants should not be obligated to pay NRG interest on Participant funds.

Notice of Filing and Protest

70. Notice of NEPOOL's informational filing in Docket No. ER03-563-005 on escrow arrangements was published in the Federal Register, 68 Fed. Reg. 28823 (2003), with comments, protests, or interventions due on or before June 4, 2003. Timely motions to intervene and protest were filed by NUSCO, Devon, and MMWEC (which also filed a motion for clarification). Additionally, Applicants filed an answer to MMWEC's request for clarification in this proceeding.

71. In commenting on this informational filing, CMEEC and MMWEC (collectively, the Municipals) state that administrative fees relating to the escrow agent and the trustee should be paid for by the Applicants and not by NEPOOL participants since the need for the escrow arrangement arose out of the financial situation of NRG. The Municipals state that the responsibility for payment of late charges, penalties or other assessments caused by gross negligence or willful misconduct on the part of ISO-NE should be the responsibility of the ISO, and, therefore, that NEPOOL participants and NRG should be responsible for fees where conduct "does not rise to this level (i.e., simple negligence on the part of the ISO)." The Municipals refer to the indemnification provision contained in Section 10.4 of the Interim ISO Agreements as support for this argument. The Municipals also ask the Commission to clarify the costs that are to be recovered in the tracking mechanism for C-1 and C-2 costs in accordance with the March 25 Order.

72. In answer to the Municipals, the Applicants state that the March 25 Order allows ISO-NE to collect not only for the deferred maintenance projects, but also for the maintenance projects whose cost will be incurred during the period from February 27, 2003 through March 31, 2004.

73. **Commission Response.** Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene serve to make NUSCO, Devon Power, and MMECC parties to this proceeding. Additionally, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits

the filing of an answer to a protest unless otherwise permitted by the decisional authority.[19] We therefore reject Applicants' answer.

74. The Commission stated in the March 25 Order that costs associated with the Reliability Projects identified in Section 5.1.3 of the Agreements contained in the February 26 application shall be collected subject to the escrow arrangements. The Commission clarifies that the use of the term "spring 2003 maintenance costs" in the March 25 Order referred to the Applicants' stated time period for performing the maintenance needed for the units to be available for summer 2003, and not to the fact that some of the identified maintenance may have been deferred from 2002 or that some of the projects will occur after the summer peak season of 2003. It was our intention that the C-1 and C-2 costs[20] identified in the February application be included in the reliability cost tracking mechanism approved in the March 25 Order. The Commission denies CMEEC's rehearing request in Docket No. ER03-563-002 of the March 25 Order. It appears in this request that CMEEC interprets the order to mean that participants are to pay NRG interest on the funds in escrow. This is not the case as interest is to be earned through investment of the funds pursuant to Section 2.6 of the Arrangements. CMEEC's concerns regarding true-up are addressed in Section 5.1.3 of the Arrangements.

75. Regarding the areas of disagreement among the parties, we emphasize that this situation is brought about by NRG's financial situation. Therefore, it seems reasonable to hold ISO-NE harmless with respect to such costs. Thus, we find that ISO-NE is not responsible for the payment of late charges, penalties or other assessments caused by its failure to pay C-2 costs in a timely manner that were not caused by the act or omissions of the Applicants. ISO-NE is also not responsible for the payments of Delaware trustee fees under the trust agreements. Additionally, we find that NRG is responsible for escrow account and administrative fees including agent fees and indemnification. These special financing arrangements are the result of NRG's financial condition. NRG should be responsible for these costs. The costs in question are necessary to protect the NEPOOL participants because of their concerns about the NRG bankruptcy. We see no reason why these additional costs should be borne by the NEPOOL participants. Additionally, such treatment is consistent with the NEPOOL rules for participants that need special arrangements because of their financial conditions.

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[19] 18 C.F.R § 385.213(a)(2) (2002).

[20] C-1 costs are generally routine operation and maintenance expenses, while C-2 costs are generally major outage expenses.

Docket ER03-563-007 & -010 - Compliance Filing Concerning Market Rule 1

76. On May 30, 2003, as amended on June 10, ISO-NE submitted revisions to Market Rule 1 and Appendix A to comply with the April 25 Order. These revisions eliminate the existing Proxy CT mitigation methodology; provide procedures for developing a PUSH mechanism incorporating fixed costs for eligible units; and allow certain units, Designated Congestion Area (DCA) Peaking Units, to make PUSH bids without being subject to mitigation. ISO-NE contends that eliminating the Proxy CT mitigation methodology, the existing mitigation methodology applicable in "Other Congested Areas," would apply to all areas experiencing transmission congestion. ISO-NE claims that the mitigation provisions would apply equally to all units, although DCA Peaking Units will be evaluated at PUSH bids, which incorporate fixed cost adders. ISO-NE states that it will calculate the initial levelized fixed cost adders for DCA Peaking Units, subject to the requirement that the unit owner/bidder file fixed cost information with the Commission to allow for review and modification of the initial PUSH mechanism as contemplated in the April 25 Order. ISO-NE adds that the existing DCAs are retained, but modified to reflect that the annual designation procedures are moot after initial identification of DCA peaking units, since the Commission has directed that the PUSH methodology only remain in place until June 1, 2004, when ISO-NE and NEPOOL are to implement a resource adequacy rule.

77. ISO-NE states that to minimize gaming and to protect strategic information, it will make available PUSH bid levels and capacity factor calculations only to the unit owner/bidder. The ISO states that this is consistent with the current treatment of reference levels in Market Rule 1.

Notice of Filing and Protest

78. Notices of NEPOOL's compliance filing in Docket Nos. ER03-563-007 and ER03-563-010 were published respectively in the Federal Register, 68 Fed. Reg. 35,395 (2003) and 68 Fed. Reg. 38,709 (2003), with comments, protests, or interventions due on or before June 20, 2003. Timely motions to intervene and protest were filed by the New Hampshire Office of Consumer Advocate and the Maine Office of the Public Advocate (jointly filed), NECOE, PPL Parties, Devon Power, NU, and NEPOOL. A motion to intervene out of time was filed by the Connecticut Office of Consumer Counsel (CT OCC). PSEG filed an answer to ISO-NE's response to PSEG's motion for clarification in this proceeding.

79. NUSCO protests the following issues that are additional to those dealt within rehearing: that market clearing prices not be set by PUSH bids until the PUSH bid ceilings have been approved by the Commission, that ISO-NE include a provision to suspend the PUSH mechanism if there are unexpected and harmful consequences to market participants

from its operation, and that ISO-NE should make a Section 205 filing to redesignate the existing DCAs if it is unprepared to implement a replacement to the PUSH mechanism by June 1, 2004.

80. The New England Advocates filed comments that the PUSH bids be subject to the $1,000 bid cap, that support ISO-NE's decision to continue to apply current market rule provisions limiting the eligibility of inflexible generators to set the clearing price during all hours of operation, that support ISO-NE's approach to reviewing cost data, and that all cost data supporting PUSH levels should be made public once PUSH is replaced with an approach requiring resource adequacy.

81. NECOE requests that the Commission direct that ISO-NE's compliance filing be revised to state that the ISO's initial PUSH bids will be made public when calculated by the ISO, and will be filed with the Commission for public notice and comment, along with whatever supporting information (consistent with the Uniform System of Accounts) was used by ISO-NE to set the bid ceilings. NECOE urges that the Commission not permit any PUSH bid ceiling to become effective unless and until such filings have been made (whether by the ISO or the specific generator), and have been accepted or approved by the Commission in accordance with the FPA. NECOE further states that the proposed process delegates rate setting authority to the ISO.

82. PPL Parties state that ISO-NE's proposed offsets to the PUSH mechanism for ICAP and other revenue is not appropriate for units to be compensated under the PUSH mechanism, that ISO-NE is proposing overreaching information and filing requirements to obtain an initial PUSH bid, that it is not appropriate for ISO-NE to reserve discretion to exclude costs from initial PUSH bids when it believes they are unsupported, that ISO-NE erred in its proposal to exclude inflexible resources from setting LMP, and that ISO-NE erred in stating that the PUSH thresholds are only applicable when constraints require dispatch of the units.

83. PSEG states that the market rule changes proposed by ISO-NE will greatly affect the amount of operating reserve uplift when inflexible PUSH units are not setting LMP and will shift the burden of PUSH costs from the transmission customer to the buyers and sellers of electricity. Therefore, PSEG proposes to allocate this uplift to network load. PSEG also takes issue with the ISO's requirement that PUSH units make Section 205 filings with their data on a non-confidential basis stating that ISO-NE has the authority to enter into settlements such as this without filing with the Commission.

84. NRG protests ISO-NE's interpretation of the April 25 Order that PUSH bidding may only be carried out by generating units that meet the 10 percent or less capacity factor test

for 2002. NRG states that two of its generating units had capacity factors in excess of 10 percent for 2002.[21] It thus appears that NRG will not be allowed to make PUSH bids for these units and therefore not allow for cost recovery. NRG asks that the Commission determine that units that are part of a plant that had an overall capacity factor of 10 percent or less in 2002 or that all of the NRG units subject to the cost agreements originally filed be allowed to PUSH bid. NRG also argues that in preventing inflexible thermal units from setting the clearing price, the PUSH mechanism will not produce the needed revenues for the Applicants' units.

85. NRG also protests ISO-NE's decision to limit PUSH bids to the $1,000 per MWh bid cap.

86. **Commission Response**. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene serve to make New Hampshire Office of Consumer Advocate, the Maine Office of the Public Advocate, NECOE, PPL Parties, Devon Power, NU, and NEPOOL parties to this proceeding.

87. The Commission will grant CT OCC's motion to intervene out of time given CT OCC's interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits the filing of an answer to a protest unless otherwise permitted by the decisional authority.[22] We are not persuaded to allow PSEG's answer; accordingly, we will reject it.

88. Most of the issues raised in these protests have already been addressed in other sections of this order. In its compliance filing, ISO-NE included provisions that allow for a "transparent process that provides an opportunity for review and comment by all affected Participants"[23] for the development of PUSH bid levels. The proposed rules also provide confidentiality of certain data to prevent other market participants from calculating PUSH bid levels of other units. We find these provision acceptable to protect the integrity of the market. The ISO also stated that it interprets the April 25 Order as not requiring a true up

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[21]The original Application by NRG for RMR agreements contained one agreement for each NRG plant and was not based on separate RMR agreements for each generating unit within the plant.

[22]18 C.F.R § 385.213(a)(2) (2002).

[23]Compliance filing at 9.

mechanism to prevent the over or under recovery of costs by eligible peaking units. We find these interpretations to be correct with regard to the Commission's intent. As explained in the April 25 Order, the PUSH mechanism will allow seldom run units an opportunity to recover costs through the market. There is equal risk that eligible units may under-recover or over-recover their costs as they are free to bid anywhere below the PUSH level. With regard to the issue, raised by NRG, of allowing PUSH bids for units with capacity factors in excess of 10 percent for 2002, the Commission finds that the capacity factor of 10 percent applies to units rather than complexes. With respect to NRG's revenue recovery comment, we reiterate that the PUSH mechanism does not guarantee that units will recover all of their costs, but rather gives them a reasonable opportunity to do so.

89. Additionally, ISO-NE indicated in its proposed market rule changes, that Section 5.3.3 will require that bids from PUSH units will be reviewed for mitigation only when they exceed the PUSH bid level by a specified amount. ISO-NE proposes mitigating PUSH units using Reference Levels, which is the same treatment used for other, non-PUSH bidding, units. The Commission does not agree with this interpretation of the April 25 Order. The PUSH level is a safe harbor, up to which units are able to bid without being subject to mitigation. It was not the Commission's intent that PUSH levels be treated as Reference Levels. Units operating under this safe harbor should not be treated the same as units operating under Reference Level mitigation because the basis for determining these levels are distinctly different. Therefore, unlike non-PUSH units, PUSH units should be subject to mitigation review whenever their bids exceed the PUSH level. We direct ISO-NE to modify the market rules to reflect this change.

90. ISO-NE proposes in this compliance filing to remove the DCA suspension authority contained in Section 1.3 of Appendix A to Market Rule 1. This authority was approved by the Commission[24] in the context of the Proxy CT mechanism that was eliminated by the April 25 Order. Should stakeholders feel it desirable that ISO-NE should retain this authority with regard to the PUSH mechanism, ISO-NE could submit a Section 205 filing to institute such a rule change.

91. The issue of redesignation of DCAs is independent of the replacement by June 1, 2004 of the PUSH mechanism . The redesignation issue was addressed in Docket No. ER02-2330-004 et al.[25]

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[24]New England Power Pool, et al., 103 FERC ¶ 61,304 (2003).

[25]New England Power Pool, et al., 103 FERC ¶ 61,304 (2003).

92. ISO-NE in the compliance filing stated that it is maintaining the price setting rules contained in Market Rule 1 because it did not interpret the April 25 Order as requiring changes especially to the treatment of inflexible units, which include some of the PUSH units. The ISO states that the proposed rules will allow these units to be paid their PUSH prices, but in certain circumstances contained in the existing market rules, would not set prices. In these instances these units would be paid the difference between LMP and their offer prices through the Operating Reserve payment. We agree with ISO-NE that the intention of the April 25 Order was not to upset the current price setting eligibility rules to which the ISO refers regarding inflexible units. NUSCO, in rehearing asks the Commission to affirm that PUSH units will not receive exemption from these market rules, specifically Sections 2.2(b), 2.4, and 2.6 of Market Rule 1.[26] The Commission affirms that the PUSH bids will not be exempt from these sections of Market Rule 1. We agree with ISO-NE in its interpretation of the April 25 Order with regard to the price setting eligibility of DCA peaking units. Additionally, this interpretation of the market rules will not reduce PUSH unit revenue as NRG states.

93. We will not permit revisions to the PUSH bid levels to become effective unless and until such filings have been accepted and approved by the Commission, in accordance with Section 205 of the FPA. We accept PUSH bid levels provided by ISO NE for the various generators listed in its filing, effective June 1, 2003, until the date the Commission accepts revisions to those PUSH bid levels based on cost data filed with the Commission. We note that parties have filed cost support data with the Commission.[27] These filings will be subject to further Commission action.

94. Regarding the New England Advocates' request for PUSH bid data, we understand this request to refer to certain data that ISO-NE has identified as confidential and that the New England Advocates wish to be made available upon the expiration of the PUSH mechanism. The Commission needs additional information before deciding this issue. The Commission will therefore require that ISO-NE provide an answer to this request in which

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[26]Section 2 of Market Rule addresses the establishment of locational marginal prices. Section 2.2(b) addresses general aspects; 2.4 addresses the determination of energy offers used in calculating LMP; and 2.6 outlines the calculation of day ahead nodal prices.

[27]PPL Wallingford Energy, LLC, in Docket Nos. ER03-421-004 and ER03-563-011; Exelon Framingham LLC, Exelon Mystic LLC, Exelon New Boston LLC, and Exelon West Medway, in Docket No. ER03-959-000; and Mirant Kendall, in Docket Nos. ER03-563-012 and ER03-998-012.

it explains whether it believes it is necessary to keep this information confidential after the expiration of the PUSH mechanism.

95. ISO-NE recognizes that PUSH bids may have an impact on the level of operating reserve payments and the appropriateness of the current allocation mechanism. The ISO states that it has committed to examining these issues through a stakeholder process.[28] The Commission believes that this is the appropriate forum to discuss any impacts the PUSH mechanism may have on operating reserve uplift and that, given the short timeframe for implementation and the short-term nature of the PUSH mechanism, ISO-NE should address these stakeholder concerns expeditiously.

Docket ER03-563-006, -008, & -009 - Applicants' Compliance Filings

96. On June 4, 2003, Applicants filed the second revised cost agreements (Docket No. ER03-563-008) pursuant to Section 205 of the FPA that supercede and replace the revised cost agreements that they filed with the Commission on May 28, 2003 in Docket No. ER03-563-006 and amended June 5, 2003 in Docket No. ER03-563-009. Applicants contend that the second revised cost agreements will provide Applicants with the means to recover the fees, costs and other reserve disputed amounts under the escrow and trust agreements as reliability costs under the Reliability Cost Tracker;[29] however, amounts related to the recovery of out-of-pocket expenses and the indemnification obligation are not included because they do not have sufficient operating experience to estimate these costs. Applicants state that they will use the true up mechanism to recover any additional costs they incurred after the effective date of this filing.

97. Applicants propose a slightly different methodology for the recovery of related reliability costs under the second cost agreements. Specifically, rather than depositing the related reliability costs into the escrow account, ISO-NE will retain these amounts, essentially paying itself as an escrow agent, from the amounts it receives from NEPOOL, if there are sufficient funds in the escrow account to cover all C-1 and C-2 costs due. Applicants claim that the amounts required to cover related reliability expenses should bypass the escrow or trust agreements for the following reasons. First, the Commission

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[28] Compliance filing at 17-18.

[29] All amounts payable by Applicants to ISO-NE, acting as escrow agent, are referred to in the second revised cost agreements collectively as “escrow costs”. The escrow costs, trustee fees, and any other costs that may be approved by the Commission for recovery under the Reliability Cost Tracker in the second revised cost agreements are referred to collectively as “related reliability costs”.

required that Applicants implement an escrow arrangement so that ISO-NE could ensure that the funds would be used solely to maintain the facilities. Since all or substantially all of the related reliability costs incurred during the initial term of the second revised cost agreements will be owed to the ISO, this will eliminate the need for ISO-NE to first deposit and then withdraw the same funds. Second, the fees and amounts due to ISO-NE under the escrow arrangements as of the proposed effective date of June 5, 2003 will be accorded a high payment priority because they were incurred after the Applicants filed for bankruptcy protection. As a result, the potential for nonpayment for use of the funds for non-maintenance purposes no longer exists. Third, Applicants argue that they would incur unnecessary expenses to amend the escrow (and possible trust) agreements if they must pay ISO-NE from escrow accounts.

98. Applicants state that since the related reliability costs are costs that arise directly from the Commission's requirement that the escrow arrangements be implemented, there is or should be no question that those costs were prudent and necessary to provide the jurisdictional reliability service that will be provided by Applicants under the second revised cost agreements. In their transmittal letter Applicants state that NEPOOL asserts that the need for escrow and trust agreements, and the costs of administering those agreements, arose out of the Applicants' financial situation and should be assigned to the Applicants. Applicants contend that NEPOOL fails to realize their weakened financial position is the result of NEPOOL's flawed market rules that do not allow suppliers in DCAs an adequate opportunity to recover their costs.

99. Applicants contend that nothing in Section V.B of the NEPOOL Financial Assurances Policy addresses or governs whether costs arising out of a Commission imposed requirement may be recovered under cost agreements or under a cost tracker. Applicants submit that they are entitled to recover the Related Reliability Costs from NEPOOL, and that, because those costs arise directly out the implementation of the Reliability Cost Tracker, it is appropriate to permit Applicants to recover those costs through that mechanism.

100. Applicants further request, pursuant to Section 35.11 of the Commission's regulations, 18 C.F.R. §35.11, that the Commission waive the 60-day notice requirement, and establish an effective date for the cost agreements and the rates proposed of June 5, 2003, after a one-day suspension.

Notice of Filing and Protest

101. Notices of Applicants' compliance filing in Docket Nos. ER03-563-006, ER03-563-008, ER03-563-009 were published respectively in the Federal Register, 68 Fed. Reg. 35,874 (2003) and 68 Fed. Reg. 33,927 (2003), with comments, protests, or interventions due on or

before June 18, 2003 (ER03-563-006), June 25, 2003 (ER03-563-008), and June 26, 2003 (ER03-563-009). Timely motions to intervene and protest were filed by CMEEC, MMWEC, NEPOOL, NU, and ISO-NE.

102. **Commission Response**. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene serve to make CMEEC, MMWEC, NEPOOL, NU, and ISO-NE parties to this proceeding.

103. The April 25 Order directed Applicants to file revised agreements that provide only for the recovery of costs related to the Reliability Projects. It did not, however, allow Applicants to propose new, non-Reliability Project related language which would give Applicants the authority to make a unilateral filing to amend each of the cost agreements. Therefore, the changes are not in compliance with the Commission's order and are rejected.

The Commission orders:

(A) The requests for rehearing and motions for clarification are granted, in part, and denied, in part, as discussed in the body of this order. The submittals by the parties are accepted, in part, and rejected, in part as discussed in the body of this order. The Parties are required to submit compliance filings to reflect all modifications required in this order, including the following:

(i) The Applicants are directed to file, within 10 days of the date of this order, PUSH bids to reflect the revised depreciation rates and amortization associated with the interconnection rights, along with supporting workpapers, as discussed in the body of this order.

(ii) The informational filing submitted in Docket No. ER03-563-005 is accepted, as clarified.

(iii) The compliance filing submitted in Docket No. ER03-563-007 is accepted, subject to modification, as discussed in the body of this order. The PUSH Bid Levels provided therein by ISO-NE for the various generators listed in its filing, are accepted, effective June 1, 2003, until the date the Commission accepts revisions to these PUSH Bids based on cost data filed with the Commission. ISO-NE is also directed to file, within 30 days of the date of this order, revisions to its market rules, as discussed in the body of this order, and an explanation as to whether it believes it is necessary to keep PUSH bid data confidential after the expiration of the PUSH mechanism.

(iv) The compliance filings submitted in Docket No. ER03-563-006, ER03-563-008, and ER03-563-009 are accepted, subject to modification, as discussed in the body of this order. Applicants are directed to file, within 30 days, revised agreements to remove language which is rejected herein.

(B) The filing submitted in Docket No. ER03-563-003 is rejected.

(C) Applicants are directed to provide status reports to the Commission concerning the issue of Operating Reserves, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.