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Commissioner Tony Clark

Commissioner Norman Bay

FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT

Docket No. ER14-1409-000

Joint Statement of Commissioner Tony Clark and Commissioner Norman Bay on ISO-New England's Forward Capacity Market Case

The ISO-New England's (ISO-NE) forward capacity market (FCM) is unique in that the auction results are subject to Commission review under the just and reasonable standard. This review process was part of a carefully negotiated settlement meant to allay stakeholder concerns over the market's design. Here, there is evidence suggesting the exercise of market power, and it is uncontroverted that the market power, if it existed, was not mitigated. In the words of ISO-NE, prices resulted from a "non-competitive auction." To the extent any portion of those prices was attributable to an exercise of market power, the auction will have imposed unwarranted costs upon consumers. Moreover, it is possible that ISO-NE may have violated its Tariff in the way it conducted the auction. On this record, we do not believe that ISO-NE has carried its burden of establishing that the auction results are just and reasonable. As a result, we would set this matter for a fast-track hearing and settlement procedures.

Under the Federal Power Act (FPA), the Commission has the primary responsibility to ensure that regional wholesale electricity markets served by regional transmission operators operate without market power.¹ Moreover, the FPA mandates that FERC deter and mitigate market power abuses for the benefit of consumers.² "Effective wholesale competition protects consumers"³ and the Commission "serves the important function of establishing a first line of defense" against anticompetitive practices.⁴ The Commission thus acts as a backstop for protecting consumers when a market produces non-competitive rates. It carries out this role, in part, by reviewing section 205 rate filings in order to ensure that they are just and reasonable.⁵ This Commission, on September 12, 2014, reiterated its understanding that "the just and reasonable standard applies to its review of ISO-NE's FCA results filing."⁶

¹ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 31,156-31,157 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

² *Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. FERC*, 471 F.3d 1053, 1058 (9th Cir. 2006) citing *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952) ("A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices."); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1017 (9th Cir. 2004) (describing "protecting consumers" as the FPA's "primary purpose").

³ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281, 125 FERC ¶ 61,071, at P 1 (2008).

⁴ *Gulf States Utils. v. Fed. Power Comm'n*, 411 U.S. 747, 758-60 (1973); *E.&J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1039 (9th Cir. 2007) (FERC approved market-based rates only after finding seller either did not have, or had adequately mitigated, market power.); *Ark. La. Gas Co.*, 453 U.S. 571, 577 n.7 (1981) (finding because the FPA and the Natural Gas Act are "substantially identical," there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes").

⁵ Order No. 719, 125 FERC ¶ 61,071, at P 1 (the Commission fulfills its statutory mandate by ensuring supplies of electric energy are provided at just, reasonable and not unduly discriminatory or preferential rates).

⁶ See *ISO-NE England Inc.*, 148 FERC ¶ 61,185, at n.19 (2014).



That the Commission would have an opportunity to ensure that the *results* of the auctions were just and reasonable - and not merely the process leading to them - was an important underpinning of New England's forward capacity market. The New England FCM was the product of a unique, but perhaps less than ideal settlement process that was a series of stakeholder compromises and tradeoffs. In order to guard against unexpected outcomes produced by the FCM settlement, ISO-NE was required to file the auction results with the Commission under section 205 of the FPA, and to carry the burden of establishing that those results were just and reasonable and not unduly discriminatory or preferential.⁷

ISO-NE and certain generators explained that such filings would "provide[] the parties with 'extraordinary protection' to voice their concerns regarding the justness and reasonableness of the auction *prices*."⁸ The Commission likewise assured market participants that "these regular filings will reveal any unanticipated problems with [the market] design" and allow "the Commission and the parties to thoroughly and regularly review and raise objections to the *prices* produced by the" forward capacity market.⁹ The suggestion that ISO-NE's FCA 8 Results Filing is merely "informational" cannot be reconciled with this unambiguous history.

Nor do we understand how the filed rate doctrine could shield inquiry into the FCA 8 results. The auction clearing prices do not "becom[e] 'finalized' [until] after the Commission approves ISO-NE's FCA results filing."¹⁰ And to now assert that the doctrine precludes an examination of auction results renders illusory the Commission's prior assurance it would undertake a "thorough review of the final auction clearing prices."¹¹

Here, ISO-NE's initial filing acknowledged that FCA 8 "prices are the result of a non-competitive auction."¹² This led the Commission to direct ISO-NE to provide information to show how it complied with sections III.13.2.3 (regarding descending clock auctions) and III.13.1.3.5.6 (regarding offers from import capacity resources) of its Tariff.¹³ In response, ISO-NE submitted information regarding the behavior it observed *during* the auction and acknowledged that "[i]n situations with limited excess supply, participants with a large amount of that supply are likely to recognize that they can be pivotal and set the auction price."¹⁴ Based on information available to the Commission,¹⁵ we cannot conclude that the ISO-NE IMM complied with the Tariff or that ISO-NE met its burden under Commission rules and regulations¹⁶ and the FPA¹⁷ to show the resulting prices are just and reasonable.¹⁸

⁷ See ISO-NE Tariff § III.13.8.2(A); 16 U.S.C. § 824d(a)-(b) (2012).

⁸ *Devon Power LLC*, 115 FERC ¶ 61,340, at P 179 (2006) (emphasis added).

⁹ *Devon Power LLC*, 117 FERC ¶ 61,133, at PP 93, 95 (2006) (emphasis added).

¹⁰ *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 30.

¹¹ *Devon Power LLC*, 115 FERC ¶ 61,340, at P 185.

¹² ER14-1409-000: ISO New England, Inc. Feb. 28, 2014 Forward Capacity Auction Results Filing (FCA 8 Results Filing), Attachment C (Testimony of D. LaPlante) at 7.

¹³ *ISO New England, Inc.*, ER14-1409-000, June 27, 2014 Letter Order re Eighth Forward Capacity Auction Results Filing at Question 1 and 5.

¹⁴ ER14-1409-000, ISO New England, Inc., July 17, 2014 Response to Letter Dated June 27, 2014 at Attachment A, Answer to Question 1, p. 3. (Supplemental Filing) [Public version].

¹⁵ See, e.g., Supplemental Filing [Non-Public Version].

¹⁶ 18 C.F.R. § 35.13(a)(1) (2014) makes clear the requirement that a public utility must file "any rate schedule change or tariff not otherwise excepted." Section 35.13(e)(3) requires the utility "to sustain the burden of proof under the Federal Power Act of establishing that the rate increase is just and reasonable and not unduly discriminatory or preferential or otherwise unlawful within the meaning of the Act."



We appreciate the concerns expressed by protesters that the stakeholders require market certainty. But the settlement giving rise to the forward capacity market “achieves this stability” by giving *Mobile-Sierra* protection to finalized auction prices, “while still allowing the Commission and the parties to thoroughly and regularly review and raise objections to the prices produced by the FCM” through ISO-NE’s section 205 auction results filings.¹⁹ The Commission would abdicate its responsibility under section 205 of the FPA if it treated the FCA 8 Results Filing as a mere informational filing and determined without further review that the prices resulting from the auction must necessarily be just and reasonable.²⁰ This alternative theory, to which we cannot subscribe, requires the Commission to ignore the clear terms of the FCM settlement which the Commission itself approved, and also requires the Commission to accept as a *fait accompli* whatever price outputs are generated from the auction. Under such a theory, not even allegations of unmitigated exercises of market power, nor referrals by a market monitor, could be taken into consideration by this Commission, no matter the harm imposed on consumers. Indeed, it is ironic that the same market rules being used to justify a finding that the FCA 8 results are just and reasonable are the subject of a unanimous Commission order under section 206 of the FPA that finds those rules may be unduly preferential or discriminatory.²¹

To be clear, we appreciate the role of capacity markets in helping to ensure system reliability. We do not object to increases in capacity prices when those prices are driven by market fundamentals. What we object to is precluding an examination of capacity prices when evidence suggests that the exercise of market power may have contributed to those prices. Information available to the Commission seriously calls into question the justness and reasonableness of the prices produced by FCA 8.

In this case, we would have directed the Commission’s Office of Enforcement to issue a public report - redacted as appropriate to protect the identity of any investigative subjects - on what it has found to date on FCA 8. While FERC regulations provide that information learned during the course of an investigation is non-public unless the Commission authorizes disclosure, we believe that disclosure is warranted here given the need for transparency and the importance of this proceeding to the New England market.

In short, given the unique circumstances of this case, we believe the Commission should have set the FCA 8 Results Filing for fast-track hearing and settlement procedures to further evaluate ISO-NE’s compliance with the Tariff and the resulting rates and to facilitate a process whereby ISO-NE, its Market Monitor, and intervenors could arrive at just and reasonable rates for capacity for the 2017-2018 delivery year.²²

¹⁷ ISO-NE confirms the FCA 8 Results Filing is being submitted pursuant to section 205 of the FPA. See FCA 8 Results Filing at p. 7.

¹⁸ We note that ISO-NE requests waiver of section 35.13 of the Commission’s regulations (FCA 8 Results Filing at p. 7), and although the Commission may routinely grant waiver of certain filing requirements, it would be unprecedented to waive the Burden of Proof requirement in section 35.13(e)(3).

¹⁹ *Devon Power LLC*, 117 FERC ¶ 61,133, at P 95.

²⁰ See *Fed. Power Comm’n v. Hope Natural Gas*, 320 U.S. 591, 602 (1944) (“Under the statutory standard of ‘just and reasonable’ it is the result reached, not the method employed which is controlling.”). In fact, there is Commission precedent for setting for hearing the justness and reasonableness of certain prices obtained during a New England capacity auction. See *ISO New England Inc.*, 137 FERC ¶ 61,056, at PP 16-29 (2011) (setting for hearing the justness and reasonableness of a dynamic de-list bid in response to allegations raising market power concerns).

²¹ See *ISO New England, Inc.*, 148 FERC ¶ 61,201, at PP 12-13 (Sept. 16, 2014).

²² *Fed. Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942) (finding the Commission must “make the pragmatic adjustments which may be called for by particular circumstances”).

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