UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell and Joseph T. Kelliher.

New England Power Pool — Docket Nos. ER04-335-001, ER04-335-002

ORDER ON REHEARING AND
ACCEPTING COMPLIANCE FILING

(Issued May 28, 2004)

I. Introduction

1. In this order, we grant in part and deny in part requests for rehearing of our order conditionally accepting changes to New England Power Pool (NEPOOL) Market Rule 1.[1] We also accept a compliance filing made in response to that order. This order benefits customers by clarifying the scope of the February 27 Order.

II. Background

2. On December 23, 2003, NEPOOL filed changes to NEPOOL Market Rule 1-NEPOOL Standard Market Design. The proposed changes to Market Rule 1 added a new section 10 entitled, “Gap RFPs for Reliability Purposes.” Specifically, the proposed changes to Market Rule 1 would apply whenever ISO New England, Inc. (ISO-NE) determines the need for requests for proposals (RFPs) to address near-term reliability concerns while long-term solutions are being implemented. New section 10 would allow ISO-NE to issue Gap RFPs and enter into contracts awarded pursuant to the Gap RFP program,[2] with informational filings at the Commission for both the Gap RFP and the resulting contracts.

3. The February 27 Order conditionally accepted NEPOOL's proposed changes for filing. In pertinent part, it determined as follows:

> The Commission is concerned that as filed the proposed language is very broad and could lead to ISO-NE becoming the entity that contracts for new supplies whenever new resources are needed to meet the reliability needs of

[1] New England Power Pool, 106 FERC ¶ 61,190 (2004) (February 27 Order).

[2] Id. at P 2-4.

> the region. Additionally, these changes would occur without Commission review, since all filings would be made as informational filings that do not require prior Commission approval. We are currently examining the issue of whether [independent system operators] and [regional transmission organizations] should be responsible for procuring new supplies. Consequently, while we are examining this issue, we are unwilling to authorize such a broad program for ISO-NE to acquire resources. Rather, we believe the proposed authority to obtain necessary resources must be reviewed by the Commission on a case by case basis, rather than left to the discretion of ISO-NE after consultation with the NEPOOL Reliability Committee. Therefore, we will condition our acceptance on revisions to the language of new section 10 to provide that ISO-NE will obtain Commission approval to issue a Gap RFP at least 60 days prior to the date it intends to issue the RFP. For the same reasons, and consistent with section 205 of the Federal Power Act, 16 U.S.C. § 824d (2000), we will also require the successful bidder to file for approval of the rates to be charged under the supply arrangement to the extent that such contracts are for jurisdictional services.[[3]]

4. Timely requests for rehearing of the February 27 Order were filed by PSEG Energy Resources & Trade LLC (PSEG), and NEPOOL and ISO-NE (filing jointly). On April 13, 2004, NEPOOL and ISO-NE filed an answer to PSEG's request for rehearing. On April 27, 2004, PSEG filed an answer to NEPOOL and ISO-NE's answer. PSEG argues that NEPOOL and ISO-NE's answer should be rejected as impermissible. Alternatively, if the Commission permits NEPOOL and ISO-NE's answer, then PSEG requests that its answer be permitted.[4] On May 3, 2004, the Connecticut Department of Public Utility Control filed a letter expressing support for the results of the Southwest Connecticut RFP and the February 27 Order.

5. In its request for rehearing, PSEG argues that the Commission erred by not imposing additional safeguards to ensure that the Gap RFP program does not exceed its appropriate scope and that the program is conducted fairly. First, PSEG argues that the Commission should specify that the need for the Gap RFP would be based on the same reliability criteria as any Locational Installed Capacity (LICAP) program that is used to

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[3] Id. at P 8 (footnote omitted).

[4] We will deny NEPOOL and ISO-NE's answer and PSEG's answer, because our Rules of Practice and Procedure prohibit answers to requests for rehearing and similarly disfavor answers to answers. See 18 C.F.R. §§ 385.213(a)(2), 385.713(d) (2003).

determine locational purchase requirements.[5] PSEG argues that the implementation of the Gap RFP mechanism and the LICAP mechanism must be consistent and applied in a coordinated manner. PSEG further argues that ISO-NE should be required to implement a definite sunset date for the Gap RFP program and any related Gap RFP contracts, based on the implementation of the LICAP program.

6. Second, PSEG argues that the Commission should require ISO-NE, following the acceptance of input through a stakeholder process, to modify its tariff to explain in detail how the Gap RFP process will be conducted. PSEG proposes criteria for the selection process. PSEG also contends that the current selection process gives ISO-NE too much discretion.

7. Third, PSEG argues that the Commission should eliminate the February 27 Order's requirement that the winning bidder obtain prior Commission approval of any jurisdictional rates and, instead, require that ISO-NE demonstrate that the winning bid met PSEG's suggested RFP requirements and that the RFP selection criteria were properly applied. PSEG asserts that bidders with market-based rate authority should be able to enter into jurisdictional contracts without receiving prior Commission approval of the rates. According to PSEG, because the Commission has already determined that a seller with market-based rate authority does not possess the ability to exercise market power, the rates determined through a properly designed, competitive RFP process should be deemed just and reasonable. Further, with respect to the Gap RFP process utilized by ISO-NE for Southwest Connecticut,[6] PSEG argues that ISO-NE's tariff requires that the Gap RFP process be "competitive;" if that cannot be demonstrated based on the record, the resultant rates under the Gap RFP contracts will not be in conformance with the filed rate and would not meet the general standards for market-based rates.

8. NEPOOL and ISO-NE request clarification of the February 27 Order with respect to the implementation of the required changes to section 10 of Market Rule 1. First, they request clarification that the Commission did not intend to require the filing either of "any contracts with municipally-owned entities"[7] or of contracts that relate to load

[5] PSEG notes that, on March 1, 2004, in Docket No. ER03-563-030, ISO-NE filed a proposed long-term LICAP mechanism for New England. The Commission will address ISO-NE's LICAP proposal in an order issued in that proceeding.

[6] When NEPOOL filed the Gap RFP proposal, ISO-NE had already issued the Southwest Connecticut RFP and the contracts would be for reliability needs this summer. Thus, the Commission allowed that process to go forward. February 27 Order, 106 FERC ¶ 61,190 at P 10.

[7] We interpret "any contracts with municipally-owned entities," to refer to contracts in which municipally-owned entities are the winning sellers/bidders.

response and other forms of conservation and load management. Second, NEPOOL and ISO-NE request clarification whether any filings that are to be made should be submitted on a confidential basis, or whether they should be publicly available.

9. On March 29, 2004, in Docket No. ER04-335-002, NEPOOL submitted a compliance filing pursuant to the February 27 Order. Notice of NEPOOL's compliance filing was published in the Federal Register,[8] with motions to intervene and protests due on or before April 19, 2004. None was filed.

III. Discussion

A. Rehearing

10. PSEG has belatedly raised issues concerning whether the Gap RFP and LICAP programs should have consistent reliability criteria, its suggested criteria for the Gap RFP process and its concerns about the Southwest Connecticut RFP. PSEG never protested the original filing. In fact, PSEG filed comments urging the Commission to accept the original filing.[9] Thus, PSEG had an opportunity to raise, but failed to raise, these issues prior to the Commission's February 27 Order. Absent compelling reasons, we typically do not consider arguments raised for the first time on rehearing.[10] Accordingly, we need not address these arguments.

11. While we need not consider PSEG's arguments, we find that, even if they were properly before us, they are unpersuasive. Regarding PSEG's concerns about the process and criteria for future Gap RFPs, PSEG is not aggrieved by the February 27 Order. As the order determined, ISO-NE would have to file for approval of future Gap RFP proposals prior to their issuance, which will allow for parties to comment on, and the Commission to impose conditions on, such RFPs before they are issued. Further, imposing conditions generically would be inconsistent with the Commission's decision to review future Gap RFPs case-by-case. The fact that PSEG believes that its proposed selection criteria would be an improvement upon the ISO-NE's selection criteria also does not support requiring ISO-NE to adopt PSEG's suggestions. In the February 27 Order, the Commission found that the proposed tariff provisions, as modified, were acceptable in light of the Commission's ability to review individual Gap RFPs prior to issuance and its ability to review jurisdictional contracts resulting from any Gap RFP. With regard to the Southwest Connecticut RFP, which seeks 300 MW of quick-start

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[8] 69 Fed. Reg. 18,895 (2004).

[9] February 27 Order, 106 FERC ¶ 61,190 at P 6.

[10] See, e.g., Carolina Power & Light Co., 106 FERC ¶ 61,141 at P 15 & n.7 (2004), and the cases cited therein.

capacity in Southwest Connecticut for the summer of 2004, it would be unduly disruptive to that process and would adversely affect reliability in that area to revisit the selection criteria at this late stage of that process -- particularly where the concerns are belatedly raised.

12. We also deny PSEG's request to replace the February 27 Order's requirement that the winning bidder make a filing seeking Commission approval of any contract for jurisdictional services with a requirement that ISO-NE demonstrate that it has met the criteria suggested by PSEG. In this regard, PSEG argues that the rates of a public utility with pre-existing market-based rate authorization are presumptively just and reasonable because the Commission has already determined that such utility lacks market power. The Commission has held that long-term power sales agreements entered into pursuant to previously granted market-based rate tariffs are not traditional FPA section 205 filings but are submitted for information purposes only. That is, the filing of such agreements does not serve as a vehicle to challenge the justness and reasonableness of either the agreements themselves or the underlying market-based rate authority.[11] However, the Gap RFP program is a new and unique program. The contracts resulting from future Gap RFPs would not serve as a vehicle to revisit previously granted market-based rate authority, but they would instead provide a vehicle to review matters such as whether the selection of the winning bidder/seller in the Gap RFP was in accordance with the authorized RFP process or whether the resulting contract is consistent with the Gap RFP. Therefore, our review of any jurisdictional contracts resulting from any future Gap RFPs, as well as of the Gap RFPs themselves, under section 205 of the FPA, will ensure that any rates, terms and conditions are reasonable. Moreover, as the February 27 Order stated, the Commission is still examining the issue of whether ISOs and RTOs should be responsible for procuring new supplies, and we will have opportunities to revisit this topic again as our thinking evolves.[12]

13. With respect to NEPOOL and ISO-NE's request for clarification concerning what contracts should be filed, we clarify that where municipally-owned entities are the winning sellers/bidders, they need not file such contracts, because they are exempt from regulation as public utilities under section 201(f) of the FPA.[13] Consistent with our practice of not requiring individual contracts under load response programs to be filed, we also will not require winning bidders for conservation and load management to file

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[11] See, e.g., GWF Energy LLC and Southern Co. Services, Inc., 97 FERC ¶ 61,297 at 62,390-91 (2001), reh'g denied, 98 FERC ¶ 61,330 at 62,390-91 (2002).

[12] The role of the ISO in the procurement of power is a topic more generally raised in Docket No. ER03-563-030, mentioned supra note 5.

[13] 16 U.S.C. § 824(f) (2000).

such contracts.[14] With respect to the issue of confidentiality, the FPA as well as the Commission's precedent require contracts for jurisdictional services to be filed in non-confidential, unredacted form.[15] Therefore, such contracts must be filed in non-confidential, unredacted form.

B. NEPOOL's Compliance Filing

14. In the compliance filing, NEPOOL has revised section 10 of Market Rule 1 to provide for broader Commission oversight of the Gap RFP and resulting contracts in accordance with the Commission's directive in the February 27 Order. Accordingly, we will accept the compliance filing, as ordered below.

The Commission orders:

(A) The requests for rehearing of the February 27 Order are hereby granted in part and denied part, as discussed in the body of this order.

(B) NEPOOL's compliance filing is hereby accepted, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.

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[14] See generally PJM Interconnection, L.L.C., 99 FERC ¶ 61,139 (2002).

[15] 16 U.S.C. § 824d (2000); see, e.g., ISO New England, Inc., 103 FERC ¶ 61,018 at P 7 (2003).