

170 FERC ¶ 61,187  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and Bernard L. McNamee.

ISO New England Inc.  
New England Power Pool Participants Committee

Docket No. ER18-1770-002

ORDER GRANTING REHEARING

(Issued March 10, 2020)

1. In an order dated November 9, 2018, the Commission accepted revisions to ISO New England Inc.’s (ISO-NE) Transmission, Markets, and Services Tariff (Tariff) filed on June 11, 2018 jointly by ISO-NE and the New England Power Pool Participants Committee (collectively, Filing Parties) pursuant to Section 205 of the Federal Power Act (FPA).<sup>1</sup> The Tariff revisions (Economic Life Revisions) modify the calculation of the economic life of an Existing Capacity Resource<sup>2</sup> to the evaluation period in which the net present value of the resource’s expected future profit is maximized. On December 10, 2018, New England Power Generators Association (NEPGA) timely requested rehearing of the November 9 Order. For the reasons discussed below, we grant NEPGA’s request for rehearing of the November 9 Order.

**I. Background**

2. As part of its Forward Capacity Market (FCM), ISO-NE conducts an annual Forward Capacity Auction (FCA). Each auction is preceded by a multi-step process that begins almost a year prior. The process contains a number of deadlines detailing when market participants must provide information to ISO-NE or when ISO-NE must send information to market participants to ensure that the process can move to the next step.

3. According to the Filing Parties, prior to the Economic Life Revisions, the Tariff stipulated that Existing Capacity Resources that wished to retire or permanently leave the

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<sup>1</sup> *ISO New England Inc.*, 165 FERC ¶ 61,088 (2018) (November 9 Order). Chairman Chatterjee dissented from that order. *See id.* (Chatterjee, Chairman, dissenting).

<sup>2</sup> ISO-NE defines “Existing Capacity Resource” as “any resource that does not meet any of the eligibility criteria to participate in the [FCA] as a New Capacity Resource.” ISO-NE, Tariff, § I.2.2, Definitions (122.0.0).

FCM could elect to submit Retirement<sup>3</sup> or Permanent<sup>4</sup> De-List Bids, respectively<sup>5</sup> and were required to include at least five years of cash flow estimates to justify their De-List Bids in the FCM.<sup>6</sup> Filing Parties explained that, once an Existing Capacity Resource submitted a De-List Bid, ISO-NE's Internal Market Monitor (Market Monitor) reviewed the bid to determine whether the bid price was consistent with competitive bidding behavior using a two-step method.<sup>7</sup> First, the Market Monitor determined the expected remaining economic life of the resource seeking to de-list by measuring the number of Capacity Commitment Periods<sup>8</sup> that the resource could continue to operate profitably. Second, the Market Monitor calculated the competitive de-list price (i.e., the Retirement or Permanent De-List Bid price) as the lowest capacity payment at which the resource would be no worse off financially by retaining its Capacity Supply Obligation in the FCA in which it is seeking to de-list, instead of exiting the FCM before the Capacity Commitment Period associated with that FCA.

## **II. Economic Life Revisions Filing**

4. In the Economic Life Revisions filing, the Filing Parties explained that, after a recent review, the Market Monitor determined that the then-existing economic life calculations may overstate the true economic life of the Existing Capacity Resource in some cases, which could result in a higher De-List Bid price than what would be

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<sup>3</sup> ISO-NE defines "Retirement De-List Bid" as "an Existing Capacity Resource seeking to specify a price at or below which it would retire all or part of a Generating Capacity Resource from all New England Markets beginning at the start of a particular Capacity Commitment Period . . . ." ISO-NE, Tariff, § III.13.1.2.3.1.5(b), Permanent De-List Bids and Retirement De-List Bids (63.0.0).

<sup>4</sup> ISO-NE defines "Permanent De-List Bid" as "an Existing Capacity Resource seeking to specify a price at or below which it would not accept a Capacity Supply Obligation permanently for all or part of a Generating Capacity Resource beginning at the start of a particular Capacity Commitment Period . . . ." ISO-NE, Tariff, § III.13.1.2.3.1.5(a), Permanent De-List Bids and Retirement De-List Bids (63.0.0).

<sup>5</sup> We refer to Retirement De-List Bids and Permanent De-List Bids generally in this order as De-List Bids.

<sup>6</sup> Transmittal, Attachment (Testimony of Hemant Patil) at 4 (Patil Testimony).

<sup>7</sup> November 9 Order, 165 FERC ¶ 61,088 at P 3.

<sup>8</sup> ISO-NE defines "Capacity Commitment Period" as "the one-year period from June 1 through May 31 for which obligations are assumed and payments are made in the [FCM]." ISO-NE, Tariff, § I.2.2, Definitions (122.0.0).

consistent with competitive bidding behavior.<sup>9</sup> The Filing Parties explained that, under the then-existing Tariff, the Market Monitor calculated an economic life for an Existing Capacity Resource's De-List Bid as equal to the maximum time period for which the Existing Capacity Resource's net present value of cumulative future expected cash flows is positive.<sup>10</sup> Specifically, the economic life calculation assumed that an Existing Capacity Resource that earned positive cash flows in the earlier years would continue to operate and sustain negative cash flows in later years as long as its overall cumulative cash flows remained positive.<sup>11</sup> The Filing Parties argued that this assumption was not consistent with competitive behavior because a profit-maximizing resource would elect to retire and keep the maximum of its cumulative cash flows rather than incur losses.<sup>12</sup>

5. To address these circumstances, the Filing Parties proposed to modify the economic life calculation to reflect that a competitive resource facing years of continual losses will seek to exit the FCM before incurring those losses that reduce its cumulative profits. The Filing Parties stated that the proposed Economic Life Revisions reflected that the expected economic life of an Existing Capacity Resource would be the period that maximizes the net present value of the resource's expected cumulative future profits.<sup>13</sup>

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<sup>9</sup> Transmittal at 4; Patil Testimony at 4-5.

<sup>10</sup> The Filing Parties explained that the Market Monitor calculated the net present value of the Existing Capacity Resource's net operating profit less its capital expenditures and the expected value of the resource at the end of the evaluation period. Transmittal at 4-5 (citing ISO-NE, Tariff, § III.13.1.2.3.2.1.2.C, Permanent De-List Bid and Retirement De-List Bid Calculation of Remaining Economic Life).

<sup>11</sup> Patil Testimony at 6-7 ("Consider a resource that expects positive five million of cash flows in year one and negative cash flows of three million in year two and each subsequent year. The current Tariff calculation would yield an economic life of two years because the resource could operate for two years with resulting cumulative cash flows of two million – positive five million in year one plus negative three million in year two. This assumption is inconsistent with how a competitive supplier would operate a resource. In this example, the supplier would not choose to operate its resource beyond year one and incur the negative cash flows of three million in year two. Instead, it would choose to exit the FCM after year one in order to maximize its cumulative cash flows at five million.").

<sup>12</sup> Transmittal at 4-5; Patil Testimony at 5.

<sup>13</sup> Transmittal at 4-5. The Filing Parties noted that, to facilitate this change, minimal Tariff revisions were required. Specifically, the Filing Parties proposed to revise

6. The Filing Parties stated that, in cases where the proposed changes would affect the economic life determination, the relative estimated De-List Bid price would decrease. The Filing Parties asserted that this reduction would be consistent with the objective of the bid review process (i.e., determining the minimum price required for the resource to “break even” over the duration of its economic life if it retains an obligation in the coincident auction).

7. The testimony supporting the Economic Life Revisions explained that the Filing Parties proposed these revisions because a large supplier submitted Retirement De-List Bids for four Existing Capacity Resources totaling about 2,000 MWs for the thirteenth FCA (FCA 13). The Filing Parties added that, given the “significant size” of these De-List Bids, they could have adverse implications for the competitiveness of the FCA.<sup>14</sup> The Filing Parties requested an effective date of August 10, 2018 for the Economic Life Revisions, so ISO-NE could apply the revised calculation for FCA 13 in February 2019.

### **III. November 9 Order**

8. In the November 9 Order, the Commission accepted the Economic Life Revisions as just and reasonable. The Commission found that the Economic Life Revisions would help ensure a competitive outcome for the FCM “by avoiding the potential that capacity resources will receive inflated FCA clearing prices.”<sup>15</sup> The Commission rejected NEPGA’s arguments that the Economic Life Revisions violated the filed rate doctrine or constituted retroactive ratemaking. Citing earlier orders describing the FCM,<sup>16</sup> the Commission found that the filed rate doctrine did not apply here because De-List Bids are merely inputs to the wholesale rate. The Commission concluded “that these Tariff provisions put market participants on notice that De-List Bids are subject to change and

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the last sentence of Tariff section III.13.1.2.3.2.1.2.C to strike the word “maximum” and replace the word “non-negative” with “maximized.” *Id.*

<sup>14</sup> Patil Testimony at 7-8.

<sup>15</sup> November 9 Order, 165 FERC ¶ 61,088 at P 23.

<sup>16</sup> *ISO New England Inc.*, 155 FERC ¶ 61,029, at P 85 (2016) (2016 FCM Order), *order on reh’g & compliance*, 161 FERC ¶ 61,115, at P 13 (2017) (2017 FCM Order). In response to a remand of the record of these orders by the D.C. Circuit, the Commission revised the 2017 FCM Order and the D.C. Circuit accordingly dismissed as moot the petition for review of these orders. *See ISO New England Inc.*, 166 FERC ¶ 61,060, at P 9 (2019), *pet. for rev’d. dismissed as moot*, *Exelon v. FERC*, No. 17-1275 (D.C. Cir. filed Feb. 5, 2019).

therefore, represent an independent basis for concluding that there is no violation of the filed rate doctrine.”<sup>17</sup>

9. The Commission also found that the Economic Life Revisions represented “a prospective change to the Tariff and therefore do not constitute retroactive ratemaking, because they are effective on August 10, 2018, before FCA 13 commences on February 4, 2019.”<sup>18</sup> In determining whether the Economic Life Revisions disrupted settled expectations based on existing market rules, the Commission concluded that “the benefits of the proposed Economic Life Revisions outweigh potential disruptions to market participants’ settled expectations and harm caused by reliance on the existing FCM rules.”<sup>19</sup>

#### **IV. Discussion**

##### **A. Request for Rehearing**

10. NEPGA argues that the Commission erred in finding that a De-List Bid is an input to a filed rate rather than a market participant’s filed rate that is subject to the filed rate doctrine.<sup>20</sup> NEPGA notes that ISO-NE filed the De-List Bids for FCA 13 in July 2018 and the Commission accepted them in November 2018. NEPGA asserts that the Commission denied suppliers an opportunity to challenge ISO-NE’s proposed mitigation or to reconsider their De-List Bids or other priced offers (or lack thereof) ahead of the FCA because the Commission accepted the retirement bids, made those bids effective in September 2018, and then allowed the Economic Life Revisions to become effective in August 2018.

11. NEPGA contends that the Economic Life Revisions violate the filed rate doctrine because ISO-NE did not request waiver or provide notice of the Economic Life Revisions ahead of the date suppliers filed their De-List Bids for FCA 13. NEPGA explains that the Economic Life Revisions’ effective date of August 10, 2018 occurred after suppliers determined how to price their bids, and after the Market Monitor filed the De-List Bids, including mitigation decisions, with the Commission. For this reason, NEPGA claims that the Commission denied suppliers the right to challenge Market Monitor determinations, which the Commission had relied on as an important procedural

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<sup>17</sup> November 9 Order, 165 FERC ¶ 61,088 at P 24.

<sup>18</sup> *Id.* P 25.

<sup>19</sup> *Id.* P 27.

<sup>20</sup> Request for Rehearing at 2.

protection in an earlier case.<sup>21</sup> NEPGA contends that, because the requirements for De-List Bids are dictated by the Tariff in effect at the time market participants file their bids with the Market Monitor, the Commission erred in stating that market participants were already on notice that their bids are subject to change through the Market Monitor's mitigation decisions in the Filing Parties' FPA section 205 filing.<sup>22</sup>

12. NEPGA argues that the Commission violated the filed rate doctrine in finding that market participants were on notice that the Economic Life Revisions would apply to De-List Bids in FCA 13 and violated the rule against retroactive ratemaking by accepting a change to a Tariff to "make up for" a prior rate, term, or condition.<sup>23</sup> NEPGA states that ISO-NE proposed the Economic Life Revisions only after market participants had acted based on earlier market rules and the Market Monitor applied and estimated that the Economic Life Revisions would materially affect the FCA 13 clearing price.<sup>24</sup>

13. NEPGA argues that the November 9 Order is not based on reasoned-decision making or substantial evidence.<sup>25</sup> NEPGA contends that the Commission did not rely on any evidence to support its finding that the Economic Life Revisions would prevent a market participant exercising market power from inflating its Retirement De-List Bid. NEPGA asserts that, to make this finding, the Commission relied on the Market Monitor's unsupported assumption that a supplier would not continue to invest in a resource and sustain negative cash flow.

14. Finally, NEPGA argues that the Commission failed to properly take into account the disruption to settled market expectations resulting from its decision or the fact that the proposal was only filed by ISO-NE after the Market Monitor calculated the potential

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<sup>21</sup> *Id.* at 9-11 (citing *inter alia* 2016 FCM Order, 155 FERC ¶ 61,029 at P 85). According to NEPGA, "the Retirement Filing provides suppliers with their only opportunity to challenge any proposed mitigation before the Commission," and ISO-NE's filing the Retirement Filing before the effective date of the Economic Life Revisions "strips suppliers of an important right previously relied upon by the Commission to justify submission of supplier bids by ISO-NE." *Id.* at 10-11.

<sup>22</sup> *Id.* at 12-14 (citing, *e.g.*, November 9 Order, 165 FERC ¶ 61,088 at PP 24, 28).

<sup>23</sup> *Id.* at 2-3.

<sup>24</sup> *Id.* at 15-18 (citing *inter alia* *San Diego Gas & Elec. Co. v. Sellers of Energy*, 127 FERC ¶ 61,191, at P 9 (2009) (citing *Assoc. Gas Distribs. v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990)).

<sup>25</sup> Rehearing Request at 19-22.

economic consequences under the former rules.<sup>26</sup> Arguing that suppliers lacked notice of the Economic Life Revisions before they were required to choose how to participate in FCA 13, NEPGA requests that the Commission find that the Economic Life Revisions should become effective, “if at all, beginning in FCA 14.”<sup>27</sup>

## **B. Commission Determination**

15. We grant rehearing. As discussed below, we find that the benefits of ISO-NE’s Economic Life Revisions do not outweigh the disruption to market participants’ settled expectations associated with changing an FCM rule regarding De-List Bids after the FCA 13 qualification process for those De-List Bids had commenced. Thus, we reject the Economic Life Revisions in their entirety, effective August 10, 2018. We also decline to rerun FCA 13 and FCA 14, as discussed below.<sup>28</sup>

16. In the November 9 Order, the Commission explained that, when protestors have asserted that proposed tariff revisions would disrupt settled expectations mid-course and harm market participants who relied on the existing tariff in calculating prices and entering into contracts, the Commission has considered a “balancing of interests” or “balancing of equities” in determining the appropriate outcome.<sup>29</sup> Thus, in certain circumstances, the Commission has accepted revisions when the benefits outweighed any settled expectations.<sup>30</sup> In balancing those expectations, in the November 9 Order, the Commission found that “the specific benefits of implementing the Economic Life Revisions, including ensuring competitive market outcomes for FCA 13, outweigh the concerns articulated by NEPGA.”<sup>31</sup>

17. Upon reconsideration, we grant rehearing and find that the Commission erred when it determined that the benefits of the proposed Economic Life Revisions outweigh

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<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 6; *see also id.* at 5, 15.

<sup>28</sup> ISO-NE’s filing of the FCA 13 results went into effect by operation of law on September 24, 2019. *See ISO New England Inc.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER19-1166-000 (Sept. 25, 2019).

<sup>29</sup> November 9 Order, 165 FERC ¶ 61,088 at P 25; *ISO New England Inc.*, 145 FERC ¶ 61,095, at P 29 (2013).

<sup>30</sup> *See ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014); *ISO New England Inc.*, 145 FERC ¶ 61,095 at P 30.

<sup>31</sup> November 9 Order, 165 FERC ¶ 61,088 at P 27.

potential disruptions to market participants' settled expectations and harm caused by reliance on existing FCM rules.<sup>32</sup> By instituting a change to FCA 13 provisions after market participants made their commercial decisions by relying on existing Tariff language, ISO-NE disrupted settled expectations and harmed market participants' ability to rely on FCM rules, and thus eroded their confidence in those rules. Specifically, ISO-NE sought to put into effect the Economic Life Revisions after market participants had relied on the existing FCM rules to determine whether to submit a De-List Bid for FCA 13. We agree with NEPGA that a market participant who chose not to submit a Retirement De-List Bid in FCA 13 based on its reliance on the then-existing economic life calculation might have, under the Economic Life Revisions, submitted such a bid based on expectations of future FCA clearing prices.<sup>33</sup> This action had the potential to interfere with the efficiency of the FCA given that resources may not have retired when, under the Economic Life Revisions, it was efficient to do so. Further, market participants had settled expectations for how the FCM rules would be applied; those settled expectations were disrupted by ISO-NE changing the rules midway through FCA 13. ISO-NE's action therefore creates uncertainty about the stability of FCM rules during the ongoing FCM processes, which in turn significantly decreases market participants' confidence in the market.

18. Thus, upon reconsideration and balancing these interests, we find that the benefits of the Economic Life Revisions do not outweigh the disruptions to settled market expectations or the potential for harm to market participants who relied on the existing Tariff language. This finding is consistent with Commission precedent in which the Commission has rejected FPA section 205 filings based on the balancing of equitable considerations.<sup>34</sup> Accordingly, we reject the Economic Life Revisions in their entirety.

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<sup>32</sup> *Id.*

<sup>33</sup> See NEPGA Oct. 1, 2018 Supplemental Protest at 5-7; *see also* NEPGA July 2, 2018 Protest at 6-7.

<sup>34</sup> See *ISO New England Inc.*, 134 FERC ¶ 61,128, at PP 39-40, *order on reh'g*, 136 FERC ¶ 61,221 (2011); *ISO New England Inc.*, 132 FERC ¶ 61,136, at P 30 (2010) (rejecting tariff revisions based on a balancing of the equities, including determination that the proposed revision is not necessary).



19. Because we reject the Economic Life Revisions, we direct ISO-NE to make a filing in eTariff, within 30 days of the date of this order, to make all tariff corrections necessary to reflect the rejection of the Economic Life Revisions.<sup>35</sup>

20. As to remedy, NEPGA requests that the Commission apply the Economic Life Revisions, if at all, beginning only in FCA 14.<sup>36</sup> Although we reject the Economic Life Revisions, on balance and based on our remedial discretion, we find it is not appropriate to require ISO-NE to rerun FCA 13 and FCA 14 without applying the Economic Life Revisions.

21. The Commission has previously explained the nature of its remedial analysis in situations where a reviewing court has identified a legal error associated with the market rules used to govern capacity auctions that already occurred, as well as delivery years that were already completed, before the legal error was identified:

The Commission generally does not order a remedy that requires rerunning a market because market participants participate in the market with the expectation that the rules in place and the outcomes will not change after the results are set. Rerunning past auctions creates two different types of risk: (1) capital risks for resources that made investments based on auction results, and (2) regulatory risk going forward (i.e., investors would be unlikely to want to invest capital in a market if the results were subject to change at a later date due to legal error). Thus, as a general matter, rerunning the markets undermines the markets themselves by creating uncertainty for market participants, and we generally eschew directing them to be rerun.<sup>37</sup>

Here, where only two auctions have occurred and no delivery year has started while rehearing was pending, the impact on market expectations may be less significant than the cases noted above. Nonetheless, we find that rerunning FCA 13 and FCA 14 would still create harm in the form of market uncertainty that outweighs the benefit of rerunning

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<sup>35</sup> We note that this rejection is without prejudice to ISO-NE filing, at the appropriate time, proposed tariff revisions similar to the Economic Life Revisions, to be effective prospectively.

<sup>36</sup> Rehearing Request at 5-6, 15.

<sup>37</sup> *Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173, at P 19 (2018) (footnote omitted); *accord PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 55 (2017) (same); see *Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173 at P 19 n.46 (listing cases); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 at P 55 n.116 (same).

those FCAs. As discussed above, we acknowledge the harm to market participant confidence resulting from changing the economic life calculation for De-List Bids mid-way through the FCA 13 process. However, we find that, because rerunning FCA 13 and FCA 14 would further decrease market participant confidence, such action is ill-suited to providing market participants relief in these circumstances.<sup>38</sup>

22. Because we grant rehearing, we need not reach NEPGA's arguments regarding whether sufficient evidence was provided regarding the initial finding. We also decline NEPGA's renewed request to require additional stakeholder processes to evaluate whether ISO-NE should apply the Economic Life Revisions to FCA 14, because FCA 14 has concluded.<sup>39</sup>

The Commission orders:

(A) NEPGA's request for rehearing of the November 9 Order is hereby granted, as discussed in the body of this order.

(B) ISO-NE is hereby directed, within 30 days of the date of this order, to make a filing in eTariff to make all tariff corrections necessary to reflect the rejection of the Economic Life Revisions, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>38</sup> Alternatively, economic analysis indicates that applying the original economic life calculation for De-List Bids in a new auction would not permit any entity directly affected by the rule change to clear the auction.

<sup>39</sup> ISO-NE held FCA 14 on February 3, 2020.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.  
New England Power Pool Participants Committee

Docket No. ER18-1770-002

(Issued March 10, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because I believe that the underlying order correctly balanced the harms and benefits of ISO New England's proposal. As that order explained, ISO New England's Market Monitor identified a flaw in the method used to calculate a generator's remaining economic life as part of the Market Monitor's review of that generator's De-List Bid.<sup>1</sup> Specifically, the calculations assumed that the generator would be willing to continue operating at an annual loss until all its future losses offset all its future profits<sup>2</sup>—*i.e.*, the calculations assumed that the generator is not profit-maximizing.<sup>3</sup> Of course, in reality, a generator is far more likely to stop operating once it starts making an annual loss, rather than blunder ahead losing money.<sup>4</sup> It should go without saying that such irrational assumptions should be promptly remedied, at least absent a showing of significant harm to the market.

2. Nothing in this record—or today's order on rehearing—makes that showing of harm. Instead, the Commission relies on speculation about what might have happened had the method for calculating economic life been rational all along.<sup>5</sup> In particular, the Commission notes that more generators might have sought to potentially retire had they known about the plan to fix the irrational assumptions before submitting their De-List

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<sup>1</sup> *ISO New England Inc.*, 165 FERC ¶ 61,088, at P 4 (2018) (Order); *see also id.* PP 2-3 (discussing the Market Monitor's review of De-List Bids).

<sup>2</sup> *Id.* P 4.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Order, 165 FERC ¶ 61,088 at P 17. *But see Astoria Generating Co. L.P.*, 151 FERC ¶ 61,043, at P 47 (2015) (dismissing concerns about resources' counterfactual bidding behavior as “impractical and speculative”).

Bids.<sup>6</sup> Even assuming that is right, I fail to see how it justifies rejecting ISO New England's filing to fix those irrational assumptions. If anything, that point only underscores the need to make the fix.

3. Finally, I note that nothing in today's order precludes ISO New England from refiling substantially the same provisions tomorrow. Today's order, as I understand it, is concerned only with the timing of ISO New England's previous filing and not its merits.

For these reasons, I respectfully dissent.

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Richard Glick  
Commissioner

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<sup>6</sup> Order, 165 FERC ¶ 61,088 at P 4.