

132 FERC ¶ 61,068  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Vermont Electric Power Company, Inc.

Docket No. ER10-1347-000

ORDER DENYING WAIVER

(Issued July 26, 2010)

1. On May 27, 2010, Vermont Electric Power Company, Inc. (Vermont Electric), on behalf of the Vermont Joint Owners,<sup>1</sup> filed a request for waiver of the minimum ICAP import commitment duration requirement in former section III.8.3.7.1 of Market Rule 1 of ISO New England Inc.'s (ISO-NE) Transmission, Markets, and Services Tariff.<sup>2</sup> Vermont Electric states that a waiver is needed to allow the Vermont Joint Owners to qualify and receive installed capacity (ICAP) payments for their import contracts for May 2010, the final month of the ICAP transition period. As discussed below, the Commission denies Vermont Electric's request for waiver.

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<sup>1</sup> The Vermont Joint Owners include The Central Vermont Public Service Corporation, Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., Barton Village, Inc., Village of Enosburg Falls Electric Light Department, Hardwick Electric Department, Village of Jacksonville Electric Company, Village of Hyde Park, Village of Johnson Electric Department, Ludlow Electric Light Department, Lyndonville Electric Department, Morrisville Water & Light Department, Town of Northfield, Village of Orleans, Swanton Village Electric Department, Washington Electric Cooperative, Vermont Marble, and Stowe Electric Department.

<sup>2</sup> With the commencement of the Forward Capacity Market (FCM) on June 1, 2010, the large majority of section III.8 became inapplicable and was removed from the Tariff. *See ISO New England Inc.*, Docket No. ER10-995-000 (Apr. 30, 2010) (accepting revised tariff sheets that remove or relocate certain provisions of Market Rule 1 related to the termination of the ICAP transition period and the commencement of the first capacity commitment period for the FCM) (unpublished letter order).

## I. Background

2. On June 16, 2006, the Commission approved the FCM Settlement Agreement, which, among other things, established an ICAP transition period during which Market Participants could qualify and receive ICAP payments prior to the beginning of the first FCM commitment period on June 1, 2010.<sup>3</sup> A new section III.8 of ISO-NE's tariff was created to implement the ICAP transition provisions of the FCM Settlement Agreement.<sup>4</sup> Section III.8 of ISO-NE's tariff was approved by the Commission on October 31, 2006.<sup>5</sup> The ICAP transition period began on December 1, 2006 and ended with the commencement of the FCM on June 1, 2010, at which time the FCM rules superseded the former ICAP transition provisions.

3. To qualify to receive a monthly ICAP Payments, section III.8.3.7.1 of Market Rule 1 required import contracts to be at least two consecutive months in duration, with both months in the same ICAP Commitment Period.<sup>6</sup> During the transition period, two ICAP Commitment Periods occurred each year. The summer ICAP Commitment Period ran from May through October and the winter ICAP Commitment Period ran from November through April.

4. All of the Vermont Joint Owners schedule a portion of their import contracts with Hydro-Quebec on the Highgate facilities. The Central Vermont Public Service Corporation, Green Mountain Power Corporation, and Vermont Electric Cooperative, Inc. have entitlements to a portion of the Phase I/II HVDC transmission facilities under a long-term power purchase contract with Hydro-Quebec that extends through the year 2020. Vermont Electric serves as agent for the Vermont Joint Owners with respect to the Highgate portion of the Hydro-Quebec contracts and for Vermont Electric Cooperative, Inc. with respect to the Phase I/II portion. As agent, Vermont Electric has submitted ICAP commitments to ISO-NE since the ICAP market began, as have The Central Vermont Public Service Corporation and Green Mountain Power Corporation, who schedule their respective related energy and capacity over Phase I/II. Vermont Electric states that the Vermont Joint Owners have received capacity payments for their Hydro-

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<sup>3</sup> *Devon Power LLC*, 115 FERC ¶ 61,340 (2006), *order on reh'g*, 117 FERC ¶ 61,133 (2006), *remanded in part sub nom. Maine PUC v. FERC*, 520 F.3d 464 (D.C. Cir. 2008).

<sup>4</sup> ISO New England, FERC Electric Tariff No. 3 (ISO-NE Tariff), First Revised Sheet No. 7232.

<sup>5</sup> *ISO New England Inc.*, 117 FERC 61,132 (2006).

<sup>6</sup> ISO-NE Tariff, First Revised Sheet Nos. 7233 and 7245.

Quebec contract imports over the Highgate and Phase II interconnections between New England and Quebec since 1999, and that these payments have ranged from \$793,000 to \$1,164,400 per month based on 260 - 284 MW.

## **II. Request for Waiver**

### **A. Description**

5. Vermont Electric states that on April 23, 2010, it attempted to commit the Highgate portion of the Hydro-Quebec contracts for May 2010 only, recognizing that the FCM was expected to begin on June 1, 2010. ISO-NE rejected the commitment because the commitment did not meet the two-month minimum duration requirement in section III.8.3.7. Vermont Electric states that it then submitted commitments electronically for May-June 2010, which were all accepted. Vermont Electric then entered the Phase II ICAP for Vermont Electric Cooperative, Inc., and The Central Vermont Public Service Corporation and Green Mountain Power Corporation entered their respective Phase II ICAP in the same manner.

6. Vermont Electric further states that one day before the May commitments were to take effect ISO-NE cancelled all of the commitments based on ISO-NE's review of section III.8.7.1 of Market Rule 1 and section 4.C. of the FCM Settlement Agreement. ISO-NE informed Vermont Electric that with the commencement of the first FCM Capacity Commitment Period in June 2010, an ICAP import contract originating in May 2010 for the Transition Period cannot satisfy the two-month minimum duration requirement of section III.8.3.7.1.

7. Vermont Electric argues that Market Rule 1 does not allow ISO-NE to refuse to pay for a full month's ICAP value simply because a new forward market was being implemented the following month. Vermont Electric requests a waiver of section III.8.3.7.1 to the extent necessary to avoid an unanticipated application of the rule that would deny the Vermont Joint Owners more than a million dollars of ICAP payments for the month of May 2010 due to the commencement of the FCM on June 1, 2010.

8. In support of their request for waiver, Vermont Electric states that it acted in good faith, since it has followed the FCM Transition Period ICAP commitment rules consistently since December 2006. Vermont Electric states that the requested waiver is of limited scope as the request applies only to the single month of May 2010. Further, Vermont Electric asserts that the waiver would resolve a concrete problem so that it would not face an approximately million dollar loss in ICAP payments and other ISO-NE participants would not receive a corresponding subsidy. Finally, Vermont Electric explains that the waiver would not harm third parties. It simply allows the Vermont Joint Owners to continue collecting ICAP payments for resources they continued to make available to the ISO-NE region.

**B. Notice and Responsive Pleadings**

9. Notice of Vermont Electric's filing was published in the *Federal Register*, 75 Fed Reg. 32,937 (2010), with interventions or protests due on or before June 17, 2010. ISO-NE timely filed a motion to intervene and comments in opposition to Vermont Electric's waiver request. New England Power Pool Participants Committee timely filed a motion to intervene. On June 18, 2010 Vermont Electric filed an answer to ISO-NE's comments.

10. ISO-NE contends that Vermont Electric's waiver request is an improperly styled complaint under section 206 of the Federal Power Act since Vermont Electric essentially seeks a determination that two-month minimum duration requirement in section III.8.3.7 is unjust and unreasonable as applied to them and granting relief would require modification of a Commission-approved tariff provision. ISO-NE disputes Vermont Electric's eligibility to receive ICAP payments for May 2010. ISO-NE argues that it is impossible within the "four-corners" of the tariff to qualify import contracts to receive ICAP payments for only May 2010 because the FCM start date of June 1, 2010 fell in the middle of the initial two months of the summer commitment period during the ICAP transition period. Despite ISO-NE's objection to the style of Vermont Electric's request, ISO-NE argues that Vermont Electric's waiver request does not meet the Commission's requirements for waivers and should be denied. ISO-NE additionally argues that there is no underlying error to correct, the waiver is not of limited scope, there is no concrete problem to be remedied, and Vermont Electric cannot claim that the waiver will not have undesirable consequences.

11. Vermont Electric contends in its answer that even if its request was considered to be a complaint, it is a matter of form over substance as all of the requisite elements for a complaint are included in its filing. Vermont Electric reiterates its arguments and requests that the Commission grant relief on behalf of the Vermont Joint Owners by construing the ISO-NE tariff to permit bids and require payments for ICAP Imports for the May 2010 summer ICAP Commitment Period, or by granting waiver to reach the same outcome.

**III. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest, unless otherwise ordered by the decisional authority. We will accept Vermont Electric's answer because it has provided information that assisted us in our decision-making process.

#### IV. Commission Determination

14. The Commission denies Vermont Electric's request for relief for failure to meet the waiver criteria. We begin our discussion by addressing the applicable provisions of the tariff and then apply the waiver criteria.

15. Looking to the tariff, we disagree with Vermont Electric that the Vermont Joint Owners are entitled to receive ICAP payments for their import contracts for May 2010. When presented with a dispute concerning the interpretation of a tariff or contract, the Commission looks first to the language of the tariff or contract itself and, only if it cannot discern the meaning of the contract or tariff from the language of the contract or tariff, will it look to extrinsic evidence of intent.<sup>7</sup> A tariff or contract is ambiguous when it is "reasonably susceptible [to] different constructions or interpretations."<sup>8</sup>

16. Here we find that the tariff is clear and unambiguous. The tariff sheets submitted and approved by the Commission implementing the transition provisions of the FCM Settlement Agreement<sup>9</sup> established that the ICAP transition period started on December 1, 2006 and ended with the commencement of the FCM on June 1, 2010. In order to receive ICAP payments during this transition period, the ISO-NE Tariff requires that import contracts must be at least two consecutive months in duration, with both months within the same ICAP Commitment Period.<sup>10</sup> As there is no second month in the summer ICAP commitment period, which began in May 2010, an ICAP import contract for May 2010 cannot satisfy the two-month duration requirement in Market Rule 1 to qualify for an ICAP payment. The tariff provides that each ICAP resource shall receive an ICAP payment for each month that it is listed as an ICAP Resource *and* meets the requirements applicable to that type of ICAP resource. Because the Vermont Joint Owners cannot meet the applicable requirements for import contracts, no ICAP payments are due for their import contracts for May 2010.

17. The Commission denies Vermont Electric's request for a waiver of the two-month duration requirement to allow Vermont Electric to qualify for ICAP payments for May 2010. The Commission has previously granted tariff waivers where: (1) the underlying

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<sup>7</sup> *New York Independent System Operator, Inc. v. Astoria Energy LLC*, 118 FERC ¶ 61,216, at P 34 (2007) (citing *Nicole Gas Production Ltd.*, 105 FERC ¶ 61,371 (2003)).

<sup>8</sup> *Mississippi River Transmission Corp.*, 96 FERC ¶ 61,185 (2001) (quoting *Lee v. Flintkote Co.*, 593 F.2d 1275, 1282 (D.C. Cir. 1979)).

<sup>9</sup> *ISO New England Inc.*, 117 FERC ¶ 61,132 (2006).

<sup>10</sup> ISO-NE Tariff, First Revised Sheet No. 7233.

error was made in good faith; (2) the waiver is of limited scope; (3) a concrete problem must be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>11</sup>

18. Vermont Electric asserts that it has acted in good faith by following the ICAP commitment rules consistently since December of 2006. However, Vermont Electric fails to identify an underlying error for the Commission to remedy with a waiver. Vermont Electric's pleading asserts that ISO-NE erred by not providing Vermont Electric with ICAP payments for May 2010. As discussed above, ISO-NE applied the Commission-approved ISO-NE Tariff as written; therefore, no error exists to justify a waiver. While the waiver may indeed be of limited scope, covering only the single month of May 2010, there is no concrete problem to be remedied since Vermont Electric was not due ICAP payments for May 2010 under the ISO-NE Tariff. Lastly, Vermont Electric states that the waiver will not harm third parties since it simply allows the Vermont Joint Owners to continue collecting ICAP payments for resources made available to the ISO-NE region. In fact, if the waiver request is granted, it will allow Vermont Electric to receive ICAP payments during a month that ICAP payments were not due under the Tariff. Such a result would award Vermont Electric ICAP payments where similarly-situated import contract providers would not receive payments. For these reasons, we deny Vermont Electric's request for waiver of the minimum ICAP import commitment duration requirement under ISO New England Market Rule 1.

The Commission orders:

Vermont Electric's request for waiver is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>11</sup> See, e.g., *National Grid USA*, 129 FERC ¶ 61,212 (2009); *Connecticut Light & Power Co.*, 126 FERC ¶ 61,186 (2009); *ISO New England Inc. – EnerNOC, Inc.*, 122 FERC ¶ 61,297 (2008); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008); *Central Vermont Public Service Corp.*, 121 FERC ¶ 61,225 (2007); *University of New Hampshire*, 121 FERC ¶ 61,185 (2007); *Waterbury Generation LLC*, 120 FERC ¶ 61,007 (2007). See also *Cal. Indep. Sys. Operator*, 124 FERC ¶ 61,031 (2008), *reh'g denied*, 124 FERC ¶ 61,293 (2008).