

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

Devon Power LLC, et al.

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Docket No. ER03-563-030

**ANSWER OF THE
NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS
TO OCTOBER 12 MOTIONS OF ISO-NEW ENGLAND AND CALPINE
ENERGY SERVICES, L.P. AND CALPINE EASTERN CORPORATION**

On October 7, 2005, ISO New England, Inc. (ISO-NE) and the New England Power Pool (NEPOOL) filed a Joint Motion to Appoint Settlement Judge and Request for Expedited Response and Consideration. (Joint Motion) All six New England regulatory commissions either supported or did not oppose the request for the appointment of a settlement judge. Subsequently, both ISO-NE and Calpine Energy Services, L.P. and Calpine Eastern Corporation (“Calpine”) filed what they each styled as “answers” to the Joint Motion. But, as Capacity Suppliers pointed out in its October 13, 2005 response to the ISO’s pleading, the ISO’s “pleading seeks affirmative relief that goes beyond the issues raised in the joint motion.” Capacity Suppliers’ Answer at 1. So does the Calpine pleading. More specifically, each of these parties asks the Commission to place new conditions on the settlement process not included in the Joint Motion. The ISO requests that, in the event the parties do not agree to an extension of the settlement discussions, “the Commission should adopt the ISO’s proposed market design.” October 12 ISO Pleading at 6. And Calpine requests that the Commission clarify that “any discussion should build off of the existing LICAP proposal and should not include a totally new substitute proposal,” October 12 Calpine Pleading at 3, misstating that the Joint Motion suggests this approach.

While answers to answers are barred under Rule 213 absent waiver, answers to pleadings that, as here, in effect seek affirmative relief, are permitted under Rule 212. *See. e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 53 FERC ¶ 61,026 at (1990); *Iroquois Gas Transmission System, L.P.*, 61 FERC ¶61,341 at 62,341 n. 9 (1992). Pursuant to Rule 212, the New England Conference of Public Utilities Commissioners (“NECPUC”) hereby submits its answer opposing both the ISO and Calpine requests. As discussed below, these requests amount to unreasonable preconditions on settlement negotiations.

I. STATEMENT OF ISSUES

1. Should the Commission determine in advance of settlement discussions what the outcome will be if settlement discussions fail, thereby making such discussions futile before they even begin?

2. Should the Commission limit settlement discussions to only those proposals that “build off of the existing LICAP proposal,” even though this approach would predetermine the end result before settlement discussions even begin?

II. ARGUMENT

The Commission Should Not Predetermine the Outcome of Settlement Discussions.

At oral argument, Chairman Kelliher urged parties to go into settlement discussions with an open mind: “But as the parties decide whether or not it’s in their interest to pursue settlement in good faith, I want to remind you of the old gypsy curse that may you be involved in a lawsuit in which you're convinced you're right.”

September 20, 2005, Transcript of Oral Argument at 5047. ISO and Calpine effectively ask the Commission to sanction parties going into settlement discussions with a closed mind. Such an approach cannot provide a sound foundation for the start of settlement

discussions. If the Commission orders, as ISO asks, that the default will be LICAP if parties cannot reach settlement, then LICAP proponents have no incentive to enter into settlement discussions with an open mind. If they reject all proposals, they will end up at their litigation position.

If parties fail to reach agreement, there should be a process in place that would allow for an expedited consideration of alternatives, consistent with the requirements of due process. Several parties in fact proposed such a process and NECPUC supported this approach.¹ This approach produces a jump ball in the event parties fail to reach agreement; Load will understand that their proposals will be considered consistent with the requirements of due process but may ultimately be rejected; LICAP proponents will understand that if settlement discussions fail, ISO's proposal may not ultimately be adopted by the Commission. Only if the Commission rejects LICAP proponents' efforts to "tip the scales" before discussions begin, will both sides come to the table with the incentive to engage in settlement discussions with an open mind as urged by Chairman Kelliher.

Further, the Commission should reject Calpine's proposal that settlement discussions must "build off of the existing LICAP proposal and should not include a totally new substitute proposal." First, Calpine mischaracterizes the Joint Motion. Calpine states, "As the Joint Motion suggests, any proposal should be complementary to, and not a replacement for LICAP.'" Calpine Comments at 3. However, the Joint Motion makes no such suggestion. The Joint Motion describes arguments made during the September 20th oral argument in this docket:

¹ Pre-Oral Argument Comments of the Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company at pp. 4-6, Sept. 13, 2005.

This request is consistent with prior suggestions of the parties in the captioned proceeding and the Commission in oral arguments on September 20, 2005. During those arguments, *a number of parties presented proposals they considered to be alternatives to the proposal by ISO New England Inc. (the "ISO") for Locational Installed Capacity ("LICAP"). The ISO expressed a willingness to consider these proposals and assist in their further development, and all other parties expressed a willingness to explore the proposals in confidential settlement discussions. A number of parties, however, including the ISO, emphasized the need for expeditious consideration of any proposals and the possibility that these proposals may be complementary to, and not a replacement for, LICAP.* At the conclusion of oral arguments, Chairman Kelliher urged the parties to meet and attempt to settle this matter, and invited the parties to accept the services of a settlement judge to hold settlement discussions, perhaps in the Boston area.

Joint Motion at 2 (emphasis added). The Motion simply outlines the views of the different parties. It correctly suggests that a number of parties sought an alternative to LICAP, that all parties at oral argument expressed a willingness to explore the alternatives in confidential settlement discussions and that a number of different parties (all LICAP proponents) suggested the *possibility* that the alternatives presented may be considered as complementary to, rather than a replacement for LICAP. The motion in no way suggests that the scope of settlement discussions should be limited to the approach taken by one set of these parties.

Even if Calpine had accurately represented the Joint Motion, however, limiting the scope of settlement discussions to an outcome that supports LICAP is fundamentally at odds with the goal of reaching a settlement because, as discussed above, a predetermined outcome will ensure that both sides will *not* come to the table with an open mind.

III. CONCLUSION

NECPUC respectfully requests that the Commissions give settlement discussions a true chance of success by rejecting ISO's and Calpine's effort to set a predetermined outcome for the settlement discussions and allowing the discussions to proceed on a level playing field.

Respectfully submitted,

/s/ Harvey L. Reiter
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Dated: October 14, 2005

CERTIFICATE OF SERVICE

In accordance with 18 C.F.R. § 385.2010, I hereby certify that I have this day served, via electronic mail or first class mail, the foregoing document upon each party designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 14th day of October, 2005.

/s/ Harvey L. Reiter