

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Waterbury Generation LLC

Docket No. ER07-890-000

Invenergy Thermal LLC

v.

Docket No. EL07-66-000

ISO New England, Inc.

Not consolidated

ORDER GRANTING WAIVER AND DENYING COMPLAINT

(Issued July 3, 2007)

1. On May 14, 2007 Waterbury Generation LLC (Waterbury) filed a request for expedited consideration and temporary waiver of the Qualification Process Reimbursement Deposit (Deposit) due under ISO New England, Inc.'s (ISO-NE) Market Rule 1.¹ Specifically, Waterbury requests that the Commission grant waiver of ISO-NE's requirement to submit a \$25,000 Deposit by February 20, 2007 to participate in the first Forward Capacity Auction (FCA), which is scheduled to be held in February 2008.²
2. On May 30, 2007, Invenergy Thermal LLC (Invenergy) filed a complaint against ISO-NE requesting that the Commission order ISO-NE to rescind its disqualification of Invenergy's Sutton Energy Project (Sutton Project) from being further considered as a potential capacity supplier in the first FCA because it failed to submit a Deposit by February 20, 2007.

¹ On April 16, 2007, the Commission conditionally approved ISO-NE's market rules for the Forward Capacity Market, all of which are within section III of the ISO-NE Tariff. *ISO New England, Inc.*, 119 FERC ¶ 61,045 (2007) (April 16 Order).

² ISO Tariff § III.13.1.1.2.1; III.13.1.9.3.

3. In this order, the Commission grants both Waterbury and Invenergy a waiver to allow them to participate in the first FCA.

Background

4. On June 16, 2006, the Commission approved a settlement requiring ISO-NE to file rules concerning the Forward Capacity Market (FCM) by February 15, 2007.³ ISO-NE filed these rules in Docket Nos. ER07-546-000 and ER07-547-000 (FCM Rule Filing). The FCM establishes annual FCAs, or forward auctions for capacity. The FCAs procure capacity three-plus years ahead of the commitment period, which is intended to provide for a planning period for new entry and allow potential new capacity to compete in the auctions. The commitment period is a year-long period that corresponds to the ISO-NE power year.⁴ Thus, sellers will commit to provide capacity for one year—for example, June 1, 2011 to May 31, 2012—three-plus years in advance of the commitment period.⁵

5. The FCM rules include the qualification rules specifying the requirements and deadlines for resources to qualify as capacity resources and participate in the FCAs. In particular, the qualification rules incorporated within the FCM rules include two initial actions that project sponsors must take to qualify in order to participate in a FCA: (i) submit a show of interest form, and (ii) submit a Deposit (for the first FCA, the rules required both actions by February 20, 2007).⁶ The Commission approved the FCM Rule Filing in two separate orders, issued on April 16, 2007 and June 6, 2007.⁷

³ *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (*FCM Settlement Order*).

⁴ The ISO-NE power year is a period of twelve months beginning June 1 of each year and ending on May 31 of the next calendar year.

⁵ For more information regarding the FCM, see *FCM Settlement Order* at P 16-39.

⁶ ISO Tariff § III.13.1.1.2.1; III.13.1.9.3.

⁷ *ISO New England, Inc.*, 119 FERC ¶ 61,045 (2007) and *ISO New England, Inc.*, 119 FERC ¶ 61,239 (2007). In the April 16 Order, the Commission granted waiver of the 60-day notice requirement to allow ISO-NE's proposed tariff changes, including the requirement to submit the Deposit by February 20, 2007, to become effective on February 16, 2007. Invenergy makes several arguments concerning the appropriateness of granting waiver of the notice requirement in the April 16 Order. We note that such arguments are an impermissible collateral attack on that order.

6. Both Waterbury and Invenergy failed to submit a Deposit by February 20, 2007 and were disqualified by ISO-NE from participating in the first FCA.

Procedural Matters

7. Notice of Waterbury's filing was published in the *Federal Register*, 72 Fed. Reg. 29,151 (2007), with interventions, answers and protests due on or before June 4, 2007.⁸ NEPOOL Participants Committee filed a timely motion to intervene. ISO-NE filed a timely motion to intervene and comments on Waterbury's request for waiver.

8. Notice of Invenergy's filing was published in the *Federal Register*, 72 Fed. Reg. 31,571 (2007), with interventions, answers and protests due on or before June 8, 2007. The NEPOOL Participants Committee filed a timely motion to intervene. ISO-NE filed a timely motion to intervene and answer to Invenergy's complaint.

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

Waterbury Request for Waiver

10. Waterbury requests waiver of the requirement to submit the Deposit by February 20, 2007 to allow it to participate in the first FCA. Waterbury contends that it acted in good faith and took commercially reasonable measures to order its bank, TD Banknorth, to wire the Deposit on February 20, 2007. Waterbury states that, although it timely submitted its request for a wire transfer to occur the same day, due to internal bank policies and procedures at TD Banknorth that were unknown to Waterbury, the wire transfer was not completed until February 21, 2007. ISO-NE did not accept Waterbury's late Deposit, returned the funds to Waterbury, and informed Waterbury that it would not be allowed to participate in the first FCA.

11. Waterbury states that, based on the exigent circumstances beyond the control of Waterbury, *i.e.*, the internal processes of TD Banknorth, the Commission should grant Waterbury's waiver request. Waterbury claims that this would be consistent with Commission precedent granting limited waiver where parties have acted in good faith to comply with the ISO Tariff and granting the limited waiver would benefit the public. In support of its argument, Waterbury offers the Commission decision in *Wisvest-*

⁸ The Commission notes that it issued three notices of this filing. The third and final notice set the comment date as June 4, 2007.

Connecticut, LLC v. ISO New England (Wisvest),⁹ where the Commission granted a limited tariff waiver noting that the case involved a limited set of circumstances, the parties acted in good faith, and granting the requested relief would benefit customers. Waterbury claims that like the applicant in *Wisvest*, Waterbury's one day tariff waiver would be limited in nature. Waterbury further states that it acted in good faith by taking reasonable measures to comply with the Deposit deadline.

12. Waterbury points out that pursuant to state energy legislation, the Connecticut Department of Public Utility Control (CT DPUC) issued a request for proposal to procure new or incremental capacity to reduce the impact of Federally Mandated Congestion Charges (FMCCs) for Connecticut ratepayers. Waterbury states that after reviewing over twenty proposals, the CT DPUC selected only four individual projects, including Waterbury's peaking unit in Southwestern Connecticut. Waterbury claims that, because Waterbury is one of only four projects that has been selected to promote Connecticut's comprehensive energy legislation, the purpose of which is to reduce FMCCs for Connecticut ratepayers, granting the waiver will benefit customers.

13. Waterbury also offers as support decisions issued in *Red Shield Environmental, LLC (Red Shield)*¹⁰ and *Great Lakes Gas Transmission Limited Partnership (Great Lakes)*.¹¹ In *Red Shield*, Waterbury claims that the Commission granted a waiver when Red Shield acted in good faith to register its generation facility in ISO-NE's Energy Management System. In *Great Lakes*, Waterbury states that the Commission granted Great Lakes' request for emergency waiver of certain provisions of its own tariff.

14. Waterbury states that granting a one day waiver would allow ISO-NE to accept Waterbury's February 21, 2007 Deposit and allow Waterbury to participate in the first FCA. Waterbury notes that it will ensure that ISO-NE will receive the returned Deposit within two business days from the date the Commission issues a decision on the instant filing. Waterbury requests a shortened notice period and expedited action.

⁹ *Wisvest-Connecticut, LLC v. ISO New England, Inc.*, 101 FERC ¶ 61,372 (2002) (*Wisvest*).

¹⁰ *Red Shield Environmental, LLC*, Docket No. ER07-249-000 (Dec. 13, 2006)(unpublished letter order).

¹¹ *Great Lakes Gas Transmission Limited Partnership*, 102 FERC ¶ 61,331 (2003) (*Great Lakes*).

Invenergy Complaint

15. On February 20, 2007, Invenergy submitted a show of interest form to ISO-NE indicating its interest in participating in the first FCA.¹² Invenergy did not submit its Deposit at that time.

16. On April 5, 2007, ISO-NE informed Invenergy that the Sutton Project would no longer be considered in the qualification process because Invenergy did not submit the Deposit by February 20, 2007.¹³ The message referenced ISO-NE's pending, but not yet approved, FCM rules as the basis for Invenergy's disqualification.

17. On April 16, 2007, Invenergy electronically wired the Deposit to ISO-NE. By electronic mail message dated April 26, 2007, ISO-NE rejected Invenergy's Deposit on the basis that the Deposit rule contained in ISO-NE's FCM Rule Filing became effective February 16, 2007, and the filed tariff provision prohibited ISO-NE from continuing to include the Sutton Project in the qualification process. On April 27, 2007, ISO-NE electronically wired the Deposit amount of \$15,000 back to Invenergy.

18. For the reasons discussed below, Invenergy asks the Commission to order ISO-NE to rescind its disqualification of Invenergy's Sutton Project from being further considered as a potential capacity supplier in the first FCA.

19. Invenergy asserts that it relied on statements made by ISO-NE in not submitting its Deposit.¹⁴ Invenergy states that the show of interest form did not reference that a Deposit was required to be made by February 20, 2007. Further, according to Invenergy, the instructions found at the ISO-NE web address provided by the ISO "strongly

¹² See Invenergy Complaint, exh. 3.

¹³ See *Id.*, exh. 6.

¹⁴ Invenergy references a February 9, 2007 electronic mail message from ISO-NE that only referenced requiring a show of interest form for the Sutton Project by February 20, 2007. See *Id.*, exh. 2. That message directed Invenergy to a specific location on ISO-NE's website to download the required form. See also http://www.iso-ne/markets/othrmkts_data/fcm/qual/index.html.

encouraged [applicants] to review the Frequently Asked Questions associated with the Forward Capacity Market (FCM) Show of Interest Form.”¹⁵ The Frequently Asked Questions (FAQs) for the qualification process contained the following question and answer:

Should Show-of-Interest applicants also submit the Qualification Process Cost Reimbursement Deposit at the same time?

No. Approval for collection of the Qualification Process Cost Reimbursement Deposit should take place with the approval of the FCM market rule sometime in the second quarter of 2007.^[16]

20. Invenergy maintains that its actions were reasonable given that ISO-NE encouraged applicants to review the FAQs. Further, according to Invenergy, the Commission has found that it is reasonable for a party to rely on an ISO’s documents that vary from the ISO’s tariff.¹⁷

21. Invenergy argues that it had no notice of the requirement to submit a Deposit to ISO by February 20, 2007, citing the timing of ISO-NE’s filing of the FCM Rule Filing and the Commission’s notice of that filing.¹⁸ Invenergy also asserts that the FCM Rule

¹⁵ The web address was provided to Invenergy in the February 9 electronic mail message. *See* Invenergy Complaint, exh. 4.

¹⁶ *See Id.*, exh. 5. Invenergy notes that the FAQs on the ISO-NE website remained incorrect on April 5, 2007, when ISO-NE sent notice to Invenergy that ISO-NE would no longer consider the Sutton Project in the qualification process.

¹⁷ *Midwest Independent System Operator, Inc.*, 117 FERC ¶ 61,113 (2006) (*Midwest ISO*) (“it is unfair to market participants to assume that interpretations made by the Midwest ISO ‘in its own publications . . . cannot be regarded as coming from a credible source.’”), *order on reh’g* 118 FERC ¶ 61,212 (2007).

¹⁸ ISO-NE submitted the FCM Rule Filing (which required a Deposit by February 20) on February 15, 2007, requesting an effective date of February 16, 2007. Notice of the FCM Rule Filing was issued by the Commission on February 20, 2007 and was published in the *Federal Register* on February 26, 2007, 72 Fed. Reg. 8,367 (2007).

Filing itself is not clear that a Deposit is due as a condition to qualification.¹⁹ Finally, Invenegy maintains that the Deposit rule approved by the Commission is silent as to the consequence for not having timely submitted a Deposit.

ISO-NE Answers

22. In response to the request for waiver filed by Waterbury, ISO-NE states that it takes no position as to whether the Commission should grant or deny Waterbury's request. ISO-NE states that if the Commission were to grant waiver, the Commission should explicitly provide that the waiver is limited to the specific, unique facts presented in this case and should not constitute established precedent that would allow market participants to avoid the tariff requirements that would be waived here.

23. In response to Invenegy's complaint, ISO-NE states that, while under normal circumstances it would strongly oppose the relief requested by Invenegy, in light of the fact that this is the initial implementation of the FCM, ISO-NE takes no position as to whether the Commission should grant or deny Invenegy's complaint.

24. ISO-NE, however, disagrees with Invenegy that there was no filed rate at the time the Deposits were due. ISO-NE notes that, in the FCM Rule Filing, it explained why waiver of the 60-day prior notice requirement for the qualification rules, specifically including the provisions governing the submission of the Deposit, was appropriate. ISO-NE's request for waiver of the 60-day notice requirement was granted in the April 16 Order.²⁰ Therefore, because the April 16 Order granted the requested effective date of February 16, 2007, the FCM rules became the filed rate on that date.

25. ISO-NE notes that Invenegy did not protest the request for waiver or notice, nor did it request rehearing of the Commission's determination to grant the waiver.

¹⁹ Invenegy Complaint at 10-11. For example, according to Invenegy, the filing states: "[i]n order to qualify as such a resource, the resource's Project Sponsor must make ... a New Capacity Show of Interest Form during the New Capacity Show of Interest Submission Window..." *Id.*, citing FCM Rule Filing at 59. Invenegy maintains that this section does not state that a Deposit is also due in order to qualify and it is not until 41 pages later that the filing notes that a Deposit also must be made "in order to qualify." *Id.*, citing FCM Rule Filing at 100.

²⁰ April 16 Order at P 212.

Therefore, ISO-NE claims that the complaint can appropriately be characterized as an untimely, and therefore impermissible, collateral attack on the April 16 Order's ruling that notice was sufficient to justify the waiver.

26. In light of the fact that there was a filed rate, ISO-NE argues that Invenenergy cannot rely on the FAQ in lieu of the filed rate. According to ISO-NE, it is well-settled that the rates, terms and conditions specified in the filed rate, rather than verbiage from other materials not filed with the Commission, must govern a utility's provision of service. For example, it states that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."²¹ According to ISO-NE, this applies, for example, to the terms of a contract that conflict with the filed rate,²² or the language on a billing statement that is neither included nor referenced in a tariff.²³ Therefore, while ISO-NE states that it is "unfortunate" that the FAQ was not correct, only the tariff can provide the official implementation rules and definitive guidance on Invenenergy's obligations to participate in the first FCA.

27. ISO-NE maintains that *Midwest ISO*, cited by Invenenergy, supports market administration by RTOs/ISOs in the manner specified in the filed rate rather than as provided in inconsistent, non-filed materials. ISO-NE asserts that the omitted first half of the sentence from *Midwest ISO* quoted by Invenenergy states: "While we recognize that the [unfiled] Midwest ISO's Business Practice Manuals *do not take precedence over the [Midwest ISO's Tariff]...*"²⁴ ISO-NE argues that it is significant that the Midwest ISO failed to follow the filed rate; whereas here, ISO-NE has applied it correctly.

²¹ ISO-NE Answer at 10, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*).

²² ISO-NE Answer at 10, citing *Arkla* at 582 ("[U]nder the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the filed rate controls.").

²³ ISO-NE Answer at 10, citing *Exelon Corp. v. PPL Elec. Util. Corp.*, 111 FERC ¶ 61,065 at P 26 (2005) ("Since PJM's Tariff and Operating Agreement do not contain a time limit to complain about billing errors, the 45-day time frame mentioned on a billing statement cannot preclude PECO from seeking a correction of this error."), *reh'g denied*, 114 FERC ¶ 61,298 (2006).

²⁴ ISO-NE at 11, citing *Midwest ISO* at P 94 (emphasis added).

28. ISO-NE asserts that Invenergy is incorrect that the qualification rule does not require or authorize disqualification of the Sutton Project and asks the Commission consider that the filed rate is unambiguous regarding the disqualifying effect of failure to provide the Deposit. Moreover, ISO-NE contends that the plain language of the Deposit rule itself does not make a distinction between the show of interest form and Deposit requirements, nor does it subordinate the importance of the Deposit requirement to the show of interest form. With regard to the specific language in the Tariff, ISO-NE states that, when read together, the qualification rules make clear that failing to submit a timely Deposit results in disqualification from FCA participation. ISO-NE states that section III.13.1.1.2.1 states that such a resource “must” submit the show of interest form and that section III.13.1.1.2.1(e) expressly states that with the show of interest form, the sponsor of the project “must” also submit the Deposit. ISO-NE asserts that it is readily evident that a generator must submit both the show of interest form and a Deposit to qualify a project in a FCA, therefore, it is obvious that a failure to meet the specifications “disqualifies” the project. Further, ISO-NE asserts that it would be counterintuitive to believe that noncompliance with a deadline stated in a rule has no adverse ramifications.

29. If, however, the Commission decides to grant the complaint on the basis of a waiver of the filed rate, ISO-NE asks that any such order explicitly provide that the waiver is limited to the specific and unique facts presented here and should not constitute established precedent that would allow market participants and Project Sponsors to avoid the terms and conditions set forth in the ISO Tariff. Therefore, ISO-NE asks the Commission to take into account the following factors in its consideration of Invenergy’s request for waiver: (1) strict enforcement of deadlines in the FCM rules is of critical importance to the orderly and fair administration of the markets by the ISO, (2) Invenergy is effectively asking to be exempted from customary due diligence for a project developer seeking to participate in a new market, (3) other non-NEPOOL members complied with the filed rate and submitted timely Deposits, and (4) ISO-NE admits that the FAQ it posted was inconsistent with the contents of the qualification rules.

Discussion

30. The Commission grants both Waterbury and Invenergy a waiver to allow them to participate in the first FCA in February 2008.²⁵ While we agree with ISO-NE that the

²⁵ Although we are granting waiver, we deny Invenergy’s complaint and disagree that the FCM Rule Filing and the tariff are not clear that a Deposit is due as a condition to qualification. *See* FCM Rule Filing at 12, 14 (“[i]t is the ISO’s intent to cease review of any Show of Interest Form if the Project Sponsor fails to submit its Qualification Process Cost Reimbursement Deposit by February 20, 2007. *Such projects will not be permitted*

(continued...)

FCM rules, including the requirement to submit the Deposit by February 20, 2007, constitute a filed rate,²⁶ we believe granting waiver in these narrow circumstances is appropriate.

31. In the past, the Commission has granted a one-time waiver of the filed rate to alleviate the effects of errors by ISOs or other entities. Specifically, the Commission has granted tariff waivers where: (1) the underlying error was made in good faith; (2) the waiver was of limited scope; (3) a concrete problem needed to be remedied; and (4) the waiver did not have undesirable consequences, such as harming third parties.²⁷

32. The Commission believes that both Invenergy and Waterbury acted in good faith to follow the FCM rules. In Invenergy's case, it followed instructions found on the ISO-NE website at a time before the Commission had granted waiver and accepted ISO-NE's proposal to require the Deposit to be submitted by February 20. Waterbury made a good faith attempt to have its bank transfer the Deposit by the deadline.

33. Further, the waiver in these circumstances is of limited scope and the problem is concrete. The waiver is based on the unique circumstances occasioned by the short timeframe between the filing of the Tariff and the Deposit due date. Further, with respect to Invenergy, the Commission realizes that there was confusion caused by the fact that ISO-NE had incorrect information on its website that contradicted the Tariff, which had not yet been accepted by the Commission. In the future, the Commission expects parties

to participate in the FCA.”), 26 (“Additionally, the Project Sponsor must submit the Qualification Process Cost Reimbursement Deposit with the New Capacity Show of Interest Form.”), and 62 (“Together with the New Capacity Show of Interest Form, the Project Sponsor must submit the Qualification Process Cost Reimbursement Deposit, as described in section 111.13.1.9.3.”); *see also* Market Rule I, section III.13.1.9.3, ISO-NE, FERC Electric Tariff No. 3 Original Sheet No. 7313A-B “With every Show of Interest Form submitted for the purposes of qualifying for either a Forward Capacity Auction or reconfiguration auction (for the first Forward Capacity Auction) the Qualification Process Cost Reimbursement Deposit shall be due on February 20, 2007.”).

²⁶ Because the Commission granted waiver of the 60-day notice requirement, the FCM rules became the filed rate as of February 16, 2007.

²⁷ *See, e.g., Wisvest* at P 26; *Great Lakes; TransColorado Gas Transmission Co.*, 102 FERC ¶ 61,330 (2003); and *Northern Border Pipeline Co.*, 76 FERC ¶ 61,330 (1996).

to arrange for deposits to be submitted in sufficient time to meet the requirements of the FCM rules. Accordingly, the scope of the waiver granted here is limited to the specific circumstances presented by the first FCA.

34. We also find that granting both Waterbury and Invenergy waiver will not harm any party. Submitting the Deposit is the first of several steps that ISO-NE has laid out to participate in the FCM auction. The final determination with regard to whether individual new resources are qualified to participate in the first FCA will not be made until October 1, 2007. We also note that no party, including ISO-NE, protested the requests. Finally, we believe that allowing additional generation to compete in the first FCA will benefit the market by allowing the ISO to consider all generation possibilities in that auction. If Waterbury and Invenergy intend to participate in the first FCA, they must submit their Deposits within 5 business days of the date of this order.

The Commission orders:

(A) Waterbury's request for waiver of the ISO-NE Deposit deadline is hereby granted, as discussed in the body of this order.

(B) Invenergy's request for waiver of the ISO-NE Deposit deadline is hereby granted, as discussed in the body of this order.

(C) Invenergy's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.