

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

NSTAR, *et al.*

Northeast Utilities, *et al.*

)
)

Docket No. EC11-35-000

**PROTEST OF
THE ELECTRIC POWER SUPPLY ASSOCIATION AND
THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”)¹ and the Commission’s January 10, 2011 “Combined Notice of Filings #1,” the Electric Power Supply Association (“EPSA”)² and the New England Power Generators Association, Inc. (“NEPGA”)³ hereby protest the January 7, 2011 application⁴ filed in the above-captioned proceeding by NSTAR, Northeast Utilities (“NU”), and their respective public utility subsidiaries (collectively, “Applicants”) for Commission approval under Section 203 of the Federal Power Act

¹ 18 C.F.R. § 385.211 (2010).

² EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA is separately filing a doc-less motion to intervene in this proceeding.

³ NEPGA is the largest trade association representing competitive electric generating companies in New England. NEPGA’s member companies represent approximately 27,000 MW of generating capacity in the region. NEPGA’s mission is to promote sound energy policies which will further economic development, jobs, and balanced environmental policy. The comments contained in this filing represent the position of NEPGA as an organization, but not necessarily the views of any particular member with respect to any issue. NEPGA is separately filing a doc-less motion to intervene in this proceeding.

⁴ Application of NSTAR and Northeast Utilities and Their Respective Public Utility Subsidiaries Under Sections 203(a)(1) and 203(a)(2) of the Federal Power Act for Authorization of Disposition of Jurisdictional Assets and Merger, Docket No. EC11-35-000 (filed Jan. 7, 2011) (the “Application”). Applicants filed a supplement to the Application on January 10, 2011. See NSTAR and Northeast Utilities, Docket No. EC11-35-000 (filed Jan. 10, 2011).

("FPA")⁵ of a proposed merger between NSTAR and NU (the "Merger"). The Merger presents substantial buyer-side market power concerns that Applicants have not even acknowledged, much less addressed, in the Application. The Commission should find the Application deficient for failing to include an analysis of these market power issues, and should require Applicants to supplement the Application with detailed data relating to, and a detailed analysis of, these issues. Even without this information, however, it is clear that the Merger of entities who, together, "**[s]erve 50% of the region's load**,"⁶ presents buyer-side market power issues sufficient to require that approval of the Merger be conditioned on additional buyer-side mitigation measures.

The Commission has long recognized that large buyers in organized markets have the incentive and ability to suppress Commission-jurisdictional rates below competitive levels necessary to maintain long-term reliability, and has adopted measures to prevent the accumulation and exercise of such market power. In the organized markets administered by ISO New England Inc. ("ISO-NE"), however, these measures have proven to be ineffective and easily circumvented; all four of ISO-NE's annual Forward Capacity Market ("FCM") auctions have cleared at the floor price⁷ due, in large part, to the abuse of buyer market power by load interests (in particular, through the sponsorship of massive amounts of uneconomic, or "out of market" ("OOM"), new

⁵ 16 U.S.C. § 824b (2006).

⁶ See Northeast Utilities–NSTAR Presentation to Edison Electric Institute Financial Conference at 9 (emphasis added) (dated Nov. 1, 2010) ("NU–NSTAR EEI Presentation"), *available at*: http://www.nu.com/investors/presentations/2010_EEI_Conference_NU_NSTAR.pdf.

⁷ See *ISO New England Inc.*, 123 FERC ¶ 61,290 at P 4 (2008) (accepting ISO-NE's filing of the results of the first Forward Capacity Auction ("FCA")); *ISO New England Inc.*, 127 FERC ¶ 61,040 at P 4 (2009) (accepting ISO-NE's filing of the results of the second FCA); *ISO New England Inc.*, 130 FERC ¶ 61,145 at P 4 (2010) (accepting ISO-NE's filing of the results of the third FCA); *ISO New England Inc.*, 133 FERC ¶ 61,230 at P 4 (2010) (accepting ISO-NE's filing of the results of the fourth FCA).

entry), while the ISO-NE's Alternative Price Rule ("APR"), which is specifically intended to deter such uneconomic entry, has yet to be triggered.⁸ As a result, FCM is verging on collapse, and permitting the combination of two of the largest buyers in New England will only further undermine the viability of that and other New England markets, which, as the Commission has consistently recognized, deliver substantial benefits to consumers.

The Commission should require that Applicants supplement the Application to provide an analysis of the increase in buyer market power and market concentration that will result from the Merger, and it should condition its approval of the Merger on the imposition of additional buyer market power monitoring and mitigation measures that will prevent the merged entity from abusing its market power. The Commission's approval of the improvements to the APR proposed by ISO-NE,⁹ NEPGA,¹⁰ and other generators¹¹ in the recently-concluded paper hearing in Docket Nos. ER10-787-000, *et al.* (the "FCM Proceeding") would go a long way to address buyer market power concerns relating to capacity markets, as long as the modified APR will clearly apply to any new or newly-acquired generation or other capacity resources that Applicants may offer into future FCAs. In addition, the Commission should consider specific, tailored mitigation to address the substantial concentration of buyer-side market power that will

⁸ See generally *ISO New England Inc. & New England Power Pool Participants Comm.*, 131 FERC ¶ 61,065 at PP 69-76 (2010) ("FCM Hearing Order").

⁹ See generally First Brief of ISO New England Inc., Docket Nos. ER10-787-000, *et al.* at 10-12 (filed July 1, 2010).

¹⁰ See generally Opening Brief of the New England Power Generators Association, Inc., Docket Nos. ER10-787-000, *et al.* at 58-64 (filed July 1, 2010); Second Brief of the New England Power Generators Association, Inc., Docket Nos. ER10-787-000, *et al.* at 15-20 (filed Sept. 1, 2010).

¹¹ See, e.g., First Brief of the Boston Gen Companies, Docket Nos. ER10-787-000, *et al.* at 19-42 (filed July 1, 2010) ("Boston Gen Companies First Brief").

result from the Merger based on the supplemental buyer market power analysis requested herein and comments from interested parties.

I. BACKGROUND

NSTAR and NU are public utility holding companies under the Public Utility Holding Company Act of 2005. Together, they serve roughly three million retail electric customers,¹² as well as numerous large industrial and commercial customers and municipalities, which account for roughly 50 percent of the load in the New England region.¹³ According to Applicants, NU owns or controls approximately 1,300 MW of generation, while NSTAR has contractual rights to roughly 450 MW of generation.¹⁴ In addition, NSTAR and NU own 25 percent and 75 percent, respectively, of Northern Pass Transmission LLC (“Northern Pass”), which was formed to construct and own a 1,200 MW high voltage direct current transmission line connecting the ISO-NE transmission system with the transmission system of Hydro-Québec.

According to Applicants, the Merger will enable the combined entity to “increase [its] ownership of power-producing assets in coming years.”¹⁵ Moreover, the increased scale and financial capability of the combined entity will “enable future larger scale

¹² NSTAR serves 1.1 million retail customers in Massachusetts through its subsidiary NSTAR Electric Company, while NU serves 1.9 million retail customers in Connecticut, Massachusetts, and New Hampshire through its three regulated public utility subsidiaries, The Connecticut Light and Power Company, Western Massachusetts Electric Company, and Public Service Company of New Hampshire. In addition, NSTAR and NU each own natural gas local distribution companies serving retail, industrial, and commercial customers in Massachusetts and Connecticut, respectively. Application at 3, 6.

¹³ NU–NSTAR EEI Presentation at 9.

¹⁴ Application, Exh. H, Prepared Direct Testimony and Exhibits of William H. Hieronymous, Ph.D. on Behalf of Applicants at 16.

¹⁵ Rebecca Smith, *Utility Merger Aims at Clean Energy: Northeast, NStar Set \$4.3 Billion Pact With Plans to Tackle New England's Green Power Targets*, Wall St. J. at B3 (Oct. 19, 2010) (“*Utility Merger Aims at Clean Energy*”).

projects,”¹⁶ while the “[l]arger utility footprint provides [the merged entity] access to projects and opportunities not available today.”¹⁷

II. PROTEST

A. The Commission Should Find The Application Deficient Based On Applicants’ Failure To Include A Buyer Market Power Analysis.

While the traditional analytic screen described in Appendix A to the Commission’s merger guidelines “focuses only on monopoly (seller) power,” the Commission has made clear that “[t]his is not intended to exclude monopsony (buyer) power as a relevant consideration” in proceedings under Section 203 of the FPA.¹⁸ To the contrary, in its Merger Policy Statement, the Commission has expressly directed that a buyer-side market power analysis “be developed if appropriate,”¹⁹ and stated that data regarding long-term purchases may be “used to assess buyer concentration in the same way that seller concentration is calculated.”²⁰ In recognizing the risks of buyer market power, the Commission’s merger policies are in accord with those of the U.S. Department of Justice and the Federal Trade Commission, which recognize that “[m]ergers of competing buyers can enhance market power on the buying side of the market, just as mergers of competing sellers can enhance market power on the selling

¹⁶ Northeast Utilities–NSTAR Presentation at 8 (dated Oct. 18, 2010) (“NU–NSTAR Investor Presentation”), available at: http://www.nu.com/investors/presentations/NU_NST_Investor_Presentation.pdf.

¹⁷ NU–NSTAR EEI Presentation at 11.

¹⁸ See *Inquiry Concerning the Commission’s Merger Policy Statement Under the Federal Power Act*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,135 (1996) (the “Merger Policy Statement”), *reh’g denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

¹⁹ Merger Policy Statement at 30,135 (1996).

²⁰ *Id.*

side of the market.”²¹ The Application is deficient insofar as Applicants have failed to provide the buyer market power analysis that is clearly appropriate under these circumstances.

To be sure, the Commission’s regulations do not require a buyer market power analysis for every transaction subject to FPA Section 203. But clearly, if there were ever a case in which buyer-side market power was a “relevant consideration” and the submission of such an analysis was “appropriate,”²² it is this case, where Applicants concede that the post-Merger entity will serve approximately 50 percent of the region’s load. Applicants’ abject failure even to acknowledge, much less to address, this critical issue is all the more remarkable in light of NSTAR’s recent claims that another FPA Section 203 application relating to a transaction involving only one load-serving entity – and one serving a substantially smaller share of New England’s load than the combined NU/NSTAR entity would – was “patently deficient” by virtue of its failure to address buyer-side market power considerations to NSTAR’s satisfaction.²³

²¹ U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, § 12 (issued Aug. 19, 2010) (“2010 Horizontal Merger Guidelines”), available at: <http://ftc.gov/os/2010/08/100819hmg.pdf>. Moreover, the Horizontal Merger Guidelines employ “essentially the [same] framework” for assessing whether a proposed merger will increase buyer market power as is applied to assess increases in seller market power. *Id.* Similarly, the previous version of the Horizontal Merger Guidelines adopted in 1992 (and revised in 1997) specified that the same analysis should be applied to assess both buyer and seller market power, and the 2010 Horizontal Merger Guidelines do not depart from this approach. See U.S. Department of Justice and the Federal Trade Commission, 1992 Horizontal Merger Guidelines § 0.1 (issued 1992, rev. Apr. 8, 1997) (“1992 Horizontal Merger Guidelines”) (“The exercise of market power by buyers (‘monopsony power’) has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.”), available at: <http://www.ftc.gov/bc/docs/horizmer.shtml>.

²² Merger Policy Statement at 30,135.

²³ See NSTAR Electric Company’s Motion to Intervene, Comments, and Request for Merger Conditions, Docket No. EC10-85-000 at 6-9 (filed Sept. 8, 2010) (“NSTAR EC10-85 Comments”). It does not seem unreasonable to hold NSTAR to the same standard it demands of others by requiring that Applicants “make a full disclosure of their respective participations in the ISO-NE market and to make a *prima facie* case that the Merger would not create the opportunity to wield market power.” *Id.* at 8

The Commission should require Applicants to supplement the Application by filing detailed data regarding Applicants' purchases and contracts, along with a detailed analysis of Applicants' buyer market power, both pre- and post-Merger. The Commission should notice Applicants' filing for comment to allow the parties to this proceeding an opportunity to suggest modifications or corrections to Applicants' analysis and to perform their own buyer market power analysis, using Applicants' data and any other relevant public or proprietary information. Consistent with the Commission's policy regarding FPA Section 203 applications that require an Appendix A analysis, it would be appropriate to establish a 60-day notice period with respect to this supplemental filing in order to afford interested parties an adequate opportunity to evaluate Applicants' analysis and, if necessary, to perform their own analyses.

B. Absent Mitigation, The Proposed Merger Is Inconsistent With The Public Interest Because It Would Substantially Increase Applicants' Existing Buyer Market Power And Market Concentration In ISO-NE.

To EPSA's and NEPGA's knowledge, the Commission has never authorized a transaction in a market administered by an independent system operator ("ISO") or a regional transmission organization ("RTO") that would allow a single market participant to increase its market share on either the buyer or seller side of the market to 50 percent or more. In any event, the post-Merger market concentration would vastly exceed the thresholds set forth in the Merger Policy Statement for triggering the

Moreover, Applicants "do not have the right to rely on bland and questionable assurances that the Merger will not have anti-competitive impacts . . .," *id.*, and should therefore be required to provide a monopsony power analysis as set forth in the Merger Policy Statement.

presumption that the Merger will “create or enhance market power.”²⁴ While EPSA and NEPGA do not have access to the data necessary to perform a detailed market power analysis of the Merger, Applicants’ own public statements provide more than sufficient evidence to demonstrate that the Merger raises serious competitive concerns.

As noted above, Applicants have stated that NSTAR and NU together “serve 50% of the region’s load.”²⁵ Thus, even if all other participants in the New England market were ignored, the post-Merger Herfindahl-Hirschman Index (“HHI”) for the New England region would be roughly 2,500, well in excess of the Merger Policy Statement’s threshold of 1,800 for a highly concentrated market.²⁶ Again, while EPSA and NEPGA do not have the information necessary to conduct a detailed concentration analysis, it appears that the Merger would result in an increase in the buyer-side HHI well in excess of 100 points,²⁷ which would give rise to a presumption “that the merger is likely to create or enhance market power.”²⁸ While this is admittedly a very rough estimate, it should be self-evident that the combination of two of the largest buyers in New England

²⁴ Merger Policy Statement at 30,129.

²⁵ NU–NSTAR EEI Presentation at 11. The Merger Policy Statement adopted the analytic approach and screens set forth in the 1992 Horizontal Merger Guidelines. Merger Policy Statement at 30,129. The 1992 Horizontal Merger Guidelines presumed that, in a market for a homogenous product like electricity, the merged entity would be able to increase prices, unilaterally and profitably, if its market share exceeded 35 percent. 1992 Horizontal Merger Guidelines § 2.22. Thus, Applicants’ post-Merger 50 percent market share would substantially exceed the 35 percent threshold set forth in the 1992 Horizontal Merger Guidelines and adopted by the Commission in the Merger Policy Statement.

²⁶ Merger Policy Statement at 30,129. EPSA and NEPGA wish to emphasize that this very rough estimate excludes all other buyers in the market. If other buyers were included, the pre- and post-Merger HHIs would be substantially larger.

²⁷ EPSA and NEPGA do not have the information necessary to determine the pre-Merger market shares of NSTAR and NU, respectively, but if the reasonable assumption is made that their 50 percent combined market share should be allocated in rough proportion to their respective numbers of retail customers (*i.e.*, 1.1 million out of 3.0 million for NSTAR and 1.9 million out of 3.0 million for NU), then NSTAR’s share of the buyer-side of the market would be 18.3 percent, and NU’s share would be 31.7 percent. The pre-Merger HHI would then be $(18.3)^2 = 335$ for NSTAR, and $(31.7)^2 = 1005$ for NU, for a total of 1,340, in which case the post-Merger change in HHI would be 1,160 points.

²⁸ Merger Policy Statement at 30,129.

would substantially enhance their market power and would likely have harmful effects on competition. Moreover, the lack of detailed information on buyer-side market power and market concentration underscores the need for Applicants to provide an analysis of buyer market power performed in accordance with the Commission's requirements to enable the Commission and other interested parties to assess the competitive effects of the Merger.

Buyer market power concerns are exacerbated by Applicants' statements that the rationale for the Merger is, among other things, to enable the combined entity to "increase [its] ownership of power-producing assets in coming years"²⁹ and to "enable future larger scale projects"³⁰ for new generation and transmission.³¹ Thus, it is clear that Applicants intend to use the Merger to substantially increase the amount of generation they own or control beyond the 1,750 MW reflected in the Application.³² Absent mitigation, this additional generation could be a tool for the exercise of buyer

²⁹ *Utility Merger Aims at Clean Energy* at B3. See also *id.* ("Northeast Utilities Chief Executive Charles Shivery said a combined utility would probably invest in wind-energy projects in addition to signing power-purchase agreements with outside developers.").

³⁰ NU-NSTAR Investor Presentation at 8.

³¹ For example, Applicants are developing other projects like the Northern Pass transmission line, which will enable Applicants to import up to 1,200 MW of new generation into ISO-NE markets. The Application does not indicate how much of this capacity Applicants will purchase and/or control.

³² Separate and apart from additional generation that Applicants might develop in the future, the amount of generation that the Application attributes to Applicants is a small fraction of the generation that they would be deemed to control if the Commission assumed that back-to-back contractual arrangements used to serve load conveyed control over generation, as NSTAR argued in another recent FPA Section 203 proceeding. See NSTAR EC10-85 Comments at 8-9. Fortunately for NSTAR and the other Applicants, the Commission implicitly rejected those arguments. See *Fore River Dev., LLC, et al.*, 133 FERC ¶ 61,248 at P 29 (2010). NSTAR has nonetheless continued to pursue them on rehearing. See NSTAR Electric Company's Application for Rehearing Seeking Correction of the Mystic 8 and 9 Common Mode Failure Condition, Docket No. EC10-85-002 (filed Jan. 21, 2011). If the same standard were applied with respect to the contracts Applicants use to serve load, the Merger would present substantial seller market power concerns not accounted for in Applicants' market power analysis.

market power in the form of more uneconomic entry of the kind that, as discussed below, has already seriously harmed FCM.

C. Buyer-Side Market Power Has Already Seriously Harmed Competition And Reliability In New England, And The Commission Must Act To Preserve Competitive Markets.

The Commission's concerns regarding the anticompetitive effects of buyer market power are not limited to its analysis of mergers and acquisitions under FPA Section 203. Indeed, the Commission has long recognized that large buyers have the ability and incentive to artificially suppress prices in organized markets such as ISO-NE³³ and has repeatedly taken steps to curb the exercise of such buyer-side market power. In fact, the Commission approved the current version of the APR for precisely this reason,³⁴ and has likewise approved analogous buyer market power measures in the markets administered by PJM Interconnection, L.L.C. ("PJM")³⁵ and the New York Independent System Operator, Inc. ("NYISO").³⁶ Discussing buyer-side mitigation of the New York City sub-market, the Commission explained:

Large net buyers may have both the incentive and the ability to depress prices through uneconomic entry. . . . A large net

³³ See, e.g., FCM Hearing Order at P 69 (explaining that the APR is a "rule intended to discourage buyers who have the incentive and ability to suppress market clearing capacity prices below a competitive level from doing so.").

³⁴ See *Devon Power LLC*, 115 FERC ¶ 61,340 at P 115 (2006) (approving APR because it found it to be necessary to ensure that buyers cannot "use self-supply to artificially suppress the auction's clearing price below the price needed to elicit new entry . . ."). See also *id.* (concluding that new capacity that is self-supplied by load (either through ownership or contract) "may have an interest in depressing the auction price, since doing so could reduce the prices they must pay for existing capacity procured in the auction.").

³⁵ See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104 (2006) (approving PJM's Minimum Offer Price Rule as "a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply.").

³⁶ See *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 101 (2008) (approving NYISO's buyer market power mitigation rule based on its finding that large net buyers have "both the incentive and ability to depress prices through uneconomic entry.").

buyer could acquire new capacity that is not needed in the market and whose costs exceed the market price. Such an investment would be inefficient, the net buyer would lose money on the capacity, and no rational seller would knowingly make such an investment. But the investment could benefit the net buyer because the additional capacity could reduce the market price for capacity and lower the net buyer's total capacity bill. If the newly added capacity represents only a portion of the net buyer's total capacity needs, the reduction in the buyer's total capacity bill caused by the lower prices could more than offset the loss on the newly added capacity investment. As a result, a large net buyer could have an incentive to make such an inefficient investment.³⁷

The Commission added that such investment would “inhibit new entry, and thereby raise price and harm reliability, in the long-run.”³⁸

Buyer-side market power has been a long-standing and increasingly significant concern in ISO-NE, as well as other organized markets.³⁹ In New England, unchecked buyer market power abuse has caused FCM prices to crash. The current version of the APR has utterly failed to achieve its purpose of deterring the abuse of buyer market power through sponsorship of uneconomic, or OOM, entry,⁴⁰ leading the Commission to recognize the urgent need to strengthen the toothless APR and other market rules to preserve competition in ISO-NE's markets.⁴¹

³⁷ *Id.*

³⁸ *Id.* at P 103.

³⁹ See, e.g., Complaint and Request for Clarification Requesting Fast Track Processing, Docket No. EL11-20-000 (filed Feb. 1, 2010).

⁴⁰ See, e.g., FCM Hearing Order at PP 69-70 (noting that the Commission's “objective” in accepting the APR provisions “has been to ensure that the prices in capacity markets reflect the market cost of new entry when new entry is needed,” but concluding that the APR “does not fully meet this objective.”). Notably, despite the entry of 3,000 or more MW of OOM in the first three FCAs, see, e.g., Boston Gen Companies First Brief at 13 & nn.47-48, the APR has never been triggered.

⁴¹ In fact, APR reforms are one of the three central issues set for hearing in the FCM paper hearing proceeding. FCM Hearing Order at P 18.

The Commission's competition policy stands at a crossroads. The Commission's long-standing policy has been to foster the development of competitive wholesale power markets, in particular, by encouraging the formation of ISOs and RTOs. The organized, competitive markets administered by ISOs/RTOs have consistently been found to produce significant benefits in terms of increased reliability, transparency, and efficiency and reduced costs and reliance on OOM mechanisms to maintain reliability such as reliability must-run ("RMR") contracts.⁴² The steady increase in buyer-side market power and market concentration, however, along with the patently inadequate buyer market power mitigation measures, threatens the long-term viability of these markets in New England and elsewhere. Simply put, unless the Commission is as vigilant in policing the accumulation and exercise of buyer market power as it has been where seller market power is involved, competitive markets and the attendant benefits will be lost.

⁴² For example, at the most recent Commission open meeting on January 20, 2011, Chairman Jon Wellinghoff and Commissioner Marc Spitzer reaffirmed their belief in the benefits of the competitive markets administered by ISOs/RTOs. Chairman Wellinghoff reiterated his conviction that ISOs/RTOs provide an "array of values," including "a reliable transmission grid; transparent, competitive and efficient wholesale electric market performance; and effectiveness in controlling costs and meeting the needs of consumers." Statement of Chairman Jon Wellinghoff on RTO/ISO Metrics Presentation, Docket No. AD01-2-000 (Jan. 20, 2011). Commissioner Spitzer explained the value of competitive ISO/RTO markets as follows:

I have consistently argued that competitive markets are a means to ensure the Nation's ratepayers reliable supplies of energy at just and reasonable rates. [The 2010 ISO/RTO Metrics Report] makes clear that competitive markets have led to greater investment (for greater reliability and lower congestion), increased efficiency and development of new technologies. As one example, the metrics demonstrate a decreasing reliance on RMR contracts in favor of market mechanisms.

Statement of Commissioner Marc Spitzer on RTO/ISO Metrics Presentation, Docket No. AD01-2-000 (Jan. 20, 2011).

D. The Commission Should Require Additional Buyer Market Power Mitigation As A Condition To Approving The Merger.

The Commission should condition its approval of the Merger on the imposition of additional buyer market power monitoring and mitigation measures that would eliminate the merged entity's incentive and ability to exercise buyer market power, whether acting on its own or in coordination with other buyers or load interests. A revitalized APR, incorporating the modifications proposed by ISO-NE, NEPGA, and other generators in the FCM Proceeding, would go a long way towards mitigating the anticompetitive effects of the Merger on capacity markets, provided all offers by Applicants' new or newly-acquired generation or other capacity resources into FCM are clearly subject to mitigation under that rule. While an improved APR mechanism would help mitigate the effects of the Merger, the Commission will need to consider imposing additional, tailored mitigation measures on Applicants as a condition to approving the Merger once it has reviewed the supplemental buyer market power analysis that Applicants should be required to file and comments on that analysis. It may be appropriate to consider not only mitigation measures relating to capacity markets but also measures to account for Applicants' buyer market power in energy markets.

Given the multitude of potential, alternative mitigation schemes, and the inherent difficulty of permitting such a dominant buyer, which dwarfs its competitors on both the buyer and supplier sides of the market, to participate in organized, competitive markets, the Commission should consider instituting hearing and settlement judge procedures to develop a more complete record on the merits of the various additional mitigation measures. At a minimum, the Commission should provide notice and an opportunity for comment at such time as there is a meaningful mitigation proposal on the table, either

