September 16, 2014

Chairman Cheryl A. LaFleur

STATEMENT

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. ER14-1409-000

Statement of Chairman Cheryl A. LaFleur on Forward Capacity Auction 8 Results Proceeding

"The ISO-New England (ISO-NE) Forward Capacity Market (FCM) plays a vital role in ensuring reliability in New England. The FCM auction (the Forward Capacity Auction or FCA) is the mechanism that ensures future system reliability by procuring capacity resources sufficient to meet New England's resource adequacy needs.[1] It is therefore imperative that the rules governing the FCA be transparent and that auction participants not be subject to significant regulatory uncertainty or after-the-fact ratemaking. This is especially important in light of the current capacity situation in New England, where for the first time the region is facing an overall capacity shortage[2] and the FCM must procure new resources in order to satisfy New England's reliability needs.

"In an order issued today in Docket No. EL14-99-000,[3] the Commission requires ISO-NE to either revise its tariff to provide for Independent Market Monitor (IMM) review of import offers prior to each FCA or show cause why it should not be required to do so. While I am concerned that any new tariff provisions regarding the mitigation of imported resources may discourage their market participation, I agree with ordering ISO-NE to examine its tariff and ensure that mitigation provisions are just and reasonable. Under the Federal Power Act (FPA), the Commission has the authority and obligation to require prospective rate changes needed to ensure that rates remain just and reasonable.[4] As such, I support that order.

"The purpose of this statement is to highlight why I would have voted to accept the results of the eighth Forward Capacity Auction (FCA 8), which went into effect by operation of law rather than being accepted or rejected by a majority vote of the Commission.[5]

"Since the inception of the FCM, the Commission has consistently followed a clearly-defined approach to determine whether the rates produced by the Forward Capacity Auction are just and reasonable. Specifically, the Commission's determination has been based solely on its assessment of whether ISO-NE conducted the auction in accordance with its

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[1] The Installed Capacity Requirement is the "level of capacity required to meet the reliability requirements defined for the New England Control Area[.]" ISO-NE, Transmission, Markets and Services, I.2 Rules of Construction; Definitions (50.0.0), § I.2.2.

[2] ISO New England, Inc., Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, Attachment B (Testimony of S. Rourke) at 17-18 (filed Feb. 28, 2014).

[3] *ISO New England, Inc.,* 148 FERC¶ 61,201

[4] 16 U.S.C. 824e (2012).

[5] *See* Notice of Filing Taking Effect by Operation of Law, issued September 16, 2014

established, Commission-approved tariff.[6] This approach is consistent with both Commission and judicial precedent that the tariff on file, which specifies the rules and procedures by which a particular rate is calculated, is the pertinent filed "rate."[7]

"I believe that the Commission's precedent should be followed with respect to FCA 8. Importantly, no party in the FCA 8 proceeding alleges that ISO-NE failed to follow its tariff in conducting the auction,[8] and the IMM states that the FCA "was conducted in accordance with the rules and the resultant prices were calculated in accordance with the tariff."[9] Accordingly, I would accept the FCA 8 results as just and reasonable.

"An alternative interpretation of the Commission's responsibility in the review of ISO-NE's FCA auction results filing is to not only determine that the tariff rules for conducting the auction are followed, but also to independently assess whether the resulting auction rates themselves are just and reasonable. In addition to being inconsistent with

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[6] *See* e.*g.*, *ISO New England Inc.*, 127 FERC ¶ 61,040, at P 28 (2009) (accepting second FCA results filing, and holding that parties' concerns regarding the ineffectiveness of market rules were not properly raised in comments to the results filing, in which "ISO-NE was obligated solely to demonstrate that it conducted the FCA pursuant to its own market rules"); *ISO New England Inc.*, 130 FERC ¶ 61,145, at P 33 (2010) (accepting third FCA results and affirming that "ISO-NE is required to file the results of the [FCA] with the Commission and we must evaluate the filing to determine if ISO-NE conducted the third [FCA] in accordance with its market rules"); *ISO New England Inc.*, 140 FERC ¶ 61,143, at P 23 (2012) (accepting sixth FCA results and affirming that "ISO-NE is required to file the results of each FCA with the Commission, and we must evaluate the filing to determine whether ISO-NE conducted the FCA in accordance with its FCM rules"); *see also ISO New England Inc.*, 133 FERC ¶ 61,230, at PP 28, 30 (2010) (accepting fourth FCA results, subject to a compliance filing showing that ISO-NE had complied with its market rules, and finding that "ISO-NE is required to file the results of each [FCA] with us and we must evaluate the filing to determine if ISO-NE conducted the [FCA] in accordance with its market rules"). Of note, the Commission accepted the results of FCA 5, except for Entergy's de-list bid for its Vermont Yankee plant, which the Commission accepted, suspended, and set for hearing and settlement procedures in response to protests regarding the legitimacy of the de-list bid. *ISO New England Inc.*, 137 FERC ¶ 61,056, at P 1 (2011). In setting the de-list bid for hearing, the Commission cited tariff section III.13.2.5.2.5.1(a)(i), which expressly provides that de-list bids rejected for reliability reasons "are subject to review and approval by the Commission pursuant to the 'just and reasonable' standard of Section 205 of the Federal Power Act." *Id.* P 25. Thus, the de-list bid at issue was directly subject to Commission review, not tariff-imposed mitigation measures. As a result, the case is distinguishable from a proposal to set the FCA 8 auction results for hearing.

[7] *See*, *e.g.*, *Public Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (affirming that the Commission "need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule'" and that the "formula itself is the rate" (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990) and *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,544-45 (1994)).

[8] While some parties allege that ISO-NE improperly adjusted the post-auction price for the NEMA/Boston capacity zone under the administrative pricing rules, those allegations do not implicate the issue in dispute here: whether the conduct of the auction itself was consistent with the ISO-NE tariff.

[9] ISO New England, Inc., Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, Attachment C (Testimony of D. LaPlante) at 4 (filed Feb. 28, 2014). I also note that ISO-NE informed all parties prior to FCA 8 that overall capacity was tight and that as a result, administrative pricing was likely to occur under the rules of the tariff, and indeed it did occur. ISO New England, Inc., Exigent Circumstances Filing of Revisions to Forward Capacity Market Rules, Docket No. ER14-463-000 (filed Nov. 25, 2013). The IMM confirmed this result, noting that the FCA 8 results in the NEMA/Boston capacity zone were "non-competitive," indicating that the level of participation in the auction was inadequate to satisfy the Installed Capacity Requirement, thereby triggering the "Insufficient Competition" rules under the tariff. ISO New England, Inc., Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, Attachment C (Testimony of D. LaPlante) at 7 (filed Feb. 28, 2014).

Commission precedent in our analysis of this proceeding, I believe that this approach is flawed as a matter of both law and policy.

"The FCA 8 rates included in ISO-NE's informational filing are the result of ISO-NE's implementation of the auction rules included in its tariff at the time the auction was conducted. Under the filed rate doctrine, a regulated entity may not charge, or be required by the Commission to charge, a rate different from the one on file with the Commission.[10] However, under the alternative approach that would evaluate the resulting *rates*, rather than compliance with the tariff provisions that produced those rates, the only way to achieve different final rates would be to – implicitly or explicitly – retroactively revise the Commission-approved rules upon which ISO-NE conducted the auction and require ISO-NE to charge a rate not on file with the Commission. I believe that the alternative approach would constitute retroactive ratemaking in violation of the filed rate doctrine, which prohibits precisely that type of after-the-fact revision of the auction rules on file.

"The alternative approach is also flawed as a matter of Commission policy. First, it creates a disincentive for auction participation, as all parties could follow the auction rules outlined in a Commission-approved tariff, yet the resulting rate could nonetheless be found unjust and unreasonable. What will the expectations of auction participants be if the rules for auction participation can be changed after the auction is conducted? A regime in which auction rules can be changed after-the-fact would introduce significant regulatory uncertainty and risk.

"In this case, I believe that respecting the established expectations of market participants as to the operation of the auction will be critical to the future ability of the FCM to attract resources needed for reliability. If market outcomes are accepted during times of excess capacity when the auction clears at the price floor,[11] but the Commission-approved auction rules are subject to retroactive revision when capacity is tight and market capacity prices are high, the long-term viability of the market is undermined.

"Moreover, even if the Commission had authority to retroactively change the tariff rules under which the auction was conducted, the alternative approach begs the question of *how* to set the auction rates. Upon rejecting the existing, Commission-approved auction rules, the alternative approach offers no guidance for establishing a just and reasonable replacement rate. This would be true whether the new rate were to be established by ISO-NE, the Commission, or a judge, because the only way to obtain a different rate is to change the underlying auction rules.

"Even if it were to be determined that parties exercised market power in a particular proceeding, our precedent is clear on how that market power may be addressed: through prospective, tariff-imposed mitigation measures.[12] For example, where the improper exercise of market power has been alleged, but the relevant mitigation measures were

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[10] *See, e.g.*, *Mont.-Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes…."); *Western Resources, Inc. v. FERC*, 72 F.3d 147, 149 (D.C. Cir. 1995) (noting that the filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority) (*citing Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)); *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (recognizing that the filed rate doctrine precludes a rate adjustment taking place prior to a section 205 filing unless the parties are on notice that a past rate may be adjusted).

[11] With one limited exception in the NEMA/Boston capacity zone for FCA 7, the prior seven FCAs cleared at the administrative price floor. ISO New England, Inc., Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, Attachment B (Testimony of S. Rourke) at 7 (filed Feb. 28, 2014).

[12] As noted in *ISO New England, Inc.,* 148 FERC¶ 61,201, ISO-NE and the IMM made a referral to the Commission's Office of Enforcement regarding bidding behavior in FCA 8. If there were to be a finding of market manipulation, as opposed to the exercise of market power, the Commission would employ its anti-manipulation rules and sanctions under 18 C.F.R. § 1c.1-1c.2 (2014), which include disgorgement, to address the unlawful behavior.

deemed sufficient and properly followed, the Commission has declined to alter the resulting rates.[13] In those circumstances, the Commission has acknowledged the "supremacy of the tariff," stating that "the prices created by operation of [Commission-approved] tariff provisions must govern."[14]

"Where the Commission has determined that existing market power mitigation measures are unjust and unreasonable for failing to sufficiently protect against the exercise of market power, Commission precedent dictates that the remedy be prospective. In such cases, the Commission has directed tariff changes going forward but refused to rerun the market or recalculate prices as long as the market mitigation provisions then in force were followed.[15] The Commission has explained that it "does not have authority to order retroactive relief unless a party violates its tariff by charging a rate other than the filed rate, parties agree to such relief, or when parties have notice that a rate is tentative and may be later adjusted with retroactive effect."[16] None of those circumstances is present here.

"The issues presented in the FCA 8 results proceeding are difficult ones, as demonstrated by the unusual circumstances of the FCA 8 rates taking effect by operation of law. As reflected in my vote in the EL14-99-000 docket, I am always open to consideration of potential revisions to mitigation rules. However, after consideration of the requirements of the Federal Power Act, court and Commission precedent, and the factual record, I would have voted to certify the outcome of FCA 8 as just and reasonable. I believe that the resulting rates, which send clear signals that additional capacity is needed in New England, are both lawful and necessary to ensure reliability."

[13] *See, e.g., New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,169 (2010), *order on reh'g*, 139 FERC 61,001 (2012); *Maryland Pub. Serv. Comm'n. v. FERC,* 124 FERC ¶ 61,276 (2008) (*MPSC I*), *reh'g denied*, 127 FERC ¶ 61,274 (2009), *petition for review denied*, 632 F.3d 1283 (D.C. Cir. 2011); *NSTAR Elec. and Gas Corp. v. Sithe Edgar LLC*, 101 FERC ¶ 61064 (2002); *Maine Pub. Util. Comm'n v. ISO New England Inc.*, 97 FERC ¶ 61,322 (2001), *reh'g denied*, 99 FERC ¶ 61,029 (2002). *Cf.*, *ISO New England Inc.*, 123 FERC ¶ 61,290 (2008), *order on reh'g*, 130 ¶ FERC 61,235 (2010).

[14] *MPSC I*, 127 FERC ¶ 61,274 at P 35.

[15] *See*, *e.g.*, *Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169, at PP 49, 51, *reh'g denied*, 125 FERC ¶ 61,340 (2008) (directing elimination of tariff provisions that exempted certain generating facilities from mitigation but rejecting requests for retroactive relief in the absence of a tariff violation).

[16] *Id.* P 51 (quoting *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 967-969 (D.C. Cir. 2003)).

Document Content(s)