

132 FERC ¶ 61,187
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.

ER09-1144-001

ORDER GRANTING CLARIFICATION AND DISMISSING REHEARING

(Issued August 30, 2010)

1. On July 14, 2009, the Commission accepted a filing that revised certain rules of ISO New England Inc.'s (ISO-NE's) Forward Capacity Market (FCM) including rules relating to the rights and obligations of resources with and without Capacity Supply Obligations (CSOs).¹ Competitive Suppliers² have requested clarification or, in the alternative, rehearing of the Commission's substantive ruling in that order. For the reasons discussed below, we will grant clarification. Additionally, we dismiss as moot a related request for rehearing.

I. Background

2. ISO-NE administers a forward market for capacity, in which capacity resources compete to provide capacity to New England on a three-year-forward basis by participating in an annual Forward Capacity Auction (FCA). Providers whose capacity is taken in the FCA acquire CSOs, which they must fulfill three years later.

3. A resource with a CSO (a CSO Resource) receives capacity payments, in return for which it is required to offer its capacity into ISO-NE's energy markets throughout the year. A resource that does not hold a CSO (a Non-CSO Resource) receives no capacity

¹ *ISO New England Inc.*, 128 FERC ¶ 61,023 (2009) (July 14 Order).

² Competitive Suppliers include the NRG Companies (NRG Power Marketing LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, and Somerset Power LLC), the Mirant Companies (Mirant Energy Trading, LLC, Mirant Canal, LLC, and Mirant Kendall, LLC), and GDF SUEZ Energy North America, Inc.

payments and has no obligation to offer into the energy markets, although it may choose to do so.

A. The May 15 Filing and Responsive Pleadings

4. On May 15, 2009, ISO-NE and the New England Power Pool Participants Committee (NEPOOL) (the Filing Parties) made a filing seeking to revise various parts of the FCM rules. The proposed revisions provided additional detail and clarification to various aspects of the FCM rules, including those dealing with the rights and obligations of Market Participants, payments and charges, and performance topics.

5. Under ISO-NE's existing market rules, all supply offers (by both CSO Resources and Non-CSO Resources) are evaluated for economic withholding in the Real-Time Energy Market.³ For resources subject to these evaluations, the internal market monitor (IMM) examines the supply offers of pivotal suppliers and of suppliers in a Constrained Area. If the offer of any such supplier exceeds the supplier's Reference Level by a threshold amount *and* would cause the market price to increase by a specified threshold amount, and if the supplier cannot satisfactorily explain to the IMM the reasons for an offer above the Reference Level, the supplier's offer is replaced by its Reference Level. The Reference Level may be calculated in any of several ways, but it is intended to reflect an estimate of the supplier's marginal costs.⁴ The Filing Parties did not propose any changes to the mitigation rules contained in Appendix A to Market Rule 1.

6. Competitive Suppliers protested the filing, asserting that the proposed tariff changes were unjust and unreasonable because they applied the same mitigation rules to energy offers from Non-CSO Resources that are applied to energy offers from CSO Resources. Competitive Suppliers argued that, since Non-CSO Resources do not receive capacity payments and must rely exclusively on energy market revenues to recover fixed costs, Non-CSO Resources should not have their energy offers mitigated based on their marginal costs like CSO Resources, because such mitigation will deny them a reasonable opportunity to recover their fixed costs. Competitive Suppliers asked the Commission to direct the Filing Parties to modify the mitigation rules so that energy offers from Non-CSO Resources are not subject to mitigation based on their marginal costs, but instead are limited only by the \$1,000/MWh Energy Offer Cap.

7. Answers to the protest were submitted by ISO-NE, NEPOOL, and the Connecticut Department of Public Utility Control (CT DPUC). Both of the Filing Parties opposed Competitive Suppliers' proposal, arguing that it presented possible market power and

³ ISO-NE Market Rule 1, Appendix A, section III.A.5.2.1.

⁴ *Id.*, sections III.A.5.2 through III.A.5.7.

price formation issues and had not been thoroughly vetted by ISO-NE or the stakeholders. ISO-NE further noted in its answer that Competitive Suppliers' proposal was improperly raised in a protest to the Filing Parties' proposed rules changes, since the mitigation provisions to which they objected were already contained in the currently-effective FCM market rules and were not modified or affected by the Filing Parties' proposed revisions to the market rules. ISO-NE therefore argued that Competitive Suppliers' proper recourse was to file a complaint with the Commission under section 206 or to initiate a full discussion of this issue in the stakeholder process. NEPOOL stated in its answer that Competitive Suppliers' proposal had been considered as an amendment to the instant proposal and was not supported by either ISO-NE or NEPOOL, but that NEPOOL had agreed to include this issue in future stakeholder proceedings.⁵

8. CT DPUC included, with its answer, an affidavit by Dr. Seth Blumsack purporting to demonstrate that Competitive Suppliers' proposal to exclude Non-CSO Resources from mitigation rules would enable Non-CSO Resources to exercise market power. Competitive Suppliers filed a reply to those answers, including an affidavit by Dr. Miles Bidwell that purported to rebut Dr. Blumsack's assertions.

B. July 14 Order

9. In the July 14 Order, the Commission accepted ISO-NE's and NEPOOL's filing. First, however, we rejected, on procedural grounds, Competitive Suppliers' argument against applying the same mitigation rules to energy offers from Non-CSO Resources and CSO Resources alike:

[T]he proposed tariff revisions do not in any way alter the provisions of Appendix A to Market Rule 1 of ISO-NE's tariff, which provides for mitigation to be applied to both CSO and Non-CSO resources, and there is no provision in the currently-effective Appendix A that contemplates different forms of mitigation depending on a resource's participation in specific ISO-NE markets. Thus, NRG's protest to the instant filing is in reality an attack on the currently-effective Appendix A mitigation provisions, which were previously found to be just and reasonable, and which ISO-NE is not proposing to change. . . . We agree . . . that NRG's request is, therefore, procedurally improper and that any revision to the

⁵ July 14 Order, 128 FERC ¶ 61,203 at P 26-27.

mitigation provisions should come either through a section 206 proceeding or as a product of the NEPOOL stakeholder process.⁶

10. The Commission then addressed Competitive Suppliers' proposal on its merits, and found first that they had not shown in their pleadings that, under current mitigation rules, Non-CSO Resources lacked a reasonable opportunity to recover their fixed costs in the energy markets. We reiterated that "in a competitive market, the Commission is responsible only for assuring that [a resource] is provided the opportunity to recover its costs,"⁷ not a guarantee of such cost recovery.

11. We also found that Competitive Suppliers' proposal undermined Commission policy, in that it would permit resources to exercise market power by providing reliability service to ISO-NE at payments up to the \$1,000/MWh Energy Offer Cap, and would create improper incentives in the ISO-NE markets by allowing resources to choose their preferred method of cost recovery – either through participation in the FCM, or through energy/uplift payments at the Energy Offer Cap – thus undermining the principles supporting the FCM Settlement.

12. The Commission therefore accepted the Filing Parties' proposal and rejected Competitive Suppliers' protest. Additionally, the Commission accepted the answers filed by ISO-NE, NEPOOL, and CT DPUC to the protests because they provided information that assisted the Commission in its decision-making process. The Commission rejected Competitive Suppliers' answer to those answers, however, on the basis that "the bulk of [Competitive Suppliers'] answer contains re-argument and additional support for the position that [Competitive Suppliers] already asserted in [their] protest."⁸

II. Request for Clarification or Rehearing

13. On August 13, 2009, Competitive Suppliers requested clarification or, in the alternative, rehearing of the Commission's decision to reject Competitive Suppliers' proposal on its merits, after ruling that the proposal was beyond the scope of the proceeding.

⁶ *Id.* P 31

⁷ *Id.* P 34, (citing *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005)).

⁸ July 14 Order, 128 FERC ¶ 61,203 at P 13 n.5.

14. Competitive Suppliers ask the Commission to clarify that its ruling in the July 14 Order on the merits of the NRG proposal does not estop or preclude them or others from seeking the same relief prospectively. Competitive Suppliers acknowledge that they do not seek rehearing of the Commission's finding that the proposal put forth in Competitive Suppliers' Protest is procedurally improper. However, they argue that the Commission erred in addressing the merits of their proposal after it had found it to be procedurally improper. Competitive Suppliers assert that the Commission failed to consider requests by Competitive Suppliers and NEPOOL to remand their proposal to the stakeholder process, and, by addressing the merits of Competitive Suppliers' proposal, may have estopped further consideration of their proposal or prejudged the outcome of the stakeholder process.

15. Additionally, Competitive Suppliers state that the July 14 Order fails to make clear the issue the Commission was deciding: they argue that it was not clear whether the Commission meant that (a) application of the existing mitigation provisions to Non-CSO Resources was just and reasonable, or that (b) Competitive Suppliers had failed to support their argument that application of those mitigation provisions to Non-CSO Resources was not just and reasonable. Competitive Suppliers seek clarification as to whether the July 14 Order precludes NEPOOL and ISO-NE from filing in the future a stakeholder proposal that addresses the same issues or prevents Competitive Suppliers and others from filing a section 206 complaint in the future.

16. In the alternative, Competitive Suppliers request that the Commission grant rehearing, accept Competitive Suppliers' Reply, and either direct ISO-NE to submit revised tariff provisions consistent with the NRG proposal, set for rehearing the issue of mitigation, or remand the matter for further consideration by ISO-NE in the NEPOOL stakeholder process.

17. Competitive Suppliers also seek rehearing of the Commission's decision to reject their reply to other parties' answers. By rejecting Competitive Suppliers' reply and the attached affidavit from Dr. Miles Bidwell, Competitive Suppliers argue, the Commission ignored important information that addressed and refuted arguments that were raised in the affidavit by Dr. Seth Blumsack that was attached to CT DPUC's answer. Competitive Suppliers argue that the Commission acted arbitrarily and capriciously in rejecting its reply, and abused its discretion by accepting answers that support the Commission's ruling and rejecting those that do not support its findings.⁹ Competitive Suppliers dispute

⁹ Request for Rehearing at 9, (citing *Shell Oil Co. v. FERC*, 664 F.2d 79, 83 (5th Cir. 1981)).

the Commission's claim that their reply contained only "re-argument and additional support for the position that NRG already asserted in its protest."¹⁰

III. Answers to Request for Clarification or, in the Alternative, Rehearing

18. ISO-NE and NEPOOL request leave to answer and submit answers to Competitive Suppliers' request for clarification or, in the alternative, rehearing.

19. ISO-NE states that the Commission should reject Competitive Suppliers' requests for clarification and rehearing. ISO-NE argues that the Commission's ruling in the July 14 Order was both substantively and procedurally correct, and that the Commission should not rule on Competitive Suppliers' estoppel argument because such a ruling might imply that the Commission's earlier order rejecting the proposal is no longer in force and that the proposals could be considered *de novo*.

20. ISO-NE states that Competitive Suppliers' claim that the Commission erred by discussing the merits of the NRG Proposal, after deciding that the proposal was procedurally flawed, is without substance. ISO-NE argues that, despite the ruling of Competitive Suppliers' proposal as being procedurally improper, the Commission had a strong interest in responding to the issues raised by the NRG proposal and Competitive Suppliers' initial protest which included such fundamental issues as mitigation of market power, cost recovery, and the Commission's market-based rate policy. ISO-NE further argues that, despite the failure of Competitive Suppliers' proposal to gain approval in a meeting of the Participants Committee with a vote of only 36.122 percent, ISO-NE had previously agreed that the Proposal could be further explored in future discussions. Thus, ISO-NE states that Competitive Suppliers' rehearing request is unnecessary since there is nothing stopping Competitive Suppliers from continuing to pursue their proposal in the stakeholder process, and Competitive Suppliers should not obtain a clean slate when further discussing the issue because of the Commission's rejection of the NRG Proposal on procedural grounds.

21. NEPOOL states that its answer applies only to Competitive Suppliers' request for clarification and not their alternative request for rehearing. NEPOOL states that it has already agreed to further discuss Competitive Suppliers' issues in the stakeholder process, and thus it does not oppose Competitive Suppliers' request for clarification (although it believes clarification is unnecessary). NEPOOL, however, requests that, should the Commission grant clarification, that it not impose any firm deadline for completion of consideration on this issue.

¹⁰ July 14 Order at P 3 n. 5.

IV. Discussion

A. Procedural Issue

22. We will treat the answers filed in this proceeding, to the extent they address the clarification request, as properly submitted in response to Competitive Supplier's motion under Rule 213(a)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(3) (2010) .

B. Analysis

23. The Commission grants the request for clarification as to whether Competitive Suppliers may take future steps to address its concerns regarding the mitigation of Non-CSOs.¹¹ Because we are granting clarification, we need not address Competitive Suppliers' alternative request for rehearing. Thus, we will not address Competitive Suppliers' substantive challenges to our discussion of its proposal in the July 14 Order.¹²

24. As requested by Competitive Suppliers, we clarify that our ruling does not prevent or estop Competitive Suppliers or any other party from pursuing the question of appropriate mitigation for Non-CSO Resources in the future, either through the stakeholder process or by exercising statutory rights under the Federal Power Act. We note that, as ISO-NE and NEPOOL have stated in their answers here, NEPOOL has already agreed to further discuss Competitive Suppliers' concerns in the stakeholder process, without objection from ISO-NE.¹³ We clarify that we will review *de novo* any

¹¹ Additionally, as noted above, Competitive Suppliers states that they are not seeking rehearing of our finding in the July 14 Order that their proposal regarding the appropriate mitigation for Non-CSO resources was procedurally improper (*see* request for rehearing at 1 n.4). Therefore, our ruling on this question has become final.

¹² Since it is no longer necessary for us to address Competitive Suppliers' alternative request for rehearing with regard to the rejection of its arguments regarding mitigation for Non-CSOs, the question of whether the Commission properly rejected Competitive Suppliers' reply to other parties' answers has also become moot, and we dismiss Competitive Suppliers' request for rehearing of that rejection on that basis. We note, however, that the Commission's rules and procedures generally prohibit answers to protests, *see* 18 CFR § 385.213(a)(2) (2010), and it is within Commission discretion to decide whether to accept answers to protests or answers to answers.

¹³ *See also* transmittal, February 22, 2010 filing, *ISO New England Inc. and New England Power Pool*, Docket No. ER10-787-000, at p. 11 ("[T]he ISO commits to study the contribution that resources without a Capacity Supply Obligation make to system reliability. The ISO will collect data on the participation in the energy market of

(continued)

filing made with us as a result of the stakeholder process, or section 206 complaint, regarding appropriate mitigation rules for Non-CSO Resources if and when it is presented to us, along with the responses and comments filed by parties.

25. Competitive Suppliers ask whether they are estopped from raising their concerns in future proceedings, and we clarify that they are not. We note, however, that, to the extent that Competitive Suppliers' request could be considered a request for vacatur of our July 14 Order, we deny that request. The Commission has held that vacatur is an equitable remedy not generally available to a party when an order became moot as a result of that party's own actions,¹⁴ as is the case here.¹⁵

26. We will not remand the question of appropriate mitigation for Non-CSO Resources in the future to the stakeholder process, as Competitive Suppliers request. Competitive Suppliers are free to raise their concerns in that forum as they wish, but we will not place an obligation on ISO-NE and the NEPOOL stakeholders as to how and when to consider such a proposal.

The Commission orders:

Competitive Suppliers' request for clarification of the Commission's findings in the July 14 Order as to their proposal for relaxed mitigation for Non-CSO resources is hereby granted.

resources without a Capacity Supply Obligation for the first two Capacity Commitment Periods and will discuss the data with stakeholders and whether further action is appropriate.")

¹⁴ *Town of Neligh, Nebraska v. Kinder Morgan Interstate Gas Transmission, L.L.C.*, 94 FERC ¶ 61,075, at 61,348 (2001). The Commission pointed out that it expends public resources to reach now-mooted decisions, and "agency orders which no longer have a binding effect on the parties to a proceeding because the issues are moot still have value because such orders function as agency policy statements" that "give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances." *Id.* (citing *Panhandle Eastern Pipe Line Company v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999)).

¹⁵ As noted above, Competitive Suppliers acknowledge in their rehearing request that the proposal put forward in their protest was procedurally improper.

Similarly, we dismiss as moot Competitive Suppliers' request for rehearing with regard to our rejection of their reply to other parties' answers.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.