

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

Devon Power LLC, et al.

) Docket Nos. ER03-563-030  
EL04-102-000

**MOTION FOR CLARIFICATION OR, ALTERNATIVELY,  
REQUEST FOR REHEARING OF MAINE PUBLIC UTILITIES COMMISSION**

In accordance with Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.713 (2000), the Maine Public Utilities Commission (“MPUC”), moves for clarification or, in the alternative, rehearing of the Commission’s June 2, 2004 Order in the above docket. *Devon Power LLC, et al.*, 107 FERC ¶ 61,240 (2004)(“June 2 Order”). In that Order, the Commission deferred LICAP in New England until January 1, 2006 and established hearing procedures designed to produce an initial decision by a presiding judge on LICAP issues by June 1, 2005. We seek clarification in the following areas:

1. In the White Paper, the Commission articulated a central role for states in resource adequacy issues. We seek clarification as to whether the New England States and the regional state committee (RSC)<sup>1</sup> will be afforded input into this process other than simply participating as a litigant in the hearings.
2. In its filing, ISO-NE recommended a regional dialogue to address a number of fundamental capacity adequacy design issues. We seek clarification that these are among those issues set for hearing and, if not, what other forums may be available to address them.
3. How can we harmonize the Commission’s goal of long-term bilateral contracts with the decisions of most New England states to move to retail competition which typically result in relatively short- term contracts between LSEs and customers or aggregations of customers? More specifically, can we fairly read the

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<sup>1</sup> On June 25, 2004, the New England States Committee on Electricity, or NESCOE filed a petition for declaratory order in Docket No. EL04-112 informing the Commission of its formation as an RSC.

Commission's order as remaining open about whether the LICAP product must be a one- month product purchased on or before the beginning of the first day of each month.

4. We seek clarification that the Commission's prohibition against allocation of CTRs to Maine generation that has not paid for transmission upgrades will not preclude allocation of CTRs to Maine load, which has paid for transmission upgrades.

### **MOTION FOR CLARIFICATION**

- 1. In the White Paper, the Commission articulated a central role for states in resource adequacy issues. We seek clarification as to whether the New England States and NESCOE will be afforded input into this process other than simply participating as a litigant in the hearings.**

Like many others, we have been frustrated that the process of designing a reasonable method to ensure capacity adequacy in New England has not been completed. The Commission's decision to place the issues for hearing, while an appropriate use of the Commission's authority to move the matter to closure, nevertheless raises a difficult problem. The MPUC, and the other New England Commissions in general, have tried to work with the FERC in achieving our mutual goals of an efficient wholesale (and, for the states at least, retail) electricity market. If the MPUC and other government entities in New England are confined to the role of a conventional litigant, however, our ability to find the solution reflecting our shared obligation to serve the public interest (rather than the pecuniary interests that other litigants must serve) is likely to be compromised.

The Commission has recognized the special role of the states in resource adequacy:

Each region with an RTO or ISO will determine how it will ensure that the region has specific resources to meet customers' needs. The approach to and level of resource adequacy will be decided by the states in the region drawing from a mix of generation, transmission, energy efficiency, and demand response. It is important to have a consistent approach throughout the region, which should be developed by a regional state committee. States may decide to ensure resource adequacy through state imposed requirements on utilities within the region. Or states may choose to have RTO's or ISO's operate capacity

markets. In any case, the choice on the approach is made by the states within the region.<sup>2</sup>

One potential problem here is that NESCOE is not yet up and running, although individual states can participate immediately. Whether or not NESCOE is fully operational, however, the litigated nature of this proceeding raises the question of how the states can provide their recommendation on these questions as envisioned in the White Paper and in a manner consistent with FERC's ex parte rules. One approach would be to allow the state commissions or NESCOE to make a recommendation prior to the evidentiary hearing for the Commission and other parties to consider. Should the state commissions or NESCOE elect not to participate as parties, the Commission might also consider their post-hearing recommendations consistent with Rule 2201 (e)(v). There may be other alternatives. We ask that the Commission provide the parties and the ALJ guidance on this question.

**2. In its filing, ISO-NE recommended a regional dialogue to address a number of fundamental capacity adequacy design issues. We seek clarification of whether such issues are among those set for hearing and, if not, what other forums may be available to address them.**

In its filing, ISO-NE noted that it had initiated a regional dialogue to work toward a long-term solution to capacity adequacy issues. This dialogue, which the MPUC supported and continues to support, was intended to consider a range of resource adequacy issues which have not, as yet, been seriously considered, at least in New England.

In its effort to meet the Commission imposed March 1 filing deadline, ISO-NE asked, and the MPUC and others agreed, to defer consideration of a number of basic structural issues in order to allow the ISO to comply with the Commission's timetable.

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<sup>2</sup> White Paper, Wholesale Market Platform, April 28, 2003 at page 11.

That is the reason the ISO filed an interim LICAP mechanism to comply with the Commission's directive while also providing a mechanism to consider a number of fundamental design issues. The MPUC believed this acceptable because we expect that the region as a whole<sup>3</sup> will have sufficient capacity for the next several years while a permanent mechanism is developed and implemented.

ISO-NE outlined a number of objectives which the regional dialogue was intended to address. This list included some fairly generic design goals, *e.g.* the mechanism should be simple and market based. But the list also included a number of critical issues which do not appear to be among the issues the Commission has set for hearing. The Maine PUC believes that there are three ISO-NE objectives which are both critical to the success of a capability mechanism and not clearly among the issues the Commission has set for hearing:

- A. "The mechanism should provide an adequate basis for financing new plant and reconfiguring existing capacity." *March 1 ISO Compliance Filing* at p. 51. This is critical for two reasons. First, the very essence of a capability responsibility mechanism is its ability to encourage investment in new resources as needed. Additional investment in existing resources will then follow to the extent that such investments are economic when compared to new resources. Second, and at least as important, we know of two ways to protect customers from market power in capacity markets. The best approach is to structure the capacity adequacy mechanism so that new entrants can effectively compete against existing capacity. The alternative, vastly inferior, is to develop a market in which only existing capacity can compete effectively and then use administrative tools to mitigate any market power abuses that may occur. We believe that the capacity adequacy mechanism must allow for direct competition between new and existing capacity resources.

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<sup>3</sup> We accept the Commission's determination that certain areas in New England, in particular Southwest Connecticut, have more immediate capability needs due to transmission system constraints.

- B. “The mechanism should recognize the lead times required to develop new resources.” *Id.* This goal is closely related to the prior goal and is important for the same reasons.
- C. “The rights and obligations of capacity resources should be clearly defined.” *Id.* In our view, the basic goal of instituting an administratively determined demand curve, such as the one the Commission apparently seeks here, is to introduce some demand elasticity into the LICAP market. Elasticity would help alleviate the ‘bipolar’ nature of the existing ICAP market, which tends to trade at either very low prices or the cap. However, supply elasticity can also be infused into the market by more clearly defining the rights and obligations of ICAP and non-ICAP resources. If there is a clear delineation of the differences, there will presumably also be non-trivial cost differences to a resource depending on whether the resource is providing the ICAP product. By extension, if there are cost differences, resources will account for these differences in their offers to provide ICAP. Simply put, this appears to be a mechanism that would allow for an up-sloping (non-vertical) supply curve for ICAP even in the short run. In fact, an up-sloping supply curve can supplement, or perhaps even replace, an administratively determined demand curve. Each is, in principle, consistent with the other. Moreover, a supply curve of the sort we have described could be determined directly by the market and avoid the litigation that appears inevitable concerning the shape and magnitude of the demand curve now before the Commission.

The MPUC believes these issues need to be addressed, but they do not appear to be among the issues that are explicitly set for hearing. One variant on the conventional hearing process the Commission might consider would be to invite the states and/or the RSC to submit their recommendations on these issues to the judge in advance of the evidentiary presentations made by other parties. This option may be a more efficient way of addressing what are predominantly policy rather than factual issues. It would provide the Commission and the parties early guidance regarding the concerns of the state regulatory bodies. Further, to the extent state commissions or an RSC determine that there are no factual issues warranting an evidentiary presentation and therefore choose not to participate as litigants in this hearing, they could undertake the advisory

role envisioned by FERC without incurring the significant expenditures required to litigate a case at FERC and could do so consistent with Commission Rule 2201 (e)(v).

*See also State-Federal Regional RTO Panels, Docket No. RT02-2-000, RTO*

*Informational Filings, et al., 97 FERC ¶61,182 at 61,837(2001).*<sup>4</sup>

**3. How can we harmonize the Commission's goal of long-term bi-lateral contracts with the decisions of most New England states to move to retail competition which typically result in relatively short- term contracts between LSE's and customers or aggregations of customers?**

The order suggests the Commission's long-term expectation for the capacity adequacy market:

The Commission stated in the PJM Order that ideally, the market should encourage LSEs to engage in long-term bilateral contracting and locational requirements for ICAP could promote such contracting.<sup>5</sup>

It expresses similar views in response to ISO-NE's query as to who should be responsible for longer-term capacity procurement and long-term reliability:

ISO-NE has sought guidance on the issue of what entity should bear the responsibility for longer-term capacity procurement and long-term reliability. The Commission addressed a similar issue in the PJM Order. As a general matter, the Commission believes that the market design of the RTO or ISO should be structured to send appropriate price signals and thus provide an incentive for load to procure capacity to meet their long-term requirements. Through the regional transmission planning process and the determination of the appropriate ICAP requirements for LSEs, ISO-NE's role is to establish the infrastructure levels needed for the system to operate reliably. However, it is LSEs that have the primary

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<sup>4</sup> As the Commission there stated:

With respect to exempt off-the-record communications with *non-party* state agencies, the Commission takes this opportunity to clarify that it views the exempt status of such communication, and by analogy to the communications covered by the modification ordered herein, as permission to engage in such communications. In other words, by exempting them from the coverage of the *ex parte* rules, albeit subject to notice and disclosure, the Commission recognizes the importance of such communications to understanding better issues critical to the Federal and state governments.

*Id.*

<sup>5</sup> June 2 Order at page 18.

responsibility for longer-term capacity procurement and obtaining sufficient supplies to ensure long-term reliability.<sup>6</sup>

The Commission must bear in mind that, at least in New England, there has been a widespread<sup>7</sup> and largely successful attempt to institute retail, as well as wholesale, competition. For example, Maine has about 40% of its load served by competitive suppliers with the remaining load served under standard offer contracts, which are awarded through a competitive bidding process administered by the MPUC. The standard offer contracts have been for terms of one to three years and it is Maine's understanding that most of the private contracts between customers and LSEs are of similar duration. Furthermore, Maine's T&D utilities are not LSEs and their role in standard offer procurement is purely ministerial.

This creates a significant problem in designing a long-term capacity adequacy mechanism based on long-term bilateral contracts between generators, particularly new generators, and LSEs. As a general matter, there are substantial financial risks in committing to finance new generation or significant upgrades to existing units without some level of contractual certainty about the value of the capacity once the investment is completed. This is particularly the case now when many of the firms that did make such investments are in bankruptcy or have turned the keys to their units over to their creditors. We believe that generators need either longer-term contracts or a substantial risk premium before they will be able to voluntarily invest in new capacity.

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<sup>6</sup> *Id.* at page 30.

<sup>7</sup> The state of Vermont is the single exception in New England.

On the other hand, LSEs would incur significant risk if they were to contract for capacity beyond the term of their own contracts with customers. Given the relatively short-term nature of those contracts, it is difficult to foresee what might lead them to enter into bilateral contracts with generators which have terms sufficiently long to provide help in attracting financing of new construction.

We believe that this was the fundamental issue ISO-NE had in mind when asking the Commission for guidance as to who should be responsible for long-term reliability. Even if the Commission adheres to its view that RTO's and ISO's should not take a direct role in contracting for capacity, the Commission should clearly articulate what types of mechanisms may be available to deal with the retail market problem we have outlined above.<sup>8</sup>

In the absence of guidance from the Commission, we fear that the hearing process will focus solely on short-term reliability goals and preclude consideration of the need for some form of longer-term LICAP product. We encourage the Commission to provide guidance.

**4. We seek clarification that CTRs may be allocated to Maine generators if they serve Maine load as LSEs.**

The June 2<sup>nd</sup> Order seeks to allocate CTRs to load that pays for transmission upgrades. Under the TCA amendments approved by the Commission in its Order of

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<sup>8</sup> Purely by way of illustration, one mechanism might be to have PUCs and/or local distribution companies play a greater role. Another might be to define the LICAP product as a commitment to provide capacity for a period of years, perhaps with a balancing market to allow LSEs to alter their portfolio of capacity in response to load shifts.

December 18, 2003,<sup>9</sup> Maine load pays for upgrades in congested areas of Southern New England. Thus, Maine load should be entitled to a CTR allocation. The June 2<sup>nd</sup> Order also states that Maine generators are not entitled to CTR allocation unless they pay for transmission upgrades. Finally, the Order envisions that one way to allocate the CTRs to load is indirectly through load-serving entities (LSEs). In order to ensure that Maine load is not unfairly precluded from CTR allocation even though it pays for transmission upgrades, we seek clarification that to the extent Maine generators (and, of course, indirectly the customers they serve in the retail market) serve load in Maine as LSEs, they are entitled to CTR allocation.

### **CONCLUSION**

The issues we have raised in this motion revolve around one fulcrum. We believe that a viable capacity adequacy mechanism must encourage healthy competition between new and existing generation. If this competition is correctly structured, we believe it can serve the twin goals of assuring reliability and minimizing the likelihood of market power abuse.

We also accept the Commission's implicit recognition that a capacity market in which both supply and demand are inelastic will often suffer from periods of extreme disequilibrium, and see the Commission's enthusiasm for a demand curve as a response to that problem. However, as we have indicated above, defining the LICAP product to achieve an up-sloping supply curve could be similarly helpful and, if done correctly, could be accomplished by the market itself, not an administrative determination as required by a demand curve approach. We urge the Commission not to foreclose

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<sup>9</sup> The MPUC's and other requests for rehearing of the Commission's TCA Order of December 18, 2003, are still pending.

consideration of this and other more effective approaches should they emerge in the hearing or through the states' efforts to provide input to the Commission. If the Commission did not intend to foreclose this inquiry, MPUC requests clarification to that effect. If, on the other hand, such an inquiry was beyond the scope of the hearing FERC has ordered, MPUC urges the Commission to grant rehearing and modify the scope of its hearing for the reasons discussed above.

More specifically, we ask that the Commission:

1. Recognize that the states have a unique role in the fundamental policy issues and allow the states the opportunity to bring such issues to the Commission in the most efficient way consistent with the Commission's ex parte limitations, not necessarily through a purely conventional hearings process;
2. Recognize the importance of having the LICAP mechanism reflect the issues of construction timing and financing discussed above;
3. Recognize that the issue of capacity adequacy, like most issues in the competitive electric market, is ultimately a matter of balancing the interests of capacity owners and the ultimate end-users, namely retail customers; and
4. Recognize that when a generator is also a load serving entity, it retains the same rights to CTRs as other LSEs who are not generators.

Respectfully submitted,

MAINE PUBLIC UTILITIES  
COMMISSION

/s/ Harvey L. Reiter

By: \_\_\_\_\_

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Dated: July 1, 2004

Its Attorneys

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing document by first class mail upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 1<sup>st</sup> day of July, 2004.

/s/ Harvey L. Reiter