

148 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

ISO New England Inc.

Docket No. EL14-99-000

ORDER TO SHOW CAUSE

(Issued September 16, 2014)

1. In this order, pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 209(a) of the Commission's Rules of Practice and Procedure,² the Commission is requiring ISO New England Inc. (ISO-NE) to either revise its Transmission, Markets and Services Tariff (Tariff) to provide for the review and potential mitigation of importers' offers prior to each annual Forward Capacity Auction (auction or FCA) or show cause why it should not be required to do so.

I. Background

2. Since 2008, ISO-NE has administered the Forward Capacity Market (FCM), through which resources compete in an annual FCA to provide capacity for the delivery year three years in the future. ISO-NE first determines the amount of capacity that ISO-NE needs to procure in an FCA, the net Installed Capacity Requirement.³ The FCA is a descending clock auction. Resources submit "de-list" bids reflecting the price at which they are willing to supply capacity (i.e., each resource indicates its intention to de-list, or leave the capacity market for that year, if it does not receive at least its de-list

¹ 16 U.S.C. § 824e (2012).

² 18 C.F.R. § 385.209(a) (2014).

³ The Installed Capacity Requirement is the "level of capacity required to meet the reliability requirements defined for the New England Control Area[.]" Tariff section I.2.2. The net Installed Capacity Requirement is the Installed Capacity Requirement minus the Hydro-Quebec Interconnection Capability Credit. *See, e.g.*, Tariff section III.13.2.2.

bid price). In each auction round, as the price goes lower, those resources whose de-list bids are higher than the price in that round exit the auction, until the amount of capacity remaining in the auction is equal to the net Installed Capacity Requirement. At that point, the auction concludes, and all resources remaining in the auction receive capacity obligations at the auction clearing price. Thus, each FCA determines the capacity obligations of each resource and the capacity price that each resource will receive for the relevant delivery year.⁴ The Tariff requires ISO-NE to file the results of each FCA with the Commission under section 205 of the FPA.⁵

3. ISO-NE conducted the eighth FCA (FCA 8) to procure capacity for the June 1, 2017 through May 31, 2018 Capacity Commitment Period on February 3, 2014. On February 28, 2014, pursuant to its Tariff and section 205 of the FPA,⁶ ISO-NE filed the results of FCA 8 with the Commission in Docket No. ER14-1409-000. It submitted an amendment to that filing on July 17, 2014 in response to a letter issued on June 27, 2014 by Commission staff notifying ISO-NE that its initial filing was deficient.⁷

4. As described in ISO-NE's February 28, 2014 filing, while each FCA to date has opened with supply in excess of the system-wide net Installed Capacity Requirement,⁸ an abrupt change in the supply and demand balance in New England just prior to FCA 8 resulted in a capacity shortage. ISO-NE stated that 3,135 MW of capacity, including 1,535 MW from the Brayton Point station, sought to retire from the capacity market prior to FCA 8, with many units deciding to retire in the fall of 2013, well after the

⁴ See generally Tariff, sections III.13.2 *et seq.* Under some circumstances relating primarily to the sufficiency of competition within the auction, the prices paid to cleared resources may be administratively determined by ISO-NE. See Tariff sections III.13.2.8.2, III.13.2.7.9 and III.13.2.7.1.

⁵ Tariff section III.13.2.8.2.

⁶ 16 U.S.C. § 824d (2012).

⁷ See July 17, 2014 response to deficiency letter, Docket No. ER14-1409-000, public version (July 17 Letter). Both filings will be referred to collectively as FCA 8 Results.

⁸ For FCA 8, the New England region was modeled using four Capacity Zones: Northeast Massachusetts/Boston (NEMA/Boston), Connecticut, Maine, and Rest-of-Pool.

qualification deadline for new resources seeking to participate in FCA 8.⁹ Thus, heading into FCA 8, supply shifted from an expected surplus of over 2,000 MWs to a deficiency of over 1,000 MWs, compared to the net Installed Capacity Requirement.¹⁰ ISO-NE stated that the deficiency, coupled with a general decline in the number of new resources seeking to participate in FCA 8, resulted in FCA 8 prices being set by the administrative pricing rules in the Tariff, namely, the Insufficient Competition and Capacity Carry Forward rules.¹¹

5. In its July 17, 2014 amendment to its initial filing, ISO-NE noted, *inter alia*, 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. Indeed, participants [in FCA 8] may have already been aware of the situation due to the publicly available information provided prior to the auction. In any event, after each round of a descending clock auction, the amount of excess supply is revealed to auction

⁹ Transmittal, Docket No. ER14-1409-000, Attachment B, Testimony of Stephen J. Rourke (Rourke Testimony) at 6.

¹⁰ Mr. Rourke notes that approximately 3,000 MW of generation internal to New England (604 MW from Vermont Yankee, 1,535 MW from the Brayton Point Station, 342 MW from the Norwalk Harbor Station and 554 MW of demand response resources) sought to exit the market between August and October 2013. Rourke Testimony at 7.

¹¹ The Insufficient Competition Rule addresses the situation where there are less existing resources than the net Installed Capacity Requirement and not enough qualified new resources to assure adequate competition in the auction. ISO-NE noted that, for FCA 8, there was Insufficient Competition system-wide. Thus, under section III.13.2.8.2 of the Tariff, existing resources will receive the lower of: (1) the price at which the auction cleared; or (2) the administrative price in the Tariff, which for FCA 8, is \$7.025/kW-month. Therefore, existing resources in the Maine, Connecticut and Rest-of-Pool Capacity Zones will be paid the administrative price of \$7.025/kW-month. In the NEMA/Boston Capacity Zone, the price was determined in part by the Carry Forward Rule (section III.13.2.7.9.1 of the Tariff), another administrative pricing rule which addresses the situation where a large resource met a zonal reliability need, but eliminated any need for new resources in the subsequent auction. The Carry Forward Rule resets the clearing price administratively when new additional capacity would have been needed and consequently would have set the clearing price, but did not because of an excess amount of additional new capacity procured in the prior auction (FCA 7 in this case). *See* Transmittal, Docket No. ER14-1409-000 at 4-5.

participants,” and thus “if there are potential pivotal suppliers, the disclosure of [limited] excess supply at the end of the round could let participants know exactly how much new capacity they would have to remove from the auction to end it and set the price.”¹²

6. ISO-NE additionally addressed steps that it takes prior to an auction to ensure that resources cannot exercise market power. ISO-NE stated that it and the Internal Market Monitor (IMM) conduct two types of review of de-list bids prior to an auction. First, the IMM reviews Permanent and Static De-List Bids from existing resources to determine whether the bids are consistent with the resource’s net risk-adjusted going forward and opportunity costs.¹³ ISO-NE notes that if the IMM determines that the bid is consistent with the resource’s costs, the bid is entered into the auction. However, if the IMM determines that the bid is inconsistent with the resource’s costs, the bid is rejected. Second, ISO-NE stated that it reviews each Permanent De-List Bid, Static De-List Bid, and Export Bid prior to an auction to determine if the capacity associated with the bids is needed for reliability during the Capacity Commitment Period associated with the auction. In addition, ISO-NE explained that, prior to an auction, the IMM reviews requests by new resources to submit offers in an auction below the applicable Offer Review Trigger Price to determine if the offer is consistent with the IMM’s capacity price estimate. Further, while ISO-NE reviews Non-Price Retirement Requests prior to an auction to determine if the units are needed for reliability,¹⁴ ISO-NE noted that the IMM does not review Non-Price Retirement Requests on their merits.

7. ISO-NE also stated that, during an auction, it reviews each Dynamic De-List Bid (i.e., a bid that is submitted at a price below \$1.00/kW-month) to determine if the capacity associated with each of those bids is needed for reliability. ISO-NE noted that the IMM does not review Dynamic De-List Bids during the auction for consistency with each resource’s costs.

8. Further, ISO-NE explained that its current Tariff provisions provide for only limited review of the offers of import resources. For example, ISO-NE stated that, under section III.13.1.3.5.6 of the Tariff, the IMM “shall review each offer from Existing Import Capacity Resources and New Import Capacity Resources” and “[a]n offer from an Existing Import Capacity Resource or a New Import Capacity Resource shall be rejected if the Internal Market Monitor determines that the bid may be an attempt to manipulate

¹² July 17 Letter, Answer to Question 1, at pp. 3, 5.

¹³ Tariff Section III.13.1.2.3.2.

¹⁴ Rourke Testimony at 6 (citing Tariff section III.13.2.5.2.5).

the Forward Capacity Auction, and the matter will be referred to the Commission[.]”¹⁵ ISO-NE noted, however, that this review takes place as part of the qualification process, and it only involves ensuring that the behavior of import resources was consistent with their actions in previous FCAs, rather than evaluating the bids of import resources for consistency with their net risk-adjusted going forward costs, as is done for the offers of other resources.¹⁶ ISO-NE stated that the IMM does not have the authority to reject offers by import resources during the auction.¹⁷

II. Discussion

9. ISO-NE’s filing of the results of FCA 8 became effective by operation of law.¹⁸ However, ISO-NE’s Tariff may be insufficient to ensure just and reasonable rates, given the changing balance of supply and demand in New England.

10. Unlike the situation at the initiation of the FCM in 2008, ISO-NE is currently facing the possibility that future capacity auctions may begin with a very small surplus, if any, above the net Installed Capacity Requirement. These tight capacity conditions may allow suppliers who are aware of their pivotal role in the market to exercise market power. Under such conditions, we are concerned that the market mitigation provisions currently contained in the Tariff may not protect customers against unjust and unreasonable prices for capacity. Specifically, although the Commission previously determined that most imports should be treated like existing internal resources for

¹⁵ Tariff section III.13.1.3.5.6.

¹⁶ Tariff sections III.13.1.2.3.2.1, and III.13.1.2.3.2.1.1.1.

¹⁷ July 17 Letter, Answer to Question 4, at p. 8 (“[s]ection III.13.1.3.5.6 of the Tariff relates to the IMM review of qualification offers from import resources. Qualification reviews are conducted prior to the auction, not during the auction; consequently, this section does not provide the IMM authority to reject offers by import resources during the auction”).

¹⁸ As noted above, ISO-NE made its original filing in Docket No. ER14-1409-000 on February 28, 2014, and amended that filing by letter dated July 17, 2014. Thus, as of the 61st day after that amendment (September 16, 2014), the filing in Docket No. ER14-1409-000 became effective by operation of law. Commissioner Bay and Commissioner Clark objected to allowing the results of FCA 8 to become effective. *See* joint statement of Commissioners Bay and Clark in Docket No. ER14-1409.

mitigation purposes,¹⁹ the tariff does not currently require the IMM to ensure that the de-list bids of importers are consistent with their net risk-adjusted going forward and opportunity costs,²⁰ as it does with regard to other existing resources.²¹ We are concerned that this may create an opportunity for the exercise of market power by importers and otherwise may result in preferential or unduly discriminatory treatment favoring importers over other capacity resources.

11. Following a non-public referral from ISO-NE and its IMM shortly after the February 3, 2014 FCA 8 auction, the Commission's Office of Enforcement began a non-public investigation into the bidding behavior in FCA 8. Although Brayton Point was not the focus of the referral, the Office of Enforcement conducted a limited review of Brayton Point's bidding behavior to determine whether investigation of Brayton Point was warranted. Following the IMM's rejection of Brayton Point's Static De-List Bid, the owners of Brayton Point submitted a Non-Price Retirement Request, permanently removing Brayton Point from the FCM. OE staff found credible justifications for the owners' retirement decision and elected not to widen its investigation to include Brayton Point. However, Commission staff continues to investigate the behavior that was the subject of the non-public referral.

12. Therefore, pursuant to section 206 of the FPA, we require ISO-NE to, within 30 days of the date of this order, either submit Tariff revisions that provide for the review and potential mitigation of importers' offers in a manner similar to the manner in which other, existing resources are reviewed and mitigated, or show cause why it should not be required to do so.

¹⁹ *ISO New England Inc.*, 135 FERC ¶ 61,209 at P 191 (2011) ("In light of the difficulty in determining the resource or resources that support imports, we conclude that it is reasonable to treat most imports like existing internal resources for mitigation purposes").

²⁰ In ISO-NE's July 17, 2014 letter, it explains that, although section III.13.1.3.5.6 of the Tariff discusses IMM review of the offers of import resources, this section refers to the review of qualification offers of import resources. During the qualification review, the IMM determines if the behavior of import resources was consistent with their actions in previous FCAs, for example, by comparing the amount of capacity qualified for the current FCA to the amount of capacity qualified from the same resources for previous auctions.

²¹ See Tariff section III.13.1.2.3.2 *et seq.*

13. In cases where, as here, the Commission institutes a proceeding on its own motion under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date. Section 206(b) permits the Commission to order refunds for a 15-month period following the refund effective date. Consistent with our general policy of providing maximum protection to customers,²² we will set the refund effective date at the earliest date possible in this docket, i.e., the date of publication by the Commission of notice of its intention to initiate such proceeding in the Federal Register.

14. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Assuming that ISO-NE files tariff revisions, we estimate that we would be able to issue our decision within approximately three months of the filing of tariff revisions.

The Commission orders:

(A) Pursuant to section 206 of the Federal Power Act, within 30 days of the date of this order, ISO-NE must either submit Tariff revisions providing for the review and potential mitigation of importers' offers prior to each annual auction or show cause why it should not be required to do so, as discussed in the body of this order.

(B) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of this section 206 proceeding in Docket No. EL14-99-000.

(C) The refund effective date established pursuant to section 206(b) of the FPA will be the date of publication in the Federal Register of the notice discussed in Ordering Paragraph (B) above.

(D) Any interested person wishing to become a party to this proceeding (Docket No. EL14-99-000) must file a notice of intervention or motion to intervene, as appropriate, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214) within 21 days of the date of issuance of this order. The Commission encourages electronic submission of interventions in lieu of paper using the

²² See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

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“eFiling” link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and three copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

By the Commission. Chairman LaFleur is concurring with a separate statement attached.
Commissioners Clark and Bay are concurring with a joint separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc.

Docket No. EL14-99-000

(Issued September 16, 2014)

LaFLEUR, Chairman, *concurring*:

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 shortage² and the FCM must procure new resources in order to satisfy New England's reliability needs.

In today's order, 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.³ As such, I support today's order.

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 16 U.S.C. 824e (2012).

I write separately primarily 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.⁴

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 established, Commission-approved tariff.⁵ This approach is

⁴ See Notice of Filing Taking Effect by Operation of Law, issued September 16, 2014.

⁵ 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.

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.”⁶

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,⁷ 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.”⁸ 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

⁶ 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)).

⁷ 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.

⁸ 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).

inconsistent with 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.⁹ 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,¹⁰ but the Commission-

⁹ 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).

¹⁰ 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.,

(continued...)

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.¹¹ For example, where the improper exercise of market power has been alleged, but the relevant mitigation measures were deemed sufficient and properly followed, the Commission has declined to alter the resulting rates.¹² In those circumstances, the Commission has acknowledged the

Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, Attachment B (Testimony of S. Rourke) at 7 (filed Feb. 28, 2014).

¹¹ 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.

¹² 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).

“supremacy of the tariff,” stating that “the prices created by operation of [Commission-approved] tariff provisions must govern.”¹³

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.¹⁴ 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.”¹⁵ 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 this proceeding, 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.

Accordingly, I respectfully concur.

Cheryl A. LaFleur
Chairman

¹³ *MPSC I*, 127 FERC ¶ 61,274 at P 35.

¹⁴ 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).

¹⁵ *Id.* P 51 (quoting *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 967-969 (D.C. Cir. 2003)).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket No. ER14-99-000

(Issued September 16, 2014)

CLARK, Commissioner and BAY, Commissioner, *concurring*:

In today's order, we recognize that the rules in place for ISO New England's forward capacity market may lead to unjust and unreasonable results and could confer an undue preference in favor of importers. We fully agree with the Commission's decision to examine these potential shortcomings and to address them, if necessary, for future auctions. As explained in our separate statement issued in Docket No. ER14-1409, we respectfully disagree with our colleagues' willingness to certify the results of the eighth Forward Capacity Auction as just and reasonable.

Tony Clark
Commissioner

Norman Bay
Commissioner

Document Content(s)

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