

132 FERC ¶ 61,022
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

PSEG Power Connecticut LLC

Docket No. EL10-58-000

v.

ISO New England Inc.

ORDER GRANTING COMPLAINT

(Issued July 9, 2010)

1. This order addresses a complaint filed by PSEG Power Connecticut LLC (PSEG) on April 2, 2010, against ISO New England Inc. (ISO-NE) challenging the justness and reasonableness of ISO-NE's actions with respect to the Capacity Network Resource (CNR) Capability ratings of capacity resources owned by PSEG. As discussed below, the Commission will grant the complaint.

I. Background

2. PSEG owns and operates the Bridgeport Harbor Station, which consists of three operating generating units: Bridgeport Harbor Unit No. 2 (BH-2), Bridgeport Harbor Unit No. 3 (BH-3), and Bridgeport Harbor Unit No. 4 (BH-4). Each unit is assigned maximum capacity deliverability rights, known as CNR Capability ratings, for participation in ISO-NE's Forward Capacity Market (FCM).

3. United Illuminating Company (United Illuminating) originally owned the Bridgeport Harbor Station. United Illuminating sold the station in 1998 to Wisvest-Connecticut LLC (Wisvest) and, in 1999, filed an interconnection agreement between Wisvest and United Illuminating, as well as four firm transmission service agreements for the three Bridgeport Harbor Station units and for a New Haven Harbor Station unit. In 2002, Wisvest transferred all of the membership interests to a subsidiary of PSEG, PSEG Fossil LLC.

4. ISO-NE conducts an annual auction as part of its Forward Capacity Market to procure capacity equal to the Installed Capacity Requirement for New England.¹ Capacity providers compete in this Forward Capacity Auction to supply capacity to the market (three years later). Providers that are selected in the auction to supply capacity are compensated by a clearing price set by the highest accepted offer.²

5. During the development of the Forward Capacity Market, ISO-NE proposed to implement a deliverability test for capacity resources participating in the Forward Capacity Market that incorporated into the ISO-NE Tariff both the procedures relating to the Forward Capacity Market and revised generator interconnection procedures.³ The deliverability test addresses the participation of both existing resources and new resources in the interconnection queue. These revised procedures offer two new levels of service: CNR Interconnection Service (capacity) and Network Resource Interconnection Service (energy-only). The CNR Capability rating—the quantity in megawatts (MW) of the offered CNR Interconnection Service—represents the absolute limit on the amount of capacity that can be qualified to participate in the Forward Capacity Auction, to participate in bilateral transactions, to participate in the reconfiguration auctions, and to provide Supplemental Availability Resource service. ISO-NE also proposed a new definition of CNR Capability in section 5.2.3 of its Large Generator Interconnection Procedures (LGIP) in Schedule 22 of its open access transmission tariff (Tariff).⁴

¹ The Installed Capacity Requirement is the amount of capacity resources needed to meet the planning reliability requirements for the New England Control Area such that the probability of disconnecting non-interruptible customers due to resource deficiency, on the average, will be no more than once in ten years (i.e., the Loss of Load Expectation (LOLE) shall be no more than 0.1 day each year.).

² See ISO-NE Transmission, Markets & Services Tariff § III.13.1 (hereinafter, Market Rule 1). Section III of ISO-NE's Transmission, Markets & Services Tariff (Tariff) is Market Rule 1. Section 13.1 addresses the rules and procedures associated with qualifying resources for participation in the Forward Capacity Market.

³ *ISO New England Inc.*, 126 FERC ¶ 61,080 (2009) (addressing ISO-NE's Proposed Revisions to the Generator Interconnection Process and Forward Capacity Market Participation Provisions, filed October 31, 2008, in Docket No. ER09-237-000 *et al.*).

⁴ ISO-NE Transmission, Markets & Services Tariff § II (Open Access Transmission Tariff), Schedule 22 (Large Generator Interconnection Procedures) § 5.2.3.

II. The Complaint

6. PSEG contends that ISO-NE is violating its Tariff by effectively applying a cap on the CNR Capability ratings of the PSEG units, limiting PSEG's available Qualified Capacity eligible to participate in the ISO-NE Forward Capacity Market (and specifically in the fourth Forward Capacity Auction in August 2010) to the values specified in the interconnection agreement for these units. PSEG makes three main arguments in support of its complaint. First, PSEG avers that its interconnection agreement predates Order No. 2003⁵ and is not an interconnection agreement under the ISO-NE Tariff and, therefore, section 5.2.3 of the LGIP.⁶ Second, PSEG argues that the nameplate values ISO-NE relies upon from PSEG's interconnection agreement to establish the CNR Capability ratings for these units are merely descriptive in nature and do not establish maximum capability limits. Last, PSEG contends that, under section 5.2.3 of Schedule 22, resources are provided with three potential methods to establish the CNR Capability ratings for these units (rather than ISO-NE's hierarchical evaluation process that relies first on the interconnection agreement to establish CNR Capability ratings and only considers the other methods when an interconnection agreement with a specified maximum capability is unavailable). PSEG argues that ISO-NE's "hierarchical" and arbitrary interpretation is inconsistent with its Tariff.

7. PSEG states that, based upon PSEG's submission of data supporting the historical operations of BH-3 and BH-4, ISO-NE proposed CNR Capability ratings of 410 MW for BH-3 and 22 MW for BH-4 and published these output figures in an April 2009 report on the forecasted capacity, energy, loads, and transmission for 2009 (2009 CELT report).⁷ PSEG reports that it previously elected to increase the Qualified Capacity ratings for the third Forward Capacity Auction for both BH-3 and BH-4 pursuant to Market Rule 1,

⁵ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *see also notice clarifying compliance procedures*, 106 FERC ¶ 61,009 (2004).

⁶ As PSEG notes, section 5.2.3 was added to the Tariff to conform its interconnection procedures to the Forward Capacity Market.

⁷ Complaint at 11 (citing ISO New England, 2009-2018 Forecast Report of Capacity, Energy, Loads, and Transmission (April 2009), *available at* http://www.iso-ne.com/trans/celt/report/2009/2009_celt_report_final_20090415.pdf).

section III.13.1.2.2.5.⁸ However, in a subsequent November 2009 report on Qualified Capacity ratings for Existing Generators for the fourth Forward Capacity Auction, PSEG states that ISO-NE calculated a lower Summer Qualified Capacity for BH-3 and BH-4.⁹ PSEG maintains that these values do not reflect the most recent (i.e., 2009) summer capacity ratings from these units. As it had done for the third Forward Capacity Auction, PSEG states that it elected to increase the capacity ratings for the fourth auction to 383 MW for BH-3 and to 20 MW for BH-4. But ISO-NE, according to PSEG, contended that the Qualified Capacity ratings for BH-3 and BH-4 could not be increased as requested without a new interconnection request.¹⁰ PSEG states that it was informed by ISO-NE on November 11, 2009, that, based on section 5.2.3 of the LGIP, the Qualified Capacity for BH-3 and BH-4 must originate from the nameplate ratings for the units as specified in the 1999 interconnection agreement. As a result, there is a 380 MW limit for BH-3 and an 18 MW limit for BH-4. PSEG notes that ISO-NE proposes these Qualified Capacity caps despite its acceptance and publication in the 2009 CELT Report of CNR Capability ratings for BH-3 and BH-4 of 410 MW and 22 MW, respectively.

8. Disputing ISO-NE's decision, PSEG maintains that the United Illuminating interconnection agreement is not an "interconnection agreement" for the purpose of determining the output levels under section 5.2.3, because that term is defined as the "Standard Large Generator Interconnection Agreement" (LGIA) or the "Standard Small Generator Interconnection Agreement" (SGIA) pursuant to Schedules 22 and 23 of the Tariff.¹¹ PSEG states that its interconnection agreement is a pre-Order No. 2003 agreement, as it was executed and filed with the Commission in 1999. Further, PSEG contends that the capacity values for the BH-3 and BH-4 units in the interconnection agreement are "merely nameplate ratings" that have nothing to do with the deliverability of these units. In support, PSEG explains that the exhibits to the interconnection

⁸ Under Market Rule 1, section III.13.1.2.2.1.5, a market participant may elect to increase the Qualified Capacity for its Existing Generating Capacity Resource above the median of the Seasonal Claimed Capability ratings within specified parameters. PSEG elected to increase the values from 372.205 MW to 383.46 MW for Summer and from 370.36 MW to 384.894 MW for Winter for BH-3 and from 9.918 MW to 15.414 MW for Summer and from 14.718 MW to 20.214 MW for Winter for BH-4. Complaint at 12-13.

⁹ The November 2009 report stated Qualified Capacity ratings of 372.205 MW for BH-3 and 9.918 MW for BH-4.

¹⁰ Complaint at 14.

¹¹ *Id.* at 20-21; ISO New England Inc., FERC Electric Tariff No. 3, General Terms and Conditions, Original Sheet No. 15LL.

agreement contain descriptions and nameplate ratings of the BH-3 and BH-4 facilities that are intended solely to identify the units.¹² PSEG also notes that United Illuminating simultaneously filed firm point-to-point transmission service agreements that provide greater capacity output levels than the interconnection agreement for firm transmission service from the BH-3 and BH-4 units.

9. PSEG disagrees with ISO-NE's interpretation and application of section 5.2.3. PSEG notes that section 5.2.3 describes three potential methods for determining the Qualified Capacity of those resources that will be treated as Existing Generating Capacity Resources in the fourth Forward Capacity Auction:

All resources that are treated as Existing Generating Capacity resources in the fourth Forward Capacity Auction pursuant to Section III.13 of the Tariff shall receive treatment as a CNR and obtain CNR Interconnection Service, in accordance with this LGIP, up to the megawatt amount specified in an Interconnection Agreement (whether executed or filed in unexecuted form with the Commission), an application pursuant to Section I.3.9 of the Tariff (or its predecessor provision, if any), or as determined by the System Operator based on documented historic capability of the Generating Facility.¹³

10. Thus, according to PSEG, the plain language of section 5.2.3 does not require that an interconnection agreement determine the Qualified Capacity ratings. PSEG argues that ISO-NE's interpretation of this section is hierarchical in nature since a capacity value specified in an interconnection agreement caps the CNR Capability rating and eliminates consideration of the other two methods for establishing this value (i.e., an application pursuant to section I.3.9 of the Tariff¹⁴ or by documented historical capability). PSEG

¹² Complaint at 22 (citing Ex. No. 1 at 8-13 (Affidavit of Robert Stein)).

¹³ ISO New England Inc., FERC Electric Tariff No. 3, Open Access Transmission System, Schedule 22, Original Sheet No. 5148C.

¹⁴ ISO New England Inc., FERC Electric Tariff No. 3, General Terms and Conditions, Second Revised Sheet No. 18 and Substitute First Revised Sheet No. 19. Under section I.3.9, market participants and transmission owners must submit to ISO-NE for review (i) any new or materially changed plan for additions to or changes to any generating and demand resources or transmission facilities rated 69 kV or above subject to control of such Market Participant or Transmission Owner, and (ii) any new or materially changed plan for any other action to be taken by the Market Participant or

(continued...)

maintains that, on its face, section 5.2.3 is clear that there are three distinct alternatives for establishing capacity, including the use of the documented historical capability to determine the Qualified Capacity for BH-3 and BH-4. PSEG explains that section 5.2.3 is intended to provide a means to identify the “documented megawatt output” while maintaining rights under existing agreements.¹⁵

11. PSEG states that, by contrast, ISO-NE appears not to be employing section 5.2.3 but instead relying on the approach set forth in a May 2008 memorandum, which indicates that the maximum interconnection capability of an Existing Generating Capacity Resource will be the megawatt quantities expressed in the interconnection agreement, where available.¹⁶ PSEG contends that ISO-NE cannot rely on this memorandum since the language from this memorandum is not contained in section 5.2.3 and, in any event, the memorandum proposes a “higher of” test¹⁷ for determining the maximum capability of a generator—under which ISO-NE should have accepted the alternative rating, based on the historical Seasonal Claimed Capability tests for the BH-3 and BH-4 units, which would result in values of 383 MW for BH-3 and 20 MW for BH-4.¹⁸

12. PSEG asserts that there are no deliverability issues with respect to BH-3 and BH-4. It states that the transmission service agreements give PSEG the right to deliver up to 425 MW from BH-3 in both seasons and up to 22 MW from BH-4 in both seasons.¹⁹ PSEG avers that United Illuminating, with over 30 years of experience with these units, “completely understood their maximum capabilities and the actual capacity that they

Transmission Owner, except for retirements of or reductions in the capacity of a generating resource or a demand resource unless otherwise provided in Section I.3.11, which may have a significant effect on the stability, reliability or operating characteristics of the Transmission Owner’s transmission facilities, the transmission facilities of another Transmission Owner, or the system of a Market Participant.

¹⁵ Complaint at 25 (citing FCM/Queue Amendments Filing); *id.* at 26.

¹⁶ *Id.*

¹⁷ PSEG states that ISO-NE staff indicated that, if an interconnection agreement was not available, the maximum interconnection capability would be the higher of MW quantities expressed in the second and third methods in section 5.2.3. *Id.* at 15.

¹⁸ *Id.* at 11, 27-28.

¹⁹ *Id.* at 17-18.

provided to the New England market.”²⁰ PSEG maintains that, in attempting to require PSEG to submit a new interconnection agreement, ISO-NE is unlawfully abrogating PSEG’s contractual rights under these transmission service agreements.

13. Further, PSEG asserts that the over-riding purpose of the Forward Capacity Market is to enable the procurement of adequate capacity supplies in the ISO-NE market. PSEG warns that ISO-NE’s actions, if left uncorrected, risk artificially constraining the amount of capacity that may be bid into the Forward Capacity Market, creating market inefficiencies. PSEG estimates that it will lose more than \$250,000 as a result of it being prohibited from offering approximately 5 MW in the auction.²¹

14. As relief, PSEG requests that the Commission find that ISO-NE’s limitations on the CNR Capability rating for PSEG’s resources are unjust and unreasonable; and direct ISO-NE to adopt CNR Capability ratings for PSEG Power CT’s generating facilities based on their documented historical capability, consistent with the ISO-NE Tariff and with the agreements between PSEG and the interconnecting transmission company (i.e., United Illuminating Company).

III. Notice and Responsive Pleadings

15. Notice of the April 2, 2010 complaint filed by PSEG was published in the *Federal Register*, 75 Fed. Reg. 18,828-29 (2010), with interventions and protests due on or before April 22, 2010. United Illuminating; NRG Companies;²² Bridgeport Energy, LLC; Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.; Exelon Corp.; and Mirant Parties timely filed motions to intervene.²³ New England Power Pool Participants Committee (NEPOOL) filed a motion to intervene out-of-time. Dominion Resources Services, Inc. (Dominion) timely filed comments in support. ISO-NE filed an answer on April 22, 2010. On May 5, 2010, PSEG filed a motion to answer and an answer. On May 20, 2010, ISO-NE filed a response to PSEG’s answer.

²⁰ *Id.* at 18.

²¹ *Id.* at 33.

²² NRG Companies include: NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC.

²³ The Mirant Parties include: Mirant Energy Trading, LLC; Mirant Canal, LLC; and Mirant Kendall, LLC.

16. Dominion supports PSEG's complaint, stating that PSEG has demonstrated that the documented historical capability of the units represents their proper capacity ratings.²⁴

17. In its answer, ISO-NE states that PSEG's assertion that its interconnection agreement is not an interconnection agreement under the ISO-NE Tariff and, therefore, cannot be relied on for administering section 5.2.3 of the LGIP, is legally incorrect and would lead to absurd results. ISO-NE explains that limiting the term "interconnection agreement" to an LGIA or an SGIA, pursuant to Schedules 22 and 23, would mean that ISO-NE cannot rely on any interconnection agreement that was not the result of the interconnection procedures set forth in those schedules, including all interconnection agreements that predate Order No. 2003. ISO-NE contends that, in fact, PSEG's witness discusses PSEG's interconnection agreement in the same way that ISO-NE interprets that agreement, namely, that the interconnection agreement "establishes [PSEG's] right to interconnect the Bridgeport Haven Harbor stations to the [United Illuminating]-owned transmission system and sets forth the operating and interconnection responsibilities of both [PSEG and United Illuminating]."²⁵

18. While PSEG contends that the term "Interconnection Agreement" applies solely to interconnection agreements formulated under the procedures in Schedule 22 of the Tariff, ISO-NE explains that its Tariff cannot deviate from the principle in Order No. 2003 that treats grandfathered agreements the same as executed LGIAs for purposes of Schedule 22 without Commission approval.²⁶ ISO-NE states that neither it nor NEPOOL ever requested Commission waiver from the Order No. 2003 provisions relating to the grandfathering of pre-Order No. 2003 interconnection agreements.²⁷

19. ISO-NE acknowledges that the term "Interconnection Agreement" is capitalized in section 5.2.3 but avers that it did not intend to limit the application of this section only to interconnection agreements pursuant to Schedules 22 and 23. Further, ISO-NE points out that, even though the term was capitalized in the FCM/Queue Amendments Filing, it was

²⁴ Dominion Comments at 6.

²⁵ *Id.* (quoting Complaint, Ex. No. 1 at 6:1-5 (Affidavit of Robert Stein)).

²⁶ ISO-NE April 22, 2010 Answer at 7.

²⁷ *Id.* at 8.

not yet a defined term in the Tariff, and ISO-NE did not interpret Schedules 22 and 23 as excluding any interconnection agreement that predates Order No. 2003.²⁸

20. ISO-NE explains that the addition of the new CNR Interconnection Service in the FCM/Queue Amendments Filing warranted revisions to the interconnection procedures to address generating facilities interconnected prior to the implementation of the amendments. ISO-NE states that some facilities interconnected prior to the implementation of the FCM/Queue Amendments Filing may have already become Existing Generating Capacity Resources. For other facilities, the addition of section 5.2.3 provides that facilities that qualify as Existing Generating Capacity Resources in the fourth auction will be considered Capacity Network Resources and obtain CNR Interconnection Service up to the output specified in the generating facility's interconnection agreement. ISO-NE states that it averred in the FCM/Queue Amendments Filing that these grandfathering provisions were not intended to create or take away the rights afforded under the existing interconnection agreements.²⁹

21. ISO-NE states that, with respect to whether PSEG's nameplate ratings establish maximum capability limits, the approved output of a generator need not be its nameplate rating under an interconnection agreement, but PSEG's interconnection agreement specifies the nameplate rating output levels. ISO-NE notes that the specified generator output levels may be increased through the LGIP by filing a new interconnection request.³⁰

22. PSEG, in its response to ISO-NE's answer, contends that ISO-NE confuses the MW amounts listing in Exhibit 1 of PSEG's interconnection agreement with the figures in Exhibit A of the LGIA that was developed under the LGIP. PSEG explains that the values in its Exhibit 1 were not derived from any studies required pursuant to Schedule 22 of ISO-NE's current Tariff, are descriptive only, and are not limiting in any way. PSEG maintains that it is not reasonable for ISO-NE to interpret PSEG's interconnection agreement in a manner that applies the language and requirements of the current LGIP and ignores the circumstances of PSEG's interconnection. Moreover, PSEG states that ISO-NE ignores the fact that these units have delivered capacity into the market at the levels specified in the transmission service agreements.

²⁸ *Id.* at 9 & n.18.

²⁹ *Id.* at 10 (quoting FCM/Queue Amendments Filing at 47).

³⁰ *Id.* at 3 n. 4, 4.

23. PSEG states that it does not contend that section 5.2.3 is inapplicable to its interconnection agreement as alleged by ISO-NE; rather, PSEG maintains that ISO-NE errs in arguing that it must rely on the capacity values set forth in any and all interconnection agreements, irrespective of when they were executed or whether an agreement contains any capacity values.³¹ Instead, PSEG contends that ISO-NE must apply the third option in section 5.2.3 (i.e., the documented historical capability of the units) to correct the CNR Capability ratings for these units.

24. According to ISO-NE in its April 22, 2010 Answer, section 5.2.3 establishes megawatt outputs for facilities without interconnection agreements. The output may be based on “an application pursuant to section I.3.9 of the Tariff (or its predecessor provisions, if any), or as determined by the System Operator based on documented historical capability of the generating Facility.” ISO-NE states that, by listing three sources of generator operating limits, section 5.2.3 recognizes that there may be a conflict between a limit set out in an interconnection agreement and a limit under Tariff section I.3.9. ISO-NE argues, in contrast to PSEG’s position, that it cannot approve CNR Capability ratings as the highest of the various values, as each of the three values “is valid for its own purposes.” ISO-NE states that this is not a “menu list of non-hierarchical options;” the lower limit cannot be exceeded.³² ISO-NE notes that it has worked with other generators similarly situated to PSEG to adjust the approved output level in their interconnection agreements.³³

25. ISO-NE contends that the issue is not deliverability or actual maximum output levels. Rather, the issue is whether section 4.4 of the LGIP is triggered by a generator seeking capacity credits for a higher level of output than specified in its interconnection agreement.³⁴ ISO-NE maintains that the Commission’s rules in this regard are clear—

³¹ PSEG Answer at 7.

³² *Id.* at 12.

³³ ISO-NE states that the Pittsfield and Pawtucket generating units had similar mismatches between their approved I.3.9 values and the values specified in their interconnection agreements. ISO-NE states that these generators updated their I.3.9 approvals to align with their interconnection agreements so that they could qualify at a higher capacity value.

³⁴ According to section 4.4 of the LGIP, a Generating Facility must submit a new interconnection request when it proposes to:

increase the energy capability or capacity capability output ...
from that specified in an Interconnection Request, an existing

(continued...)

increases in the output of generating facilities always require a new interconnection request.³⁵

26. In its answer, PSEG maintains that increasing the CNR Capability ratings for BH-3 and BH-4 would not be a material modification of its interconnection agreement. PSEG seeks to distinguish its situation from that of the *Midwest* case cited by ISO-NE and avers that it has made no “change to the design or operating characteristics of an existing Generating Facility, including its Interconnection Facilities.”³⁶

27. ISO-NE makes three points in its response to PSEG’s answer: first, ISO-NE seeks to treat PSEG’s interconnection agreement on a comparable basis with all others; second, all interconnection agreements are subject to the “material modification” provision of Order No. 2003 and ISO-NE’s LGIP; and, finally, PSEG’s proposed CNR Capability ratings represent an increase in the output levels from those listed in the interconnection agreements, requiring a new interconnection request.

28. Further, ISO-NE states that its granting of higher CNR Capability levels for these units in past Forward Capacity Auctions is not evidence of arbitrary administration or varying interpretation of section 5.2.3; rather, ISO-NE’s actions resulted from PSEG’s failure to provide ISO-NE PSEG’s interconnection agreement. ISO-NE states that it was previously unable to locate an agreement for BH-3 and BH-4. Addressing PSEG’s assertion that its transmission service agreements support its request for higher CNR Capability ratings, ISO-NE avers that PSEG’s transmission service agreements are not interconnection agreements and, consequently, cannot supplant the PSEG interconnection agreement or the levels specified in that interconnection agreement. ISO-NE explains that the level of firm service that a generator elects may or may not be related to the output of a particular generating station. Last, ISO-NE notes that no special relief is required for PSEG as a Commission-approved process already exists for PSEG to revise the approved operating level for the Bridgeport Harbor units.

Interconnection Agreement (whether executed or filed in unexecuted form with the Commission), and application pursuant to I.3.9 of the Tariff (or its predecessor provision, if any) or as determined by the System Operator based on documented historic capability of the Generation Facility....

³⁵ ISO-NE April 22, 2010 Answer at 14 (citing *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,210, at P 12-16 (2008) (*Midwest ISO*)).

³⁶ PSEG Answer at 3 (quoting definition of “Material Modification,” ISO-NE, FERC Electric Tariff No. 3, 2nd Rev. Sheet No. 5118 and 1st Rev. Sheet No. 5119).

IV. Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given NEPOOL's interest, the early stage of the proceeding, and the absence of undue prejudice or delay, we will grant the motion to intervene out-of-time.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept PSEG's answer and ISO-NE's response because they have provided information that assisted us in our decision-making process.

B. Commission Determination

31. As discussed below, we will grant PSEG's complaint.

32. ISO-NE and PSEG present two interpretations of section 5.2.3 of the LGIP, which ISO-NE applies to determine the capacity levels that a generator can bid into ISO-NE's Forward Capacity Auction. Section 5.2.3 contains three criteria for this determination, namely:

All resources that are treated as Existing Generating Capacity resources in the fourth Forward Capacity Auction pursuant to Section III.13 of the Tariff shall receive treatment as a CNR and obtain CNR Interconnection Service, in accordance with this LGIP, up to the megawatt amount specified in an Interconnection Agreement (whether executed or filed in unexecuted form with the Commission), an application pursuant to Section I.3.9 of the Tariff (or its predecessor provision, if any), or as determined by the System Operator based on documented historic[al] capability of the Generating Facility.³⁷

³⁷ ISO New England Inc., FERC Electric Tariff No. 3, Open Access Transmission System, Schedule 22, Original Sheet No. 5148C.

33. ISO-NE asserts that this section sets up a “hierarchy,” whereby, if a resource has an interconnection agreement, the first of the three alternatives—the interconnection agreement—determines the megawatt amount, without further reference to the latter two criteria. Under the ISO-NE’s “hierarchy” interpretation, the “up to” language in the provision requires that the megawatt amount specified in the interconnection agreement serves as a cap on the megawatt amount, without regard to any other document or evidence, including an application pursuant to section I.3.9 of the Tariff or documented historical capability.

34. In contrast, PSEG asserts that this section does not provide two alternatives which would apply only in the absence of an interconnection agreement, but rather as listing three equal criteria, any one of which can be used. PSEG maintains that its interconnection agreement is not the same as that which is envisioned in this provision but, in any case, section 5.2.3 provides co-equal alternatives to the interconnection agreement, with the “up to” language allowing each option equal potential to serve as the upper boundary. Further, PSEG contends that ISO-NE accepted the higher megawatt amounts PSEG now proposes and published its acceptance in the 2009 CELT Report.

35. While ISO-NE and PSEG thus proffer two competing interpretations of section 5.2.3, a contract or tariff is not ambiguous simply because the parties disagree as to its interpretation.³⁸ However, an ambiguity may be found where, as here, the contract or tariff is susceptible to different constructions or interpretations.³⁹ When a contract or tariff provision is found to be ambiguous, the ambiguity must be resolved by reference to the contract or tariff as a whole.⁴⁰ In addition, extrinsic evidence of interpretation or

³⁸ See *Appalachian Power Co. v. FPC*, 529 F.2d 342, 347-48 (D.C. Cir.), cert. denied, 429 U.S. 816 (1976).

³⁹ See *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 85, clarified, 123 FERC ¶ 61,060 (2008); *Southern Cal. Edison Co.*, 41 FERC ¶ 61,188 (1987).

⁴⁰ See *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc.*, 119 FERC ¶ 61,319, at P 19 (2007) (contract provisions should be interpreted as consistent with the contract as a whole); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (“[It is a] cardinal principal of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.”); *Southern Co. Servs., Inc. v. FERC*, 353 F.3d 29, 35 (D.C. Cir. 2003) (rejecting interpretation that would render contract provisions superfluous, and stating “contracts must be read as a whole, with meaning given to every provision.”).

intent may be considered to prove a meaning to which the tariff language is reasonably susceptible.⁴¹

36. Reference to the Tariff alone does not resolve which of the two interpretations is appropriate. We do not agree with ISO-NE that “[t]his approach is consistent with the plain language of section 5.2.3,”⁴² as it is not clear that the section’s language limits a generator to a “lower of” alternative for establishing the CNR Capability rating. Nor is it clear from section 5.2.3., as argued by ISO-NE, that the documented historical capability option on which PSEG relied “is used only when a generating facility has neither a grandfathered interconnection agreement or LGIA, and in the absence of a grandfathered interconnection agreement or LGIA, it also has no approval under Section I.3.9 of the ISO Tariff (or a predecessor provision).”⁴³

37. ISO-NE argues that since the interconnection agreement for these units has now been discovered, and because the output values in that agreement are below the values ISO-NE has approved for these facilities historically, these output levels from the interconnection agreement govern the upper limit for CNR Capability levels, absent a new interconnection request by PSEG. While ISO-NE looks to the language in section 4.4 of the LGIP as requiring PSEG to submit a new interconnection request, section 5.2.3 does not suggest that the megawatt amount specified in the interconnection agreement must prevail; rather, the amount specified in the interconnection agreement is simply one of three values to consider when determining the applicable cap.⁴⁴

38. With no clear outcome apparent from the Tariff alone, we next look to extrinsic evidence. After reviewing the extrinsic evidence proffered by ISO-NE and PSEG, we find that ISO-NE’s previous determination of the capacity levels of BH-3 and BH-4 (as published in the 2009 CELT Report) to be the most relevant and persuasive evidence of the intended operation of section 5.2.3 under the circumstances. ISO-NE’s consideration and determination of the units’ capacity levels complies with the third criterion of section 5.2.3, namely, that a resource shall obtain CNR Interconnection Service up to the

⁴¹ See *N.Y. Indep. Sys. Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34 (2007); see also *Miss. River Transmission Corp.*, 771 F.2d 1536, 1554 (D.C. Cir. 1985).

⁴² ISO-NE April 22 Answer at 13.

⁴³ ISO-NE May 20 Answer at 12.

⁴⁴ Given our interpretation of section 5.2.3, we do not need to address *Midwest ISO*, 125 FERC ¶ 61,210.

megawatt amount “as determined by the System Operator based on documented historic[al] capability of the Generating Facility.”

39. ISO-NE already has allowed PSEG to use a megawatt output consistent with PSEG’s historical output in previous Forward Capacity Auctions, the parties do not dispute the documented historical capability of the units, and there is no basis in the Tariff or extrinsic evidence to interpret section 5.2.3 to allow ISO-NE to now reduce that CNR Capability rating for the PSEG units by insisting that the interconnection agreement alone must control.⁴⁵ Nor is the May 2008 memo dispositive. First, it espouses an interpretation of 5.2.3 that places a preference on the value contained in the interconnection agreement regardless of documented historical capability or a section I.3.9 application—an interpretation unsupported by section 5.2.3. Second, we find that, under the circumstances of this complaint proceeding, it is just and reasonable to read section 5.2.3 as affording coequal status to the value ISO-NE previously determined based on documented historical capability. In this case, where ISO-NE has previously used higher testing values to establish the CNR Capability level for these units in prior auctions, and no party disputes the ability of these resources to deliver the higher capacity, ISO-NE’s interpretation of section 5.2.3 as it relates to PSEG is not just and reasonable.⁴⁶

40. Based on these considerations, we conclude that PSEG’s megawatt output under section 5.2.3 must be determined by reliance on the historical capacity levels of BH-3 and BH-4. We therefore direct ISO-NE to use the historical capacity levels for BH-3 and BH-4 for the fourth Forward Capacity Auction.

41. While we are granting PSEG’s complaint, we note that the Commission’s involvement in resolving this dispute appears to have been unnecessary. ISO-NE indicates in its answer that, rather than pursuing this complaint, PSEG could have worked with ISO-NE to update the interconnection agreements for these facilities to qualify at a higher value for the next Forward Capacity Auction. In response, PSEG, in its May 5 answer, states that ISO-NE failed to provide any assurance that such a process would have been completed in time for the fourth Forward Capacity Auction. However, the

⁴⁵ The Pittsfield and Pawtucket examples that ISO-NE points to are not inconsistent with the interpretation of section 5.2.3 established in this order since the Pittsfield and Pawtucket interconnection agreements contained values that were higher than their Proposed Plan Applications reviewed and approved under the original section I.3.9 requests. As here, the largest supported value was allowed to prevail.

⁴⁶ If ISO-NE wants to establish a hierarchy procedure, it may seek to make a section 205 filing proposing to modify section 5.2.3 of the LGIP.

need to quickly resolve the dispute before the next Forward Capacity Auction may have been caused by PSEG's own failure to provide ISO-NE with its interconnection agreement in a timely fashion, despite the fact that ISO-NE's interpretation of this section 5.2.3 language was discussed at several stakeholder meetings. We encourage parties to make every effort to resolve disputes within ISO-NE processes prior to filing a complaint with the Commission.

The Commission orders:

PSEG's complaint is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.