

132 FERC ¶ 61,098
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.

ISO New England Inc. and
New England Power Pool

Docket No. ER09-1051-002

ORDER DENYING REQUEST FOR REHEARING

(Issued August 2, 2010)

1. On January 21, 2010, the Commission issued an order¹ conditionally accepting a filing submitted by ISO New England Inc. (ISO-NE) and the New England Power Pool Participants Committee (NEPOOL) (jointly, Filing Parties) to revise ISO-NE's Transmission, Markets and Services Tariff (Tariff) in accordance with Order No. 719.² Among other things, the January 21, 2010 Order found that Filing Parties' proposed tariff revisions satisfied the Commission's directives in Order No. 719 regarding the market monitoring function. The Connecticut Department of Public Utility Control, Connecticut Attorney General, and the Connecticut Office of Consumer Counsel (collectively, Connecticut Representatives) request rehearing of the January 21, 2010 Order. For the reasons discussed below, we deny the Connecticut Representatives' request for rehearing.

I. Background

2. In Order No. 719, the Commission directed certain reforms in order to enhance the market monitoring function and improve the performance and transparency of regional transmission organizations (RTO) and independent system operators (ISO). Specifically, the Commission required each RTO or ISO to provide its Market Monitoring Unit

¹ *ISO New England Inc.*, 130 FERC ¶ 61,054 (2010) (January 21, 2010 Order).

² *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *reh'g denied*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

(MMU) with access to market data, resources, and personnel sufficient to carry out its duties. The Commission further required that the MMU report directly to the RTO or ISO board of directors (in a hybrid MMU, the external MMU, as well as an internal MMU that performs any of the core MMU functions, must report to the board of directors).³ In addition, the Commission required that the MMU's functions include the core functions of: (1) identifying ineffective market rules and recommending proposed rules and tariff changes; (2) reviewing and reporting on the performance of the wholesale markets to the RTO or ISO, the Commission, and other interested entities; and (3) notifying appropriate Commission staff of instances in which a market participant's behavior may require investigation.⁴

3. The Commission also took the following actions with regard to MMUs: (1) expanded the list of recipients of MMU recommendations regarding rule and tariff changes, and broadened the scope of behavior to be reported to the Commission; (2) modified MMU participation in tariff administration and market mitigation; and (3) expanded the dissemination of MMU market information to a broader constituency.⁵

4. The January 21, 2010 Order accepted Filing Parties' proposed revisions to the ISO-NE Tariff regarding market monitoring, finding that these revisions satisfied the Commission's directives in Order No. 719. In making this determination, the Commission rejected protests filed by the Connecticut Representatives as beyond the scope of Order No. 719. Specifically, the Commission noted that certain reforms requested by the Connecticut Representatives, such as their request that ISO-NE's External MMU have principal authority over market monitoring, were contrary to the directives of Order No. 719 and rejected such proposed reforms as a collateral attack on Order No. 719. The Commission also noted that the Connecticut Representatives had presented no evidence that other reforms were necessary. The Commission stated that it did not support requiring further restructuring of ISO-NE's market monitoring policies without such restructuring being fully vetted by all affected parties in New England.⁶

³ The use of the phrase "board of directors" herein also includes the board of managers, board of governors, and similar entities.

⁴ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 5.

⁵ *Id.* P 5-6.

⁶ January 21, 2010 Order, 130 FERC ¶ 61,054 at P 132-37.

II. Request for Rehearing and Responsive Pleadings

5. The Connecticut Representatives contend that the January 21, 2010 Order disregarded structural flaws in ISO-NE's market monitoring function. They argue that, even if ISO-NE's Tariff satisfies the rote requirements of Order No. 719, more comprehensive reforms are needed because ISO-NE's market monitors failed for more than two years to prevent clearly non-competitive energy market offers. They contend that ISO-NE acknowledged in a March 20, 2009 filing in Docket No. ER09-873-000 that its market monitor had condoned capacity importers' energy market offers that could not represent competitive pricing, allowing energy offers at or near ISO-NE's \$1,000/MWh price cap without any constraint or challenge (Competitive Imports Rules Filing).⁷ The Connecticut Representatives contend that this demonstrates that ISO-NE's market monitors did not perform the duties on which the Commission relies to assure competitive markets.

6. Rather, the Connecticut Representatives state that the Internal MMU is not truly independent from ISO-NE. They note that internal market monitoring staff are ISO-NE employees and their compensation is tied to customer satisfaction through an annual bonus program that is based, in part, on an annual customer survey.⁸ Further, the Connecticut Representatives argue that under ISO-NE's "hybrid" structure, the External MMU cannot perform its review functions because the Internal MMU dictates whether and when to make necessary information available.

7. The Connecticut Representatives note that they raised these same concerns in their complaints in Docket Nos. EL09-47-000 and EL09-48-000.⁹ They contend that in that joint proceeding, the Commission declined to address the Connecticut Representatives' proposed modifications to ISO-NE's market monitoring function, stating that "such comments are more appropriately addressed in ISO-NE's Order No. 719 compliance

⁷ Connecticut Representatives Request for Rehearing at 9 (citing ISO-NE's March 20, 2009 Filing, Docket No. ER09-873-000); *see ISO New England Inc.*, 127 FERC ¶ 61,235 (2009), *order accepting compliance filing*, 129 FERC ¶ 61,101 (2009). The Commission accepted ISO-NE's and NEPOOL's proposal to apply competitive offer requirements to energy transactions associated with installed capacity import contracts.

⁸ Connecticut Representatives Request for Rehearing at 11.

⁹ The two dockets were consolidated into one proceeding. *See Attorney General for the State of Connecticut v. ISO New England Inc.*, 128 FERC ¶ 61,182 (2009) (Complaint Order).

proceeding in Docket No. ER09-1051-000 because that proceeding will comprehensively address the issue of market monitoring.”¹⁰ The Connecticut Representatives assert that the Commission failed to address market monitoring comprehensively in the January 12, 2010 Order as the Commission pledged in the Complaint Order.

8. Further, the Connecticut Representatives disagree with the Commission’s statement that the NEPOOL stakeholder process is the appropriate forum to develop tariff modifications regarding market monitoring. The Connecticut Representatives state that the Federal Power Act (FPA) does not require state regulators to seek market participants’ support for market reforms before petitioning for those reforms at the Commission, nor does it direct that any state proposal be “fully vetted by all affected parties” before such proposals may be brought to the Commission.¹¹ Additionally, the Connecticut Representatives argue that, although ISO-NE has committed to conduct an audit of its market monitor failures, this audit will not address whether market rule changes were pursued in a timely manner, or whether changes should be made to the structure of the internal and external market monitoring units.

9. The Connecticut Representatives assert that the Commission erred by dismissing the Connecticut Representatives’ comments as a collateral attack on Order No. 719. The Connecticut Representatives contend that they did not seek to alter any of the provisions of Order No. 719; rather, they focused on the failures of ISO-NE’s market monitoring function. The Connecticut Representatives state that it would have been beyond the scope of the Order No. 719 rulemaking proceeding to raise comments specific to a single RTO. Further, the Connecticut Representatives note that evidence of ISO-NE’s market monitor’s failure came to light only after the Commission closed the rulemaking proceeding’s comment period.¹²

10. On March 9, 2010, ISO-NE and NEPOOL filed answers.

¹⁰ Connecticut Representatives Request for Rehearing at 13 (citing Complaint Order, 128 FERC ¶ 61,182 at P 57).

¹¹ *Id.* at 14 (citing January 21, 2010 Order, 130 FERC ¶ 61,054 at P 137).

¹² *Id.* at 16.

III. Discussion

A. Procedural Matters

11. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2010), prohibits answers to requests for rehearing. Accordingly, we reject both the ISO-NE and NEPOOL answers.

B. Commission Determination

12. We deny the Connecticut Representatives' request for rehearing. The Connecticut Representatives have presented no new arguments to persuade us to reconsider our findings in the January 21, 2010 Order. The Connecticut Representatives contend that, even if ISO-NE's Tariff satisfies "the rote requirements of Order No. 719," we should have required ISO-NE to make certain modifications to its Tariff in the January 21, 2010 Order.¹³ However, the purpose of a compliance proceeding is to ensure that a compliance filing adheres to the directives of the underlying order, in this case Order No. 719. The Commission has held that requests to alter a compliance filing in a manner that differs from the order requiring the compliance filing constitute a collateral attack on the order requiring the compliance filing.¹⁴ Therefore, the Commission was correct to find in the January 21, 2010 Order that many of the reforms proposed by the Connecticut Representatives were a collateral attack on Order No. 719's determinations.

13. However, even if we were we to find that Connecticut Representatives' arguments were properly raised, we would not find that ISO-NE must make additional changes to the market monitoring function in this proceeding. The Connecticut Representatives' principal argument for restructuring ISO-NE's market monitoring function focuses on the issues raised in the Competitive Imports Rules Filing; however, Connecticut Representatives have not demonstrated that the existing relationship between the ISO-NE board and the Internal or External MMUs inhibited any of their actions in relation to the Competitive Imports Rules Filing.¹⁵ In addition, Connecticut Representatives have not

¹³ *Id.* at 8.

¹⁴ *California Independent System Operator Corp.*, 119 FERC ¶ 61,240, at P 13 (2007).

¹⁵ We note that Connecticut Representatives did not request rehearing of the Complaint Order, which found that "[w]ith respect to comments related to ISO-NE's market monitoring unit and ISO-NE's pending Order No. 719 compliance finding ... the Connecticut Representative have not raised a reasonable doubt that the existing tariff provisions are unreasonable and thus should be set for hearing under section 206."

(continued...)

shown in their rehearing request that the management of ISO-NE had any motivation for ISO-NE or the Internal MMU to do other than administer the rules appropriately.

14. Specifically, Connecticut Representatives argue that the ISO-NE market monitors' alleged failure to perform their duties demonstrates that the ISO-NE's market monitoring function possesses fundamental structural problems, in particular that the Internal MMU is not truly independent and is insufficient to ensure competitive markets. We disagree. The argument that an internal MMU lacks independence ignores the very reforms directed in Order No. 719, in which the Commission observed that it has not detected any deficiency in performance by internal MMUs that is attributable to their structure.¹⁶ In addition, the Commission determined that if an internal MMU carries out any or all of the core market monitoring functions, independence can be achieved by requiring the internal MMU to report to the ISO's board of directors.¹⁷

15. We also disagree with Connecticut Representatives' claim that under ISO-NE's hybrid structure, the External MMU cannot perform its review functions because the Internal MMU has control over necessary information. To the contrary, ISO-NE's compliance filing in this proceeding revised the ISO-NE Tariff to require ISO-NE to (1) provide the External MMU with full and real-time access to all ISO market data; (2) allow the External MMU to participate in ISO board of directors meetings; (3) allow the External MMU to submit recommendations directly to the board and market participants on how to improve market competitiveness; and (4) allow the External MMU to review ISO-NE's filings to determine the effects of such filings on market competitiveness and efficiency.¹⁸ Further, Connecticut Representatives have not provided any basis for finding that the errors or the alleged delay at issue in the Competitive Imports Rules Filing would not have occurred if their proposed restructuring of the market monitoring function had been in place.

16. Connecticut Representatives also argue that the Commission did not "comprehensively address" the issue of market monitoring in ISO-NE's compliance proceeding, as it stated it would do in the Complaint Order.¹⁹ Contrary to the

Complaint Order, 128 FERC ¶ 61,182 at P 57.

¹⁶ Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 327.

¹⁷ *Id.* P 341.

¹⁸ ISO-NE Transmission, Markets and Services Tariff § III.A.1.2, III.A.1.3. and III.A.2.2.

¹⁹ *Id.* at 13 (citing Complaint Order, 128 FERC ¶ 61,182 at P 57).

Connecticut Representatives' claim, the Commission did comprehensively address the issue of market monitoring in the January 21, 2010 Order by discussing each of Order No. 719's requirements regarding market monitoring and determining whether or not ISO-NE's market monitoring structure satisfactorily met these requirements. In addition, in determining that ISO-NE's market monitoring structure does, in fact, satisfy these requirements, the Commission considered a number of reforms suggested by the Connecticut Representatives.²⁰ However, other than referring to the Competitive Imports Rules Filing, the Connecticut Representatives provided no specific examples to demonstrate that their proposed reforms were necessary to address perceived flaws in ISO-NE's market monitoring structure.

17. Connecticut Representatives also challenge the Commission's ruling in the January 21, 2010 Order that Connecticut Representatives should raise their concerns in the stakeholder process, arguing that the FPA does not require state regulators to seek market participants' support for market reforms before petitioning the Commission. While Connecticut Representatives are correct that there is no requirement that a complainant go through the NEPOOL stakeholder process before petitioning the Commission under section 206, we maintain that the NEPOOL stakeholder process is the appropriate forum to address the Connecticut Representatives' concerns. The Commission has held numerous times, including in matters pertaining to the Connecticut Representatives, that parties seeking to make changes to agreements on file with the

²⁰ January 21, 2010 Order, 130 FERC ¶ 61,054 at P 135. Along with suggesting that the External MMU have principal authority and the Internal MMU report directly to the External MMU, other reforms suggested by Connecticut Representatives included: (1) curtailing the ISO-NE board of directors' ability to control the market monitoring function; (2) prohibiting the ISO-NE board of directors, management, and counsel from having the right to review, screen, alter, delete, or exercise editorial control over the External MMU's reports; (3) requiring the External MMU to chair a Market Monitoring Advisory Committee to enhance communications between the External MMU and interested parties; (4) requiring the External MMU to meet regularly with the New England Conference of Public Utilities Commissioners; and (5) requiring the External MMU to improve the quality of its analyses and reports and ensure that all materials are timely published on its website or a dedicated page of ISO-NE's website. *See* Connecticut Department of Public Utility Control Protest, Docket No. ER09-1051-000, at 25-29.

Commission should first seek to address their concerns through the stakeholder process.²¹ This process provides parties with a forum to voice their concerns and resolve disputes prior to petitioning the Commission. We find that it is not inappropriate to have recommended the stakeholder process to Connecticut Representatives and, accordingly, deny rehearing.

18. As discussed above, the Connecticut Representatives have failed to adequately support their claims that ISO-NE's market monitoring structure is flawed, and have not demonstrated that the Commission erred in finding Filing Parties in compliance with Order No. 719. We will not require ISO-NE to revise its market monitoring structure in this compliance proceeding without convincing evidence that such changes are necessary. If ISO-NE's independent audit, established to investigate the facts surrounding the Competitive Imports Rules Filing, has not satisfactorily addressed the Connecticut Representatives' concerns, then the Connecticut Representatives should raise their concerns in the stakeholder process and request further discussion.

The Commission orders:

Connecticut Representatives' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²¹ See, e.g., *Northeast Utilities Service Co.*, 109 FERC ¶ 61,024, at P 14 (2004) (“If [the State of Connecticut Department of Public Utility Control] desires to continue to pursue this issue, it should raise the issue with ISO-NE and seek to have its suggestions addressed through the ISO-NE's stakeholder process.”).