

110 FERC ¶ 61,040

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ANP Funding I, LLC

Docket No. EL05-39-000

v.

ISO New England, Inc. and
New England Power Pool

ORDER ON COMPLAINT

(Issued January 21, 2005)

1. In this order, the Commission grants, in part, and denies, in part, a complaint filed by ANP Funding I, LLC (ANP) on revisions to New England Power Pool's (NEPOOL) Operating Procedures (OPs) regarding forecasted extreme weather conditions. ANP contends that the revisions to the OPs change the NEPOOL tariff and, as such, should have been filed under section 205(d) of the Federal Power Act (FPA).¹ ANP also contends that there is no guarantee that generators will be compensated for the costs and risks they incur as a result of the revisions. The Commission finds that the revisions to the OPs must be filed in the NEPOOL tariff, pursuant to section 205, but, because this represents a departure from a prior Commission ruling, and because the Commission is also concerned that NEPOOL and ISO-New England (ISO-NE) have sufficient procedures to ensure reliability this winter, we will allow the revised OPs to remain in effect until the date the Commission acts on a subsequent filing of the revised OPs under section 205. We direct ISO-NE to file the revisions to the OPs within five business days of the date of this order. Once the revised OPs are filed, the Commission will act expeditiously and suspend the revisions to the OPs for a nominal period and waive the 60-day notice period to allow them to go into effect, subject to refund. This decision will help ensure reliable energy delivery at just and reasonable rates in the New England region.

¹ Complaint at 2-3, *citing* section 205(d) of the FPA, 16 U.S.C. § 824d(d) (2000).

I. Background

2. ANP, a power marketer, has ownership interests in certain companies that own power generation projects, including ANP Bellingham Energy Company, LLC (ANP Bellingham), ANP Blackstone Energy Company, LLC (ANP Blackstone) and Milford Power Limited Partnership (Milford). These companies own and operate plants in NEPOOL and are authorized to sell power at market-based rates.² ANP Bellingham's plant is an approximately 550 MW gas-fired, combined cycle electrical power generating facility in Bellingham, Massachusetts. ANP Blackstone's plant is an approximately 550 MW gas-fired, combined cycle electrical power generating facility in Blackstone, Massachusetts. Milford's plant is a gas-fired, combined cycle electrical generating facility near Milford, Massachusetts.

II. The Complaint

3. On December 6, 2004, ANP filed a complaint with the Commission regarding changes NEPOOL adopted to its OPs. ANP states that NEPOOL has adopted a new operating procedure (OP20) and revised an existing operating procedure (OP5). ANP explains that OP20 is intended to address market conditions during extreme cold weather forecasts. Under OP20, ANP says that ISO-NE can prohibit the availability of Economic Outages³ in "Cold Weather Conditions."⁴ Among other things, OP20 provides that ISO-NE can grant requests for new Economic Outages for all units, including de-listed units, during Cold Weather Watch days⁵ only if it expects that it will be able to maintain greater than 100 MW of Capacity Margin.⁶ In addition, ANP says that OP20 gives ISO-NE the authority to deny requests for Economic Outages, and to cancel any existing

² ANP's market-based rate authority was granted on October 31, 2000 in Docket No. ER00-3751-000.

³ Economic Outage is a request by a participant to remove a generator from service for purely economic reasons associated with market conditions. *See generally* OP5 (Generation Maintenance and Outage Scheduling).

⁴ OP20 defines Cold Weather Conditions as when Effective Temperatures are less than or equal to 0 degrees Fahrenheit.

⁵ Cold Weather Watch refers to days when Cold Weather Conditions are forecasted and the 7 Day Capacity Margin Forecast is greater or equal to 1000 MW.

⁶ Complaint at 14.

Economic Outages for all units, including de-listed units, on Cold Weather Warning days,⁷ and requires all generators on Economic Outage to return to service under OP5 requirements.

4. ANP states that OP5 gives ISO-NE the right to deny applications for, or to cancel, Economic Outages when certain anticipated weather conditions are expected. In addition, ANP contends that the revisions to OP5 require a generator to offer capacity and energy regardless of whether it would be economic for the generator to do so. ANP contends that ISO-NE has also revised OP5 to state that ISO-NE will approve the scheduling of Maintenance and Economic Outages for de-listed resources, but that ISO-NE may cancel any approved Generator Economic Outage if ISO-NE has issued a Cold Weather Warning or declared a Cold Weather Event, pursuant to OP20.

5. ANP requests that the Commission direct ISO-NE to withdraw OP20 and the revisions to OP5. It generally alleges that: (1) ISO-NE improperly adopted revised OPs that are in direct conflict with section 3.2.6 of Appendix B to NEPOOL's filed tariff – Market Rule 1; (2) the OPs are a non-market resolution of issues that occur in extreme cold conditions; (3) contrary to Commission policy, the OPs confer power on ISO-NE to order de-listed units to act as capacity involuntarily; (4) the OPs place all the risks and burdens on merchant generators while not requiring load serving entities to engage in any form of demand reduction, or mitigate or assume such risks; and (5) the OPs will expose merchant generators to undue risks without proper compensation.

6. ANP contends that the change in OPs is essentially a change to the NEPOOL tariff and, as such, was required to be filed with the Commission under section 205(d) of FPA. ANP alleges that OP20 and OP5 are in direct conflict with Market Rule 1, NEPOOL's FERC Electric Rate Schedule No. 7 which gives generators the right to determine whether it is economic to operate their units. It contends that section 3.2.6 of Appendix B to Market Rule 1 unambiguously grants generators the right to determine the availability of a unit based on the economics of operating that unit, and that participants are not required under the ISO-NE tariff to provide services for a resource where the resource-specific NEPOOL market revenues from providing this service do not economically justify the associated operating costs or opportunity costs.⁸

⁷ Cold Weather Warning refers to days when Cold Weather Conditions are forecasted and the 7 Day Capacity Margin Forecast is greater than 0 MW and less than 1000 MW.

⁸ *Id.*, citing section 3.2.6 of Appendix B to Market Rule 1.

7. ANP alleges that ISO-NE is essentially attempting to implement a change to section 3.2.6 without complying with section 205(d), which prohibits a utility from directly or indirectly imposing any classification, practice, rule, regulation or contract that is different from the rate schedule with the Commission. ANP contends that OP20 and revised OP5 should not be enforced, since ISO-NE did not comply with section 205.

8. Further, ANP contends, ISO-NE's attempt to change the OPs negates section 3.2.6 of Appendix B of Market Rule 1 in violation of the Commission's rulings in *Pacific Gas & Electric Company*, 81 FERC ¶ 61,320 (1997), *Dynegy Power Marketing, Inc.*, 98 FERC ¶ 61,074 (2002) and *California Independent System Operator Corporation*, 101 FERC ¶ 61061 (2002). ANP argues that in these cases, the Commission ruled that an independent system operator cannot adopt changes to its OPs instead of making a proper tariff revision in order to circumvent Commission scrutiny. ANP also argues that the mandatory nature of OP20 and revised OP5 conflicts with the Commission's holding in those cases that ISO-NE cannot force a generator to sell into the Installed Capacity market.⁹

9. ANP argues that OP20 and revised OP5 do not address threatened blackouts. The genesis of the revised OPs was the "January Cold Snap" of 2004, when New England experienced record cold temperatures. ANP contends that while the Commission generally agreed that the system in place operated appropriately, the Commission's Office of Market Oversight and Investigation (OMOI) noted, among other things, that ISO-NE dispatched high cost, gas-fired generators out-of-merit to ensure reliability during this period, but did not raise the market clearing price.¹⁰ This, ANP contends, caused inaccurate price signals to be sent to the market, resulting in over \$24 million being paid in uplift charges for January 14-16.¹¹ This resulted in market participants discovering after the fact that these added costs were not reflected in the market clearing price.

10. ANP argues that OP20 and revised OP5 do not send more accurate price signals to the market.¹² According to ANP, OP20 procedures will likely cause an over-commitment of resources and thus a depression of the energy market.¹³ ANP explains that during the

⁹ *Id.* at 3.

¹⁰ Complaint at 4 and Exhibit 5 at 10, citing September 13, 2004 Presentation by FERC Chairman Pat Wood.

¹¹ Complaint at 5.

¹² Complaint at 5.

¹³ Complaint at 19.

“January Cold Snap,” the market clearing prices did not rise to the levels that would be expected in a shortage situation. Thus, incentives for natural gas-fired generators to produce electricity were lacking.¹⁴ Instead, ANP argues, generators were incited by the assurance of receiving uplift to cover their bids. ANP surmises that OP20 and revised OP5 will have the same effect.

11. ANP contends that OP20 and revised OP5 do not address the concerns raised by OMOI, as there are no provisions to seek load reduction. ANP recognizes that the OP revisions make some attempt to address OMOI’s concern that there are different time requirements to submit bids in the electric and gas markets.¹⁵ However, ANP contends that the revisions attempt to address this problem during Cold Weather Events, but not during Cold Weather Watches or on Cold Weather Warning days, both of which are likely to occur more frequently than Cold Weather Events. This partial attempt to align the electric and gas bidding deadlines does not address the problems the Commission identified from the January Cold Snap. According to ANP, the failure to send accurate price signals to the market is even more critical when markets are under stress.

12. ANP contends that the OP revisions impose substantial risks on all generators, particularly gas-fired units that have chosen to de-list.¹⁶ Under the revised OPs, ISO-NE can compel generators to make generating units available, including de-listed units, regardless of whether the units are appropriately on Economic Outage. Section 3.9.1 of NEPOOL Manual M-20 for Installed Capacity delineates the process by which a generator may de-list a unit. De-listing makes the units ineligible for capacity payments in NEPOOL. ANP explains that while a de-listed unit is eligible to sell energy in the

¹⁴ Complaint at 19.

¹⁵ Under OP20, in the event that a Cold Weather Event is declared, the deadline for submission of Supply Offers, Demand Bids, Increment Offers and Decrement Bids for the Day-Ahead Energy Market would be moved forward from 12:00 noon to approximately 9:00 a.m., in order to facilitate notification to certain natural gas-fired generating units (at approximately 9:30 a.m.) that those units will be committed for a certain period of operation the following day, so that the unit owners would have the certainty needed to procure natural gas supplies. The Day-Ahead Energy Market results would continue to be posted at 4:00 p.m. and the re-offer period would be conducted between 4:00 and 6:00 p.m., as under normal conditions.

¹⁶ Complaint at 7, 20-25.

NEPOOL Control Area, it is not eligible to sell capacity. While the revised OPs may force a de-listed unit to be restored to service, they do not explain how that unit will be paid for providing that service.¹⁷

13. In addition, ANP argues that there is no guarantee that ISO-NE will fully compensate generators for the costs and risks they incur as a result of the ISO's directive. De-listed generators on Economic Outage that are forced to return to service when their Economic Outages are cancelled will essentially be providing Reliability Must Run service on a short-term basis without any compensation.¹⁸ Even if payments are made to generators that are dispatched, the payments may be insufficient to cover their costs. Further, ANP argues, gas-fired units that are required to return to service but are not dispatched may incur, for example, gas costs and imbalance penalties for which they will not receive any compensation.

III. Notice of Filing, Interventions, Protests and Answers

14. Notice of ANP's complaint was published in the *Federal Register*, 69 Fed. Reg. 75,526 (2004), with comments, interventions and protests due on or before December 20, 2004. The Mirant Parties,¹⁹ TransCanada Power Marketing Ltd., Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., Duke Energy North America LLC, Massachusetts Municipal Wholesale Electric Company, Northeast Utilities Service Company, and NRG Energy, Inc., filed timely motions to intervene in this proceeding. ISO-NE, New England Power Pool Participants Committee (NEPOOL), Lake Road Generating Company, L.P. (Lake Road), New England Conference of Public Utilities Commissioners (NECPUC), Calpine Eastern Corporation, and Calpine Energy Services, L.P. (Calpine) filed timely motions to intervene and comments in this proceeding. Con Edison Energy, Inc., and Millennium Power Partners, L.P., filed motions to intervene out-of-time. PSEG Energy Resources and Trade LLC (PSEG) filed a motion to intervene and comments out-of-time. ANP filed a motion for leave to reply and a reply to the comments of ISO-NE and NEPOOL.

¹⁷ Complaint at 21.

¹⁸ Complaint at 7.

¹⁹ Mirant Americas Energy Marketing, L.P.; Mirant New England, L.L.C.; Mirant Canal, L.L.C.; and Mirant Kendall, L.L.C.

15. Lake Road, Calpine, and PSEG support ANP's complaint. Lake Road also points out that the Commission has held that any requirements imposed by an independent system operator that significantly affect jurisdictional rates and service must be filed with and accepted by the Commission.

16. In its answer, ISO-NE states that the complaint must be denied because the OP changes are not required to be filed under section 205. ISO-NE states that the OP changes essentially re-codify existing provisions of OP5, and through OP20, provide operational and communications enhancements that can help the New England system and markets function better during extreme cold weather conditions. ISO-NE contends that the OP changes do not conflict with the existing market rules, that the subject matter of the OPs is clearly within the scope of the existing market rules, and that the OPs simply provide implementation details.

17. ISO-NE states that the complaint raises factual or policy allegations that are not relevant to a section 205 filing. ISO-NE states that these allegations only relate to whether market rule changes may be justified to enhance the region's ability to cope with extremely cold weather. Pursuant to the "rule of reason," ISO-NE states that the OP changes need not be filed with the Commission under section 205 because they neither significantly affect rates nor conflict with tariff provisions. It contends that the OP changes are consistent with OMOI's findings regarding January Cold Snap issues, and that the complaint seeks changes to market rules without recognizing their merits.

18. ISO-NE argues that the OP changes, rather than conflicting with Market Rule 1, are consistent with the existing structure of filed rules and with the ISO's existing operating authority. ISO-NE states that NEPOOL and ISO-NE overwhelmingly adopted the OP changes as part of a comprehensive initial response to the January Cold Snap and that ANP cast one of only two votes against the final approval of the changes. ISO-NE contends that the business process clarifications and communications enhancements in the OP changes were supported by at least nine generators in the final NEPOOL vote, and will increase reliability and reduce generator risks. It states that if further improvements are desirable through changes to the market rules themselves, these improvements can be considered through the stakeholder process.

19. NEPOOL states that the OPs, which were approved by more than 96 percent of the NEPOOL vote, are appropriate and reasonable improvements to the existing NEPOOL arrangements. NEPOOL states that these improvements are transitional in nature, and that NEPOOL's approval specifically included the requirement that ISO-NE complete and file with the Commission a report on the impact of the OPs on markets during the 2004/2005 winter. NEPOOL states that changes to the OPs will expire on April 15, 2006. NEPOOL contends that the OPs are reasonable advancements to the procedures for operating markets during this transitional period while additional information is gathered and tools are developed.

20. NEPOOL also claims that the OPs make no change in the Commission-approved Market Rule provisions that specify compensation for services provided during extreme cold weather, and that ANP has not challenged those Market Rules provisions. Instead, NEPOOL states that the OPs have refined and made more transparent the operating procedures for ISO-NE and participants to follow under those extreme conditions. The OPs are designed to materially reduce challenges to reliability and the market during such conditions. NEPOOL states that ANP had the opportunity to raise this issue in the Participants Committee discussion of the matter or through the Review Board and failed to do so. NEPOOL and NECPUC both urge the Commission to reject ANP's request to reverse the approved changes.

IV. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We accept the motions to intervene out-of-time of Con Edison Energy, Inc., Millennium Power Partners, L.P., and PSEG Energy Resources and Trade LLC given their interest in this proceeding, the early stage of this proceeding, and the absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept ANP's answer and will, therefore, reject it.

B. Commission Determination

22. We will grant, in part, and deny, in part, ANP's complaint. The issue of whether operating procedures must be filed under section 205 is subject to a "rule of reason," which governs the types of documents that must be filed for Commission approval.²⁰ As

²⁰ See, e.g., Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,986-89, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *Pacific Gas and Electric Co., et al.*, 80 FERC ¶ 61,128 at 61,423 (1997); *Tenaska Power Services Co. v. Midwest Independent Transmission System Operator, Inc.*, 102 FERC P61,095 (2003), *order on clarification*, 103 FERC P61,049 (2003), *order on reh'g*, 104 FERC P61,075 (2003).

we have stated, only those that significantly affect rates and services fall within the directive of section 205(c) of the FPA.²¹

23. Previously, the Commission ruled that NEPOOL did not have to file its OPs in its tariff.²² However, we note that, as we gain experience with market rules and procedures and a better understanding of how operating procedures may actually affect rates or service, over time the Commission may need to exercise its discretion under the rule of reason differently. Here, ANP's complaint has focused our attention on the effects of the revisions to the OPs. We conclude that OP20 and revised OP5 could significantly affect rates and services. The revisions could affect compensation that generators receive under Market Rule 1 by limiting the circumstances under which they can declare economic outages. Consequently, we find that the revisions must be filed under section 205 of the FPA. The Commission will act expeditiously on any such section 205 filing.

24. Market Rule 1 gives ISO-NE the authority to direct changes in scheduling in an emergency to assure reliability.²³ Because we are concerned that ISO-NE has sufficient tools to ensure reliability this winter,²⁴ we will allow the revised OPs to remain in effect until the date the Commission acts on a subsequent filing of the revised OPs under section 205. We direct ISO-NE to file the revisions to the OPs within five business days of the date of this order. Once the revised OPs are filed, the Commission will act expeditiously and suspend the revisions to the OPs for a nominal period and waive the 60-day notice period to allow them to go into effect, subject to refund.

²¹ See *California Independent System Operator Corporation*, 107 FERC ¶ 61,329 (2004).

²² *New England Power Pool*, 95 FERC ¶ 61,253 (2001) (The Commission found that NEPOOL's rates, terms and conditions were already set forth in its open access transmission tariff, and therefore, NEPOOL was not required to file its OPs under section 205 filing at the time. Furthermore, the Commission noted that NEPOOL had agreed to make the OPs available for public inspection on a permanent basis on its website.).

²³ See, e.g., *Market Rule 1, section 1.10 and section 8.3.3*.

²⁴ We recognize that in situations that did not concern reliability, the Commission has not allowed operating procedures to remain in effect in the absence of a necessary section 205 filing. (See *Atlantic City Electric Co., et al.*, 91 FERC ¶ 61,063 (2000).) Here, our reliability concerns dictate a different result.

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The Commission orders:

ANP's complaint is hereby granted, in part, and denied, in part, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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FEDERAL ENERGY REGULATORY COMMISSION

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v.

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(Issued January 21, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I agree with the Commission's determination that the revisions to NEPOOL's OPs regarding the circumstances under which ISO-NE can compel generators to make their units, including de-listed units, available during extreme cold weather conditions must be filed and approved by the Commission under section 205 of the FPA. Section 205 states that every public utility shall file with the Commission schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges. While the Commission has previously indicated that NEPOOL's OPs involving "general technical operating/management procedures" need not be filed under section 205,²⁵ the revised OPs affect the circumstances under which generators must run their units as well as the compensation they would receive if required to operate. Thus, in my view, the revised OPs clearly fall within the scope of section 205 and must be filed with and approved by the Commission.

In light of the determination that the revised OPs must be approved by the Commission under section 205, I disagree with the Commission's decision to allow the revised OPs to remain in effect on an interim basis until the Commission acts on a subsequent filing of the revised OPs under section 205. While the order directs ISO-NE to file its revised OPs within five business days, I do not see how the Commission can permit the revised OPs to remain in effect for any period of time once the determination is made that they are required to be filed under section 205. As the Commission previously

²⁵ *New England Power Pool*, 95 FERC ¶ 61,253 at 61,877 (2001).

explained in a similar context, the failure to file the proposed revisions deprives interested parties of the opportunity to be heard on the merits of the proposed provisions prior to their implementation.²⁶ While the order emphasizes winter weather-related reliability concerns as justification for leaving the revised OPs in place as a short-term measure, and I am sympathetic to those concerns, I do not believe that they provide a sufficient basis for trumping the requirements of section 205. Once the ISO-NE files its revised OPs, I am confident that the Commission can and will act expeditiously to minimize any reliability risks posed by the failure to comply with the statutory requirements. In the meantime, however, I believe the proper course would be for the Commission follow its precedent and rule that until ISO-NE makes the appropriate section 205 filing with the Commission, its revisions to the OPs are without effect.²⁷

Joseph T. Kelliher

²⁶ *Atlantic City Electric Co.*, 91 FERC ¶ 61,063 at 61,220 (2000).

²⁷ *Id.*