

128 FERC ¶ 61,028  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Boralex Ashland LP

Docket No. EL09-51-000

v.

ISO New England Inc.

ORDER DENYING COMPLAINT

(Issued July 16, 2009)

1. This order addresses a complaint filed by Boralex Ashland LP (Boralex) on May 5, 2009, against ISO New England Inc. (ISO-NE) seeking a transmission priority for installed capacity (ICAP) imports. As discussed below, the Commission will deny the complaint.

**I. Background**

2. On July 16, 2001, Boralex assumed the rights to a long-term, firm point-to-point transmission service agreement with the Maine Electric Power Company, Inc. (MEPCO), which entitled Boralex to transmit 26 megawatts (MW) of capacity and energy over the transmission facilities owned by MEPCO from the New Brunswick interface into the ISO-NE market.<sup>1</sup> Effective December 1, 2008, and as approved by the Commission, ISO-NE rolled in MEPCO's transmission facilities as "pool" transmission facilities (PTF) under the ISO-NE open access transmission tariff (OATT).<sup>2</sup> As part of this process, ISO-NE gave existing transmission customers taking firm point-to-point transmission

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<sup>1</sup> *Me. Elec. Power Co.*, Docket No. ER01-2889-000 (Sept. 26, 2001) (unpublished letter order).

<sup>2</sup> *See ISO New England Inc.*, 124 FERC ¶ 61,297 (2008); *see also ISO New England Inc.*, 121 FERC ¶ 61,097 (2007).

service over MEPCO's facilities (such as Boralex) the option of terminating or grandfathering their transmission service agreements with MEPCO. Boralex timely elected to grandfather its MEPCO transmission service agreement.<sup>3</sup>

## II. The Complaint

3. Boralex states that its grandfathered transmission service agreement at issue in this proceeding (grandfathered agreement) entitles it to transmission priority with respect to the scheduling and curtailment of *energy* imports over the New Brunswick interface into the ISO-NE market. However, Boralex complains that ISO-NE informed Boralex that its grandfathered agreement does not entitle Boralex's *capacity* imports to similar transmission priority. Boralex states that ISO-NE initially denied its request for 26 MW of ICAP import rights over the New Brunswick interface from May 1, 2009, to June 1, 2010 (ISO-NE subsequently informed Boralex that ICAP import rights were available in May and June 2009 when another ICAP importer relinquished its rights over the interface). Boralex now complains that it has no assurance that ISO-NE will grant its request for ICAP import rights for the remaining period (July 1, 2009, until June 1, 2010).<sup>4</sup>

4. Boralex contends that ISO-NE's failure to ensure that Boralex's request for ICAP import rights over the New Brunswick interface will be granted violates the terms of Boralex's grandfathered agreement and section 3.11(g) of ISO-NE's transmission operating agreement (TOA). Boralex maintains that its grandfathered agreement entitles it to an ICAP import right of 26 MW as well as priority for energy imports over the New Brunswick interface. Further, Boralex maintains that section 3.11(g) prohibits ISO-NE from modifying or abrogating the terms and conditions of such grandfathered transmission service agreements.<sup>5</sup>

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<sup>3</sup> Boralex subsequently exercised its rollover right to extend its grandfathered transmission service agreement for another five-year term, i.e., from January 1, 2009, until January 1, 2014.

<sup>4</sup> Boralex states that the financial impact of the denial of its request from July 1, 2009, through June 1, 2010, is \$1,147,963. Complaint at 20.

<sup>5</sup> Complaint at 8.

5. Boralex explains that it has the highest transmission priority for energy imports, pursuant to sections II.44 and II.45.1 of the ISO-NE OATT.<sup>6</sup> Boralex uses its grandfathered agreement to offer energy into the day-ahead market as a self-scheduled transaction over the New Brunswick interface. Boralex explains that because it self-schedules energy on a day-ahead basis and is a price-taker, no other transactions can have a higher status in terms of economic merit order. Further, Boralex states that since its transactions are supported by its “MEPCO grandfathered transmission service agreement” contained in Attachment H to ISO-NE’s OATT, Boralex’s external transactions are accorded the highest transmission priority.

6. Boralex disputes ISO-NE’s position that Market Rule 1 does not grant Boralex similar transmission priority with respect to ICAP imports.<sup>7</sup> Boralex acknowledges that, while its grandfathered agreement is listed in Attachment H of ISO-NE’s OATT, it is not listed in section III.8.8.6 of the Tariff (part of Market Rule 1) or in related ISO-NE Manual M-20 (ICAP Manual), which afford special treatment to certain grandfathered ICAP import agreements across the New Brunswick interface. Boralex complains that ISO-NE recognizes Boralex’s transmission priority for its *energy* imports over this interface, but not for its *capacity* imports.<sup>8</sup>

7. Boralex explains that, as part of the MEPCO roll-in proceeding (in which the Commission’s approved ISO-NE’s proposal to roll in MEPCO’s transmission facilities as PTF under the ISO-NE OATT), ISO-NE gave MEPCO’s transmission customers the option of terminating or grandfathering their MEPCO service agreements. Boralex states that, because of its scheduling practice described above, the priority of its energy imports was not adversely affected by the roll-in proposal;<sup>9</sup> however, Boralex claims that ISO-NE did not provide Boralex adequate notice that its alleged rights regarding capacity imports over the New Brunswick interface would be affected by the roll-in proposal.

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<sup>6</sup> *Id.* at 10. Both section II (the OATT) and section III (Market Rule 1) fall under the umbrella “Transmission, Markets and Services Tariff” (Tariff). ISO-NE, FERC Electric Tariff No. 3, Transmission, Markets and Services Tariff, Sections II and III, *available at* <http://www.iso-ne.com/regulatory/tariff/index.html>.

<sup>7</sup> ISO-NE, FERC Electric Tariff No. 3, Transmission, Markets and Services Tariff, Market Rule 1, Section III (Market Rule 1).

<sup>8</sup> Complaint at 13 & n.32.

<sup>9</sup> *Id.* at 14-15 & n.37.

8. Moreover, Boralex contends that, even if it had examined Market Rule 1 on its own initiative, the ISO-NE Tariff is silent regarding how grandfathered capacity import contracts are treated.<sup>10</sup> Rather, the allocation of ICAP import rights over external interfaces is located in the ICAP Manual. Boralex remarks that the Commission “has stated on numerous occasions that a company’s tariff, not its manuals or handbooks, must define the rates, terms and conditions of jurisdictional services provided by the company.”<sup>11</sup>

9. Furthermore, Boralex alleges that ISO-NE’s failure to provide it with transmission priority for ICAP imports over the New Brunswick interface under its grandfathered agreement is a violation of section 3.11(g) of the TOA, which reads:

Notwithstanding any other provision of this Agreement, MEPCO Grandfathered Transmission Service Agreements will remain in effect for the terms of such agreements or on such earlier date mutually agreed upon by the parties. ...[ISO-NE] shall exercise its operating Authority and otherwise fulfill its responsibilities under this Agreement in a manner that is consistent with and that *does not modify or abrogate the terms and conditions of such MEPCO Grandfathered Transmission Service Agreements.*[<sup>12</sup>]

10. Boralex requests that the Commission direct ISO-NE to amend section III.8.8.6 of its Tariff to include Boralex’s grandfathered agreement in the list of the grandfathered ICAP agreements that receive priority for ICAP imports; to establish a refund effective date of July 1, 2009; and to grant such relief on an expedited basis by July 1, 2009.

### **III. Notice and Responsive Pleadings**

11. Notice of the May 5, 2009 complaint filed by Boralex was published in the *Federal Register*, 74 Fed. Reg. 23,183 (2009), with interventions and protests due on or before May 26, 2009. Brookfield Energy Marketing Inc., MEPCO, NEPOOL Participants Committee, and H.Q. Energy Services (U.S.) Inc. filed timely motions to intervene. The Maine Public Utilities Commission filed a notice of intervention. On

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<sup>10</sup> *Id.* at 16 (quoting section III.8.8.6 of ISO-NE Tariff).

<sup>11</sup> *Id.* at 16 (quoting *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 20 (2004)).

<sup>12</sup> *Id.* at 17 & n.43 (quoting ISO-NE, TOA § 3.11(g) (Aug. 16, 2008), available at <http://www.iso-ne.com/regulatory/toa/index.html>) (emphasis supplied in complaint).

May 26, 2009, ISO-NE filed an answer. On June 9, 2009, Boralex submitted a response to ISO-NE's answer. On June 23, 2009, ISO-NE submitted a response to Boralex's response.

12. In its answer, ISO-NE contends that Boralex's grandfathered agreement, regardless of the *transmission* priority (firmness) it might provide, does not provide Boralex a priority to ICAP import rights over others seeking import rights.<sup>13</sup> ISO-NE states that section 5 of Boralex's grandfathered agreement, upon which Boralex relies for its alleged capacity priority, is simply a limit on transmission usage (reserved transfer capability); it does not mention reliability products such as "Installed Capacity," "Installed Capacity Agreement," "UCAP," or the like.

13. ISO-NE further states that, as a transmission provider, MEPCO did not have the authority to provide ICAP import rights or to dictate ISO-NE's (or NEPOOL's) ICAP import right allocation process, which ISO-NE has performed on a first-come, first-served basis for the past six years, with the exception of those specific grandfathered ICAP agreements listed in section III.8.8.6.<sup>14</sup> With respect to those excepted contracts, ISO-NE emphasizes that none of them is a transmission service agreement, much less a pre-roll-in MEPCO transmission service agreement, such as Boralex's.<sup>15</sup>

14. ISO-NE clarifies that, prior to the MEPCO roll-in, a firm transmission service agreement with MEPCO provided the holder a transmission reservation for the utilization of the MEPCO transmission facilities under the MEPCO OATT, which became Schedule 20B of the ISO-NE OATT after ISO-NE commenced operations as a regional transmission organization. After the MEPCO roll-in, according to ISO-NE, the only priority afforded by a firm grandfathered agreement is over non-firm agreements in the scheduling and curtailment of external transactions in the real-time energy market. It does not provide a priority for ICAP import rights.

15. ISO-NE explains that the treatment of ICAP import contracts, which are a reliability product, is governed by Market Rule 1 (section III of the ISO-NE Tariff) and the ICAP Manual.<sup>16</sup> ISO-NE points out that denying a request for an ICAP import right (and thereby the ability to submit an ICAP import contract) to a grandfathered agreement

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<sup>13</sup> Answer at 18-19.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 27.

<sup>16</sup> *Id.* at 16, 19-21.

holder such as Boralex has no effect on the holder's ability to use its firm transmission rights to offer and deliver energy from an external control area.<sup>17</sup>

16. Further, ISO-NE maintains that it did not violate the grandfathered agreement by denying Boralex's request, because neither the grandfathered agreement nor section 3.11(g) of the TOA provides Boralex a priority for ICAP import rights. ISO-NE states that such *transmission service* agreements do not provide or even contemplate any ICAP import rights.<sup>18</sup> According to ISO-NE, the rights provided in such agreements are only those defined in section II.45 of the ISO-NE OATT and pertain to scheduling and curtailment of external transactions, not ICAP import rights, which are governed by Market Rule 1 and the ICAP Manual.

17. ISO-NE further explains that the pre-roll-in MEPCO transmission service agreement did not provide an ICAP import right, and even assuming *arguendo* that MEPCO had intended to bestow such a right (which it had no authority to do), that purported right would have been eliminated when the Commission approved the MEPCO roll-in proposal. According to ISO-NE, Boralex's grandfathered agreement provides scheduling and curtailment rights on an interface that is now PTF for external transactions submitted in the real-time energy market.<sup>19</sup> Finally, ISO-NE states that it did not violate section 3.11(g) of the TOA, because that provision merely obligates ISO-NE to preserve the terms and conditions of the pre-roll-in MEPCO transmission service agreements; as discussed above, those agreements do not provide ICAP import rights.<sup>20</sup>

18. ISO-NE maintains that it did not fail to provide Boralex any required notice at the time of the roll-in proceeding because "the terms of the [MEPCO transmission service agreement] did not implicitly or explicitly provide [Boralex] any rights in the prior ICAP market or the replacement ICAP Transition Period in Market Rule 1."<sup>21</sup> ISO-NE explains that a change did not occur as part of the MEPCO roll-in proposal to which ISO-NE could give notice.

19. With respect to whether ISO-NE supplied sufficient detail on how it would assign ICAP import contract rights, ISO-NE reiterates that neither the grandfathered agreement nor Market Rule 1 provides Boralex any special (prioritized) ICAP import rights.

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<sup>17</sup> *Id.* at 21 (citing Complaint at 8-11).

<sup>18</sup> *Id.* at 22.

<sup>19</sup> *Id.* at 23-24.

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.* at 25.

ISO-NE explains that Market Rule 1 provides that “[c]ertain ICAP Import Contracts are afforded grandfathered status with special treatment that is described in the ISO New England Manuals,”<sup>22</sup> but that Boralex did not, and does not now, hold that type of agreement. Further, ISO-NE states that the ICAP application Boralex used to register explains the “first-come, first-served” approach after accounting for the grandfathered agreements listed in section III.8.8.6 of Market Rule 1.

20. Lastly, ISO-NE contends that Boralex has not made, nor could make, any showing supporting its statement that ISO-NE’s interpretation of the grandfathered agreement frustrates Boralex’s ability to participate in future Forward Capacity Auctions as a new capacity resource. ISO-NE states that its OATT does not preclude Boralex from such participation. ISO-NE explains that whether or not an entity with an external resource holds a transmission service agreement does not impact whether or not that resource qualifies to participate in or can clear in a Forward Capacity Auction.

21. In its response to ISO-NE’s answer, Boralex maintains that it is harmed when ISO-NE allocates transfer capability remaining after subtracting the tie benefits and grandfathered import rights from the total transfer capability of the New Brunswick interface on a first-come, first-served basis without taking into account Boralex’s alleged “rights” over the New Brunswick interface. Boralex maintains that its alleged pre-existing ICAP import rights did not terminate at the time of the roll-in. According to Boralex, the purpose of such an agreement is to preserve, not terminate, the terms and conditions of the original agreement.<sup>23</sup>

22. Boralex reiterates that its grandfathered agreement provides ICAP import rights over the New Brunswick interface into the ISO-NE market separate from the first-come, first-served allocation process. Boralex remarks that the pre-roll-in agreement does not include the terms such as “ICAP” or “UCAP” because ISO-NE implemented the Standard Market Design, which adopted such terms, two years after Boralex entered into the pre-roll-in agreement. Boralex contends that ISO-NE’s argument is contradictory, because ISO-NE denied Boralex transmission priority for capacity imports while agreeing that it has priority for energy imports.

23. ISO-NE responds that reserve capacity/ICAP-related rules existed in New England long before the pre-roll-in agreement. It explains that the first ICAP market auction in the region dates back to 1998.<sup>24</sup> ISO-NE argues that regardless of what

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<sup>22</sup> *Id.* at 26 (citing Market Rule 1 § III.8.8.3).

<sup>23</sup> Boralex Response at 7-8.

<sup>24</sup> ISO-NE June 23, 2009 Response at 4.

terminology existed at the time, the pre-roll-in agreement was a transmission service agreement and is distinguishable from a grandfathered ICAP agreement, under which a reliability product is sold.

24. Additionally, ISO-NE states that the definition of the grandfathered agreements, i.e., the “MEPCO Grandfathered Transmission Service Agreements (or MGTSAAs),” in its TOA includes a reference to the ISO-NE Tariff. Specifically, ISO-NE maintains that the definition for these grandfathered agreements in the TOA provides that they “shall have the meaning ascribed thereto *in the ISO OATT*.”<sup>25</sup>

25. Finally, ISO-NE contends that its position will not affect Boralex’s participation in future Forward Capacity Auctions. ISO-NE states that there are no ICAP import rights for the Forward Capacity Auction. ISO-NE explains that the Forward Capacity Auction will award capacity supply obligations to whichever entities clear a given auction.

#### **IV. Discussion**

##### **A. Procedural Matters**

26. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rules 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Boralex’s answer to ISO-NE and ISO-NE’s response to Boralex, because they have provided information that assisted us in our decision-making process.

##### **B. Commission Determination**

28. As discussed below, we find that Boralex’s grandfathered agreement does not entitle Boralex to any ICAP import rights over the New Brunswick interface into the ISO-NE market. Boralex’s grandfathered agreement provides it with scheduling and curtailment priority over non-firm transmission users over the MEPCO facilities, and it must apply to ISO-NE under a separate agreement to import ICAP on a first-come, first-served basis. Therefore, the Commission will deny the complaint, including specifically Boralex’s request to have its grandfathered agreement included in section

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<sup>25</sup> *Id.* at 7.

III.8.8.6 of Market Rule 1 or the ICAP Manual and its request for a refund effective date of July 1, 2009.<sup>26</sup>

29. In support of its request, Boralex cites section 5.0 of its grandfathered agreement, which provides: “Maximum amount of capacity and energy to be transmitted (Reserved Capacity): 26.”<sup>27</sup> Boralex contends that its grandfathered agreement entitles it to transmission priority with respect to the scheduling and curtailment of up to 26 MW of not only real-time energy, but also ICAP imports over the New Brunswick interface. Moreover, Boralex contends section 3.11(g) of the TOA prohibits ISO-NE from modifying or abrogating the terms and conditions of Boralex’s grandfathered agreement. Boralex acknowledges that, while its grandfathered agreement is listed in Attachment H of ISO-NE’s OATT, it is not listed among the excepted (prioritized) grandfathered ICAP import contracts in section III.8.8.6 (Market Rule 1) of the Tariff or in the ICAP Manual, which address the process for allocating ICAP imports over external interfaces such as the New Brunswick interface. Boralex nonetheless requests that we direct ISO-NE to include its grandfathered agreement among the latter. We below explain our reasons for declining to do so.

30. First, Boralex confuses, or conflates, two different categories of grandfathered agreements, those that are transmission service agreements and those that are non-transmission agreements, such as ICAP import agreements. It is only the latter that are listed in section III.8.8.6 (Market Rule 1) of the Tariff or the ICAP Manual. Boralex signed a transmission service agreement with MEPCO, which it later elected to grandfather after the MEPCO roll-in proceeding (and later extended). That grandfathered agreement is properly listed in Attachment H of ISO-NE’s OATT. Simply put, Boralex never had the type of agreement (an ICAP import agreement) that should have been grandfathered in section III.8.8.6.

31. Second, we disagree with Boralex that any term or condition of its pre-roll-in transmission service agreement with MEPCO (or its post-election grandfathered agreement) provides any ICAP import rights apart from the first-come, first-served allocation process available to any party outlined in Market Rule 1 and the ICAP

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<sup>26</sup> We find the issue of whether Boralex can participate in future Forward Capacity Auctions to be beyond the scope of this proceeding. The issue before us here is whether the grandfathered agreement provides ICAP import rights and should be added to the list of agreements in section III.8.8.6 of the Market Rule 1 or in the ICAP Manual.

<sup>27</sup> Complaint at Ex. 2, p. 3 (underscoring in original).

Manual.<sup>28</sup> Moreover, MEPCO could not have bestowed any “rights” with respect to importing ICAP (or any other reliability product) on any of its transmission service customers, since MEPCO had no such rights to bestow. MEPCO could only provide Boralex with firm transmission service rights over its facilities through the New Brunswick interface, and we find no evidence that ISO-NE had altered or diminished Boralex’s firm rights over that interface.

32. It is undisputed that, under its grandfathered agreement, Boralex has firm transmission rights for a maximum of 26 MW across the New Brunswick interface into the ISO-NE market. That is, Boralex has scheduling and curtailment priority for real-time external transactions over non-firm users of the New Brunswick interface pursuant to section II.44 of the OATT section of the Tariff.<sup>29</sup> However, Boralex’s firm transmission rights do not include, as Boralex contends, any ICAP import rights. Boralex’s grandfathered agreement is a transmission service agreement governed by section II (i.e., the OATT) of the Tariff. As ISO-NE convincingly explains, Boralex did not have a pre-existing, long-term import contract to deliver installed capacity to New England governed by section III (Market Rule 1) of the Tariff.<sup>30</sup> Other entities did have such contracts, and, once grandfathered, ISO-NE properly listed them in section III.8.8.6. Section II.44 of the ISO-NE OATT, which governs Boralex’s grandfathered agreement, addresses firmness with respect to the scheduling and curtailment of external

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<sup>28</sup> We need not, and thus will not, reach Boralex’s allegations that details of the ICAP allocation process should be contained only in a filed rate schedule, rather than in a manual.

<sup>29</sup> While the pre-roll-in agreement and grandfathered agreement both contain the same terms and conditions (that is, both look exactly alike), MEPCO provides transmission service under the former under Schedule 20B of the OATT, while ISO-NE provides transmission under the latter under section II.44 of the OATT. When Boralex elected to grandfather the pre-roll-in agreement after the conclusion of the MEPCO roll-in proceeding (Docket No. ER07-1289-000), it agreed to become subject to section II.44’s terms and conditions, including its specific scheduling and curtailment priority rules.

<sup>30</sup> According to ISO-NE, the installed capacity import contracts now listed in section III.8.8.6 were not grandfathered as part of the MEPCO roll-in proceeding, but as part of the Standard Market Design proceeding. *New England Power Pool*, 102 FERC ¶ 61,112 (2003).

transactions; in contrast, Market Rule 1 addresses priority with respect to ICAP resources.<sup>31</sup>

33. ISO-NE has properly distinguished between firm transmission service and ICAP import rights; thus, ISO-NE has not modified or abrogated Boralex's grandfathered agreement, which addresses only the former and not the latter. Boralex itself acknowledged this same distinction when it separately applied to ISO-NE for ICAP import rights on a first-come, first-served basis consistent with Market Rule 1 and the ICAP Manual. Only later, when its request was denied, did Boralex assert that it had a "right" to an ICAP import based on its grandfathered agreement, a claim that we reject herein.

34. Accordingly, we will deny the complaint.

The Commission orders:

Boralex's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>31</sup> Thus, Boralex is technically correct in stating that "the ISO-NE OATT is silent regarding how such grandfathered ICAP import contracts are treated," because this is addressed in section III of the Tariff (Market Rule 1) and the ICAP Manual and not in the OATT section of the Tariff. Complaint at 16.