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June 8, 2007

BY ELECTRONIC FILING

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

**Re: Invenergy Thermal LLC v. ISO New England Inc.; Docket No. EL07-66-000;
Answer of ISO New England Inc.**

Dear Secretary Bose:

Enclosed for electronic filing in the referenced docket is the Answer of ISO New England Inc. to Complaint of Invenergy Thermal LLC.

If there are any questions concerning this filing, please call me at (202) 661-2205.

Very truly yours,

/s/ Howard H. Shafferman

Howard H. Shafferman
Counsel for
ISO New England Inc.

Enclosure

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

Invenergy Thermal LLC,)	
<i>Complainant,</i>)	
)	Docket No. EL07-66-000
v.)	
ISO New England Inc.)	
<i>Respondent.</i>)	
)	

ANSWER OF ISO NEW ENGLAND INC.

ISO New England Inc. (the “ISO”), in accordance with Rules 206(f) and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),¹ hereby files this answer (“Answer”) to the complaint filed in this docket by Invenergy Thermal LLC (“Invenergy”) on May 30, 2007 (the “Complaint”).

While under normal circumstances the ISO would strongly oppose the relief requested in the Complaint, in light of the fact that this is the initial implementation of the FCM, the ISO takes no position as to whether the Commission should grant or deny the Complaint. Accordingly, the Answer simply presents a number of factors that the ISO believes the Commission should take into account in rendering its decision on the Complaint.

¹ 18 C.F.R. §§ 385.206(f) and 213 (2007).

I. SUMMARY OF COMPLAINT

In the Complaint, Invenenergy requests that the Commission order the ISO to rescind its disqualification of Invenenergy's Sutton Energy Project (the "Invenenergy Project") and reinstate it for further consideration as a potential capacity supplier in ISO-NE's 2008 Forward Capacity Market ("FCM") auction scheduled to occur in February 2008.² The ISO disqualified the Invenenergy Project due to Invenenergy's untimely submission of its Qualification Process Cost Reimbursement Deposit.³ Invenenergy submitted its Show of Interest form for the Invenenergy Project on February 20, 2007, but did not submit its Qualification Process Cost Reimbursement Deposit by that date.

Invenenergy claims it was justified in not timely filing its Qualification Process Cost Reimbursement Deposit due to its reliance on a "Frequently Asked Question" or "FAQ" posted on the ISO website that was at odds with the FCM-related rules that the ISO filed on February 15, 2007 (the "FCM Rules").⁴ Incorporated within the FCM Rules is Section III.13.1 (the "Qualification Rules") governing the process – including the timely submission to the ISO of the Show of Interest form and the Qualification Process Cost Reimbursement Deposit – by which resources may qualify as capacity resources and participate in the FCM.

In effect, Invenenergy asserts (at ¶ 33) that there was no practical way to have learned in timely fashion, other than through the FAQ, of the Qualification Process Cost Reimbursement

² Complaint at 1, 4.

³ Capitalized terms not otherwise defined in this Answer have the meanings ascribed thereto in the ISO New England Inc. Transmission, Market and Services Tariff (the "ISO Tariff.") Market Rule 1, which contains the rules for the FCM, is Section III of the ISO Tariff.

⁴ See filing of the ISO in Docket Nos. ER07-546-000 and ER07-547-000 (February 15, 2007) (the "February 15 Filing").

Deposit deadline. Further, Invenergy argues that, while the Commission accepted the filing of the Qualification Rules with an effective date of February 16, 2007 – prior to the Qualification Process Cost Reimbursement Deposit deadline – based on the ample notice to market participants and Project Sponsors of the rules’ substance⁵ – there is nothing in Section III.13.1.9.3 that requires or authorizes the ISO to exclude a project from further consideration because the project was late in making its Qualification Process Cost Reimbursement Deposit.⁶

Invenergy asserts in the alternative that, even if the Commission interprets the Qualification Rules as permitting the ISO to exclude the Invenergy Project from further consideration, the Commission should waive the Qualification Rule’s provisions for Invenergy because it relied on the FAQ, was not a NEPOOL stakeholder and did not receive “notice” of the deadline until six days after the deadline had passed.⁷

II. EXECUTIVE SUMMARY OF ANSWER

As noted above, the ISO takes no position as to whether the Commission should grant or deny the Complaint. If, however, the Commission decides to grant the Complaint on the basis of a waiver of the filed rate (*i.e.*, the ISO Tariff), the ISO asks that any such order explicitly provide that the waiver is limited to the specific and unique facts presented here and should not constitute established precedent that would allow market participants and Project Sponsors to avoid the terms and conditions set forth in the ISO Tariff.

⁵ See *ISO New England Inc.*, 119 FERC ¶ 61,045 at PP 211-212 (“April 16 Order”).

⁶ Complaint at 3 and ¶ 16.

⁷ Complaint at 4.

As explained further in Section V below, the Commission should take the following factors into account in its consideration of the Complaint:

- a filed rate (*i.e.*, the Qualification Rules) was in place, and governs the Timeliness of the Qualification Process Cost Reimbursement Deposits and related requirements;
- the filed rate is unambiguous regarding the disqualifying effect of a Project Sponsor's failure to provide the Qualification Process Cost Reimbursement Deposit; and
- if, as it should, the Commission finds the filed rate to be the governing document, it should consider a number of factors in acting on the request for waiver, including that:
 - strict enforcement of deadlines in the FCM Rules, in particular, and in all markets, generally, is of critical importance to the orderly and fair administration of the markets by the ISO;
 - while this is the first time that the FCA is being run and the FCM Rules are complex, Inverenergy is effectively asking to be exempted from customary due diligence for a project developer seeking to participate in a new market;
 - other Project Sponsors that are not New England Power Pool ("NEPOOL") members complied with the filed rate and submitted timely Qualification Process Cost Reimbursement Deposits; and
 - the ISO had posted – in the months prior to making the February 15 Filing – an FAQ that was inconsistent with the contents of the Qualification Rules subsequently filed on February 15, and did not correct the FAQ by the time of the February 20 Qualification Process Cost Reimbursement Deposit deadline specified in the Qualification Rules. The ISO regrets its error in posting and not correcting an FAQ that was inconsistent with the Qualification Rules.

III. CORRESPONDENCE AND COMMUNICATIONS

All correspondence and communications concerning this Answer should be sent to the following persons, who should be added to the official service list, at the addresses shown:

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IV. BACKGROUND

On February 15, 2007, pursuant to the FCM settlement (the “Settlement Agreement”) approved by the Commission,⁸ the ISO filed the FCM Rules implementing the Settlement Agreement.⁹ As noted above, and as relevant to this Complaint, the FCM Rules include the Qualification Rules specifying the requirements and deadlines for resources to qualify as capacity resources and participate in the Forward Capacity Auctions (“FCAs”) that implement the FCM.

The FCM Rules were developed through a transparent and open stakeholder process spanning roughly six months prior to filing. In particular, the Qualification Rules incorporated within the FCM Rules include two initial actions Project Sponsors must take to qualify in order to participate in an FCA: (i) submit a Show of Interest Form,¹⁰ and (ii) submit a Qualification Process Cost Reimbursement Deposit (for the first FCA, by February 20, 2007).¹¹ The ISO requested a waiver of the 60-day prior notice requirements, and a February 16, 2007 effective

⁸ *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (the “June 16 Order”), *reh’g denied*, 117 FERC ¶ 61,133 (2006).

⁹ See Filing Containing Revisions to Market Rules Implementing the FCM Settlement Agreement, Docket No. ER07-546-000 *et al.* (February 15, 2007).

¹⁰ ISO Tariff § III.13.1.1.2.1.

¹¹ ISO Tariff § III.13.1.9.3; *see also* April 16 Order at P 27.

date, for the Qualification Rules. The Commission's April 16 Order granted this waiver and assigned the requested effective date to the Qualification Rules.¹²

As noted above, the stakeholder process was extensive. Throughout the stakeholder process, the linkage between the Show of Interest Form and the Qualification Process Cost Reimbursement Deposit was clear. At the September 22, 2006 Joint NEPOOL Reliability Committee/Markets Committee Meeting, for example, the ISO made a presentation of the FCM qualification process, including a discussion of the Show of Interest Form application process for new capacity and the related Qualification Process Cost Reimbursement Deposit. The presentation indicated, on slide 37, that "Show of Interest includes payment of the Qualification Process Cost Reimbursement."¹³

More fundamentally, it was clear that the stakeholder process was designed to produce rules that would dictate how the qualification process – including the Show of Interest Form and the Qualification Process Cost Reimbursement Deposit – would proceed, and that those rules would be filed no later than February 15, 2007. The deadline of February 15, 2007 for the filing of the FCM Rules was well publicized. Indeed, it was "hard-wired" as one of the first sections of the Settlement Agreement (Section 3.A.), and this deadline was noted in the June 16 Order approving the Settlement Agreement.¹⁴ Moreover, the date was prominently referred to in the stakeholder meetings at which the FCM Rules were developed and discussed.¹⁵ The Settlement

¹² April 16 Order at PP 211-212.

¹³ See Forward Capacity Market Qualification of Resources, Show of Interest Application, presentation given to the Joint Reliability and Markets Committee meeting (Sept. 22, 2006) (the "September 22 Presentation"). Available at http://www.iso-ne.com/committees/comm_wkgrps/relblty_comm/relblty/mtrls/2006/sep222006/index.html.

¹⁴ See *Devon Power LLC*, Order Accepting Proposed Settlement Agreement, 115 FERC ¶ 61,340 at P 33 (2006) ("The second filing, which must be made by February 15, 2007, will contain the rules for the FCM.").

¹⁵ See, e.g., September 22 Presentation, at slide 2.

Agreement described these rules as “implementing the settlement.” Therefore, entities proposing to qualify resources had ample notice to: (i) monitor the filing of the FCM Rules on February 15, 2007, and (ii) read the Qualification Rules and the accompanying filing letter on the ISO or Commission websites for an authoritative explanation of the Show of Interest Form and Qualification Process Cost Reimbursement Deposit requirements and the deadlines for their submittal, in advance of the occurrence of the February 20 deadline.

In compliance with Section 3.A of the Settlement Agreement, the ISO and NEPOOL filed the FCM Rules on February 15, 2007 and the ISO posted the complete filing on its website that same day, allowing Invenergy and other market participants/Project Sponsors several days to review the filing before its Qualification Process Cost Reimbursement Deposit would be due under the FCM Rules. In pertinent part, Section III.13.1.9.3 of the FCM Rules provides:

With every Show of Interest Form submitted for the purposes of qualifying for either a Forward Capacity Auction or reconfiguration auction (for the first Forward Capacity Auction, the Qualification Process Cost Reimbursement Deposit shall be due on February 20, 2007), the Project Sponsor must submit to the ISO a refundable deposit in the amount shown in the table below.¹⁶

V. ANSWER

As noted in Section II above, the ISO takes no position as to whether the Commission should grant or deny the Complaint. Instead, the ISO offers several factors for the Commission to consider in formulating its ruling. If the Commission decides to grant the Complaint on the basis of a waiver of the filed rate, the ISO asks that any such order explicitly provide that the waiver is limited to the specific and unique facts presented therein and should not constitute

¹⁶ Emphasis added.

established precedent that would allow market participants and Project Sponsors to avoid the terms and conditions set forth in the ISO Tariff. Furthermore, the ISO requests that, if a waiver is granted, the Commission clearly state that all interested persons, whether they are NEPOOL Participants or not, are bound by the terms of the filed rate and cannot rely on materials outside the ISO Tariff to somehow modify the tariff or excuse such person from following the tariff's requirements.

A. A Filed Rate (*i.e.*, the Qualification Rules) Was in Place, and Governs the Timeliness of the Qualification Process Cost Reimbursement Deposits and Related Requirements

The Complaint asserts that there was no filed rate governing the submission of Qualification Process Cost Reimbursement Deposits as of the date (February 20) on which the deposits were due,¹⁷ and that Invenergy was therefore forced to rely (for purposes of discerning the Qualification Process Cost Reimbursement Deposit due date) on the answer to a Frequently Asked Question posted on the ISO's website. This is not correct. A filed rate was in place, and governs the timeliness of Qualification Process Cost Reimbursement Deposits and related requirements.

As noted above, the Settlement Agreement approved by the Commission in June 2006 explicitly required that the FCM Rules be filed by February 15, 2007. These rules (including the Qualification Rules) were in fact filed on February 15, 2007, and the April 16 Order granted the requested effective date of February 16, 2007. Thus, a filed rate existed – in the form of the Qualification Rules – and those rules explicitly set a February 20, 2007 due date for the Qualification Process Cost Reimbursement Deposits.

¹⁷ See Complaint at ¶ 32.

In the February 15 filing, the ISO had explained why waiver of the 60-day prior notice requirement for the Qualification Rules – *specifically including the provisions governing the submission of the Qualification Process Cost Reimbursement Deposit* – was appropriate. The ISO’s explanation was summarized by the Commission in paragraph 211 of the April 16 Order:

ISO-NE further states that market participants had ample notice of the Show of Interest Procedures (*including the necessity of making a \$25,000 deposit*), due to the many months of discussion among market participants prior to the February 15 filing; thus, according to ISO-NE, there was no element of the kind of surprise that the 60-day notice requirement is designed to prevent.¹⁸

In response to this explanation, the Commission found that market participants had sufficient notice, stating (in paragraph 212):

The Commission grants the waiver requested by ISO-NE. We find that ISO-NE has presented good cause for a waiver, as discussed above. At this critical time, when ISO-NE is preparing for the first Forward Capacity Auction, *we will grant some leeway in terms of notice*. Moreover, as ISO-NE noted, ISO-NE notified its market participants of the Show of Interest procedures as early as the September 22, 2006 Joint NEPOOL Reliability Committee/Markets Committee Meeting, and posted the same information on its web site on October 19, 2006. Thus, we find good cause to grant a waiver of the 60-day notice requirement ... for the February 16 effective date requested for the definitions and those tariff sheets related to the qualification process....¹⁹

Significantly, Invenergy did not protest the ISO’s request for waiver of the 60-day prior notice requirement, or seek rehearing of the Commission’s grant of that waiver. For the latter

¹⁸ Emphasis added.

¹⁹ Emphasis added; footnotes omitted.

As discussed in greater detail in Section V.C. of this Answer, Invenergy seeks to make much of the fact that it had not become a NEPOOL Participant at the time of the February 15 Filing, and therefore had no means of obtaining information about the qualification process. However, FCM-related meetings were open to the public, and briefing materials and rule drafts were posted promptly on the ISO’s public webpages. Moreover, the Commission’s waiver

(continued...)

reason, the Complaint can appropriately be characterized as an untimely, and therefore impermissible, collateral attack on the April 16 Order’s ruling that notice was sufficient to justify the waiver.

It is well-settled that the rates, terms and conditions specified in the filed rate, rather than verbiage from other materials not filed with the Commission, must govern a utility’s provision of service. Indeed, the filed rate doctrine “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.”²⁰ This applies, for example, to the terms of a contract that conflict with the filed rate,²¹ or the language on a billing statement that is neither included nor referenced in a tariff.²²

Under this principle, an FAQ – that the ISO neither filed with the Commission nor referenced in the FCM Rules – certainly cannot be the official implementation of the Settlement Agreement and provide definitive guidance as to key deadlines for participating in the FCM. While it is unfortunate that the FAQ was not updated in February to be consistent with the filed rate, only the ISO’s governing documents – in this case, Market Rule 1 – can provide definitive guidance. Because the Qualification Process Cost Reimbursement Deposit language in the Qualification Rules is unambiguous in expressing the deposit due date, Invenergy cannot argue a

(...continued)

of the 60-day notice requirement was not based on the sufficiency of notice to *NEPOOL members*, but to “*market participants*” generically.

²⁰ *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

²¹ *Id.* at 582 (“[U]nder the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls.”).

²² *Exelon Corp. v. PPL Elec. Util. Corp.*, 111 FERC ¶ 61,065 at P 26 (2005) (“Since PJM’s Tariff and Operating Agreement do not contain a time limit to complain about billing errors, the 45-day time frame mentioned on a billing statement cannot preclude PECO from seeking a correction of this error.”), *reh’g denied*, 114 FERC ¶ 61,298 (2006).

need for extrinsic evidence, such as an FAQ, to interpret or override the documents' requirements or the documents' intent.²³

Interestingly, the Midwest ISO order²⁴ cited by Invenergy in the Complaint squarely supports market administration by RTOs/ISOs in the manner specified in the filed rate rather than as provided in inconsistent, non-filed materials. Indeed, the omitted first half of the sentence from the Midwest ISO Order quoted in paragraph 27 of the Complaint states: "While we recognize that the [unfiled] Midwest ISO's Business Practice Manuals *do not take precedence over the [Midwest ISO's Tariff]....*"²⁵ The Commission repeats this principle elsewhere in the Midwest ISO Order: "the filed and accepted tariff is the governing document and not the Business Practice Manuals – the former has precedence over the latter and not the other way around."²⁶ Significantly, the Midwest ISO had failed to follow the filed rate; here, the ISO has applied it correctly.

For these reasons, the ISO believes that the Commission's ruling on the Complaint should reflect the principle that the document governing the timeliness of Qualification Process Cost Reimbursement Deposits is the Qualification Rules, and not an FAQ. In other words, the

²³ See, e.g., *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229 at 61,755 (2000) ("Extrinsic evidence (which may include the parties' course of performance) is admissible to ascertain the intent of the parties when that intent has been imperfectly expressed in ambiguous contract language, but is not admissible either to contradict or alter express terms."); see also *Nicole Gas Production, Ltd.*, 105 FERC ¶ 61,371 at P 10 (2003) ("Furthermore, Columbia's past practices are irrelevant to the interpretation of Section 26.9(b). When presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the tariff or contract itself, and only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence."), *vacated on other grounds sub nom. Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005).

²⁴ *Midwest Independent System Operator, Inc.*, 117 FERC ¶ 61,113 (2006) (the "Midwest ISO Order").

²⁵ *Id.* at P 94 (emphasis added).

²⁶ Midwest ISO Order at P 47. As the MISO manuals were developed through an established process, there is even less of an argument, in the instant case, that a single FAQ (not developed through an established process) should trump a filed rate.

ISO respectfully requests that the order on the Complaint affirm that customers are bound by the terms of the filed rate and cannot rely on materials outside the ISO Tariff to somehow modify the tariff or excuse such person from following the tariff's requirements.

B. The Filed Rate Is Unambiguous Regarding the Effect of a Project Sponsor's Failure to Provide the Qualification Process Cost Reimbursement Deposit

In Section III.A of the Complaint, Invenergy asserts that the Qualification Rule does not require or authorize disqualification of the Invenergy Project, while admitting (at ¶ 19) that the rule states that the Qualification Process Cost Reimbursement Deposit for the first FCA "shall be due on February 20, 2007," and that every Show of Interest form must be submitted with such a deposit. This assertion is apparently based on Invenergy's unilateral judgments that: (i) it is the "submission of the Show of Interest form that is critical to the process;" and (ii) the deposit "merely provides a mechanism to pay for the required studies" and therefore need not be timely.

As a fundamental point, the Qualification Rules, read together, make clear that disqualification from FCA participation is the consequence of a Project Sponsor's failing to timely submit a Qualification Process Cost Reimbursement Deposit. Section III.13.1.1 states that to participate in an FCA, a New Generating Capacity Resource "must meet the definitions and requirements of this Section III.13.1.1." Section III.13.1.1.2.1 says that such a resource "must" submit the Show of Interest form. As a corollary, Section III.13.1.1.2.1(e) expressly states that with the Show of Interest form, the Project Sponsor "must" also submit the deposit.

Moreover, the plain language of the Qualification Process Cost Reimbursement Deposit Rule itself does not make the distinction that Invenergy seeks to draw between the form and deposit requirements, nor does it subordinate the importance of the deposit requirement to the Show of Interest form. And because the readily evident purpose of Section III.13.1.9.3 of the

rules is to specify what it takes (namely, submitting both the Show of Interest form *and* a deposit) to “qualify” a project in an FCA, from semantic logic alone it is obvious that a failure to meet the specifications “disqualifies” the project. Further, it would be wholly counterintuitive to believe that noncompliance with a deadline stated in a rule has no adverse ramifications.²⁷

In any event, the February 15 Filing is replete with references to the linkages between the mandatory Show of Interest Form, the mandatory Qualification Process Cost Reimbursement Deposit and subsequent qualification for FCA participation.²⁸ These statements in the filing letter – in addition to the statement referred to by Invenergy that the ISO intended to cease reviewing projects that failed to submit deposits by February 20 – provided ample warning of the

²⁷ Indeed, the making of a timely deposit is critical to the effective administration of the FCM. As the evidence from the first Show of Interest process indicates, parties are very willing to submit papers indicating an interest in participating, but requiring a deposit culls out those who are not “truly interested.” For the first FCA, 19 Project Sponsors withdrew a total of approximately 122 Show of Interest forms through their decision not to submit the required Qualification Process Cost Reimbursement Deposits.

²⁸ For example:

“The New Capacity Show of Interest Form for new capacity resources includes information necessary for the ISO to evaluate the project, including data to allow the ISO to conduct an initial interconnection analysis for new generating resources. Additionally, the Project Sponsor must submit the Qualification Process Cost Reimbursement Deposit with the New Capacity Show of Interest Form. Such deposit is reimbursable and will cover costs incurred by the ISO associated with the qualification process, interconnection analysis and critical path schedule monitoring.” February 15 Filing at 26.

“...the analysis of a project’s ability to interconnect and its viability are *critical steps in the qualification process*. It is the ISO’s position that requiring a deposit is an appropriate exercise of the ISO’s judgment in implementing the market design set forth in the Settlement, and is just and reasonable as a means of assuring that only serious projects are proposed. It represents an estimate of the cost of conducting necessary studies and review, and any excess will be refunded to the Project Sponsor.” *Id.* at 34 (emphasis added).

“Together with the New Capacity Show of Interest Form, the Project Sponsor *must submit* the Qualification Process Cost Reimbursement Deposit, as described in Section III.13.1.9.3.” *Id.* at 62 (emphasis added).

“Section III.13.1.9.3 of the proposed rules requires that with every Show of Interest Form submitted for the purposes of qualifying for either an FCA or a reconfiguration auction, the Project Sponsor *must submit* to the ISO a refundable deposit in the amount shown in the table below. For the first FCA, the Qualification Process Cost Reimbursement Deposit will be due on February 20, 2007. This deposit will be used for costs incurred by the ISO and its consultants and Transmission Owners associated with the qualification process described in Section III.13.1, and with the critical path schedule monitoring described in Section III.13.3.” *Id.* at 100 (emphasis added).

adverse qualification consequences of failing to timely submit the Qualification Process Cost Reimbursement Deposit.

C. If, As It Should, the Commission Finds the Filed Rate to Be the Governing Document, It Should Consider a Number of Factors in Acting on the Request for Waiver

The Complaint requests that, if the Commission finds that the Qualification Rules authorize the ISO to exclude the Invenergy Project from the 2008 Qualification Process, the Commission waive those rules. As noted above, the ISO suggests the Commission take into account several factors in considering this waiver request.

First, strict enforcement of deadlines in the FCM Rules, in particular, and in all markets, generally, is of critical importance to orderly and fair administration of the markets by the ISO.

Second, while this is the first time that the FCA is being run and the FCM Rules are complex, Invenergy appears to be asking to be exempted from all forms of regulatory due diligence that are customary for an entity seeking to develop a new project to participate in a new market. Invenergy apparently felt exempt from any need to: (i) stay current, through an occasional visit to the ISO website, with the development of rules for that new market; (ii) read a widely-publicized settlement agreement that provided, up front, for implementation of the FCM settlement in rules to be filed February 15, 2007; (iii) check the ISO's website or Commission's eLibrary on or after February 15, 2007 to review the February 15 filing; and (iv) to consider whether the ISO's February 9, 2007 e-mail (Exhibit 2 to the Complaint) – sent by the ISO as a courtesy reminder to Invenergy, and noting that the timely submission of a Show of Interest form

was “*part* of [the] qualification process”²⁹ – meant that Invenergy should consult the rules which were to be filed imminently to see what the other “parts” of the process entailed.

Third, other market participants and Project Sponsors that were, like Invenergy, non-NEPOOL members complied with both requirements of the Qualification Rule. The ISO received timely forms and deposits from 10 non-NEPOOL member New Generating Capacity Resource Project Sponsors, and from 12 non-NEPOOL New Demand Resource Project Sponsors. Thus, NEPOOL membership was not a dispositive factor as to compliance with the Qualification Rules.

Finally, the Commission should consider that the ISO had posted – in the months prior to making the February 15 Filing – an FAQ that was inconsistent with the contents of the Qualification Rules filed with the Commission on February 15, and did not correct the FAQ by the time of the February 20 Qualification Process Cost Reimbursement Deposit deadline specified in the Qualification Rules. The ISO regrets its error in posting and not correcting an FAQ that was inconsistent with the Qualification Rules.

The ISO respectfully requests the Commission to consider these factors when it rules on the waiver request reflected in the Complaint.

VI. COMPLIANCE WITH RULE 213(C) OF THE COMMISSION’S RULES OF PRACTICE AND PROCEDURE

A. Disputed Material Factual Allegations

As discussed in greater detail in Section V above, the ISO disputes a number of the material factual allegations raised in the Complaint:

²⁹ Emphasis added.

- **Complaint at ¶ 32:** There was no filed rate governing the submission of Qualification Process Cost Reimbursement Deposits as of the date (February 20) on which the deposits were due.
- **ISO Response:** See Section V.A of the Answer. A filed rate was in place (due to FERC’s grant of waiver of the 60-day prior notice requirement) and governs the timeliness of Qualification Process Cost Reimbursement Deposits.
- **Complaint at 3-4 and ¶¶ 12, 15, 19-24:** The language of the filed rate does not require or authorize disqualification for failure to submit a timely Qualification Process Cost Reimbursement Deposit.
- **ISO Response:** See Section V.B of this Answer. The plain language of the filed rate (as discussed in multiple places in the FCM Rules filing letter) makes clear that failure to submit both the Show of Interest *and* the Qualification Process Cost Reimbursement Deposit will result in disqualification.
- **Complaint at ¶ 3:** The February 9, 2007 e-mail from the ISO to Invenergy neither mentioned a Qualification Process Cost Reimbursement Deposit nor listed any other requirements for consideration in the Qualification Process beyond what was requested on the Show of Interest form.
- **ISO Response:** See Section V.C of this Answer. The February 9 e-mail stated that the timely submission of a Show of Interest form was “*part* of the qualification process.” (emphasis added)
- **Complaint at 4 and ¶¶ 10, 33:** Invenergy did not receive notice of the Qualification Process Cost Reimbursement Deposit deadline (February 20, 2007) until six days after the deadline had passed. It would have been impossible for Invenergy to comply with the deadline even if it had been on the lookout.
- **ISO Response:** See Section IV of this Answer. Invenergy had ample notice of the deadline: the Settlement Agreement provided for a February 15, 2007 deadline for the ISO to file the FCM Rules implementing the settlement; the filing was made on February 15, 2007 and posted on the ISO website that same day.
- **Complaint at 4 and ¶¶ 14, 16:** The deadline should be waived, *inter alia*, because Invenergy was not a NEPOOL stakeholder.
- **ISO Response:** See Section V.C of this Answer. The ISO received timely forms and deposits from 10 non-NEPOOL member New Generating Capacity Resource Project Sponsors, and from 12 non-NEPOOL New Demand Resource Project Sponsors.

The ISO's responses to other points raised by Invenergy are reflected in the discussion in Section V, above.

B. Law on Which the Answer Relies

To support this Answer, the ISO relies on, *inter alia*:

- **The FCM Rules were in place at the time of the Qualification Process Cost Reimbursement Deposit deadline:** *ISO New England Inc.*, 119 FERC ¶ 61,045 at PP 211-212 (2007).
- **The filed rate, rather than verbiage from unfiled materials, governs a utility's provision of service:** *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Exelon Corp. v. PPL Elec. Util. Corp.*, 111 FERC ¶ 61,065 (2005), *reh'g denied*, 114 FERC ¶ 61,298 (2006); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229 at 61,755 (2000); *Nicole Gas Production, Ltd.*, 105 FERC ¶ 61,371 (2003), *vacated on other grounds sub nom. Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005); *Midwest Independent System Operator, Inc.*, 117 FERC ¶ 61,113 at PP 94, 47 (2006).

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, the ISO respectfully requests the Commission to consider its Answer to the Complaint.

Respectfully submitted,

ISO NEW ENGLAND INC.

By /s/ Raymond W. Hepper
Raymond W. Hepper
Vice President and Assistant General Counsel
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June 8, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at Washington, D.C. this 8th day of June, 2007.

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