

131 FERC ¶ 61,194
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc. and
New England Power Pool

Docket Nos. ER09-1051-001
ER10-588-000

ORDER ON COMPLIANCE FILINGS

(Issued May 28, 2010)

1. On October 27, 2009, ISO New England Inc. (ISO-NE) and the New England Power Pool Participants Committee (NEPOOL) (together, the Filing Parties) filed a compliance filing in Docket No. ER09-1051-001 addressing the treatment of aggregators of retail customers (ARCs) as required by Order No. 719-A.¹ On January 12, 2010 the Filing Parties filed a compliance filing in Docket No. ER10-588-000 regarding a mechanism through which a load-serving entity can be notified when a customer is enrolled as a demand response resource, also as required by Order No. 719-A. As discussed below, the Commission conditionally accepts the two compliance filings, effective June 1, 2010, as requested. The order also requires an additional compliance filing to ensure that contracts between ISO-NE's external Market Monitoring Unit (MMU) and certain affiliates of ISO-NE's market participants comply with Order No. 719-A.

I. Background

2. On January 21, 2010, in Docket No. ER09-1051-000, the Commission conditionally accepted Filing Parties' compliance filing submitted in accordance with Order No. 719.² Among other things, the Compliance Order noted an acknowledgement

¹ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64100 (October 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), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

² *ISO New England Inc.*, 130 FERC ¶ 61,054 (2010) (Compliance Order).

by Filing Parties that ISO-NE's external MMU provides independent monitoring services to certain affiliates of ISO-NE's market participants.³ While Order No. 719 initially found that such an arrangement would entail a conflict of interest and directed regional transmission organizations (RTO) and independent system operators (ISO) to propose a transition plan for dealing with these arrangements, the Commission explained that it revised its approach to responding to such matters in Order No. 719-A. Therefore, the Commission stated that it would discuss this issue in the order addressing ISO-NE's Order No. 719-A compliance filing.⁴

A. Docket No. ER10-588-000

3. In Order No. 719-A, the Commission ordered various reforms to the organized electric markets. As pertinent here, the Commission required a compliance filing within 180 days of the issuance of Order No. 719-A to identify the mechanism through which an affected load-serving entity would be notified when load served by that entity is enrolled to participate as a demand response resource in an RTO/ISO market, including the expected level of that participation. The Filing Parties' compliance filing adds new section III.13.1.4.10 to Market Rule 1⁵ to address this requirement. The Filing Parties state that under the new section, ISO-NE, upon request from a Market Participant with a registered Load Asset, will provide the following information about end use customers served by a Market Participant: (a) whether the end use customer's facility is registered with ISO-NE as part of an asset and whether the asset is associated with a Real-Time Demand Response or Real-Time Emergency Generation Resource, and; (b) the load reduction capability of the asset, as specified in ISO-NE's asset registration system. The Filing Parties explain that the information will be provided "upon request," in recognition that information linking a load-serving entity with its end-use customer registering a demand response resource is not currently collected by any of ISO-NE's systems.⁶ However, the Filing Parties state that ISO-NE will notify Market Participants with Load Assets on a recurring, automatic basis should any market rule changes lead ISO-NE to modify its systems to collect information on these linkages.

³ Specifically, ISO-NE's external MMU, Potomac Economics, provides independent monitoring services to an affiliate of Duke Energy Corporation and an affiliate of Entergy.

⁴ Compliance Order, 130 FERC ¶ 61,054 at P 159.

⁵ Section III of the ISO-NE Transmission, Markets, and Services Tariff.

⁶ ISO-NE January 12, 2010 Compliance Filing, Docket No. ER10-588-000 at 4.

4. The Filing Parties request an effective date of June 1, 2010 for this new Market Rule 1 section. ISO-NE states that it will have the systems and business processes in place by that time to implement the amendments, and that the date also corresponds to the start of the Forward Capacity Market's (FCM) first Capacity Commitment Period.

B. Docket No. ER09-1051-001

5. Order No. 719-A also required a compliance filing to address the treatment of ARCs that participate in the wholesale capacity and electricity markets.⁷

6. The Filing Parties state that new section III.13.1.4.9 prohibits the registration of a Real-Time Demand Response Asset, Real-Time Emergency Generation Asset, or asset associated with an On-Peak Demand Resource or Seasonal Peak Demand Resource (and requires the retirement of a previously-registered asset of this type, in accordance of with new section III.13.1.4.9.1) if it is composed of the following: (a) customers of Host Utilities that distributed more than 4 million MWh in the previous fiscal year if the relevant electric retail regulatory authorities (Retail Regulator) prohibits such customers' demand response to be bid into the ISO-administered markets or programs unless the registering Market Participant is the Host Utility serving those customers; or (b) customers of Host Utilities that distributed 4 million MWh or less in the previous fiscal year, unless the Retail Regulator permits such customers' demand response to be bid into the ISO-administered markets or programs or the registering Market Participant is, or is acting on behalf of, the Host Utility serving those customers.

7. The Filing Parties also state that new subsection III.13.1.4.9.1 allows a Market Participant to retire previously registered assets a maximum of 12 months from the date

⁷ Order No. 719-A requires RTOs and ISOs to amend their market rules, as necessary, to preclude acceptance of bids from ARCs that aggregate the demand response of:

- (1) the customers of utilities that distributed more than 4 million MWh in the previous fiscal year, where the relevant electric retail regulatory authority (RERRA) prohibits such customers' demand response to be bid into organized markets by an ARC, or
- (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC.

that the ISO receives a notice that the Retail Regulator prohibits the customer's demand response from being bid into the ISO-administered markets or programs or by May 31, 2013, whichever is later. Finally, new section III.E.1.6 prohibits the registration of a (and requires the retirement of a previously registered) Load Response Program Asset if it is composed of: (a) customers of Host Utilities that distributed more than 4 million MWh in the previous fiscal year if the RERRA prohibits such customers' demand response to be bid into the ISO-administered markets or programs unless the registering Market Participant is the Host Utility serving those customers, or (b) customers of Host Utilities that distributed 4 million MWh or less in the previous fiscal year, unless the Retail Regulator permits such customers' demand response to be bid into the ISO-administered markets or programs or the registering Market Participant is, or is acting on behalf of, the Host Utility serving those customers.

8. The Filing Parties state that they believe the new subsection III.13.1.4.9.1 is compliant with Order No. 719-A because it does not require the retirement of Order No. 719-A-affected previously registered Assets until the later of May 31, 2013 or 12 months after notice from a Retail Regulator prohibiting demand response to be bid into the markets. The Filing Parties also clarify that the aforementioned language that allows a Market Participant to aggregate retail customers "on behalf of" a Host Utility applies narrowly to the situation in which a Market Participant has contracted with a Host Utility to administer the Host Utility's retail aggregation program by providing aggregation-related services.⁸ The Filing Parties state that this type of administrative role is distinct from the type of role to which Order No. 719-A applies.

9. The Filing Parties request an effective date of June 1, 2010 for the new sections to Market Rule 1 for the same reasons as those listed above for Docket No. ER10-588-000.

II. Notices of Filing, Protests, and Answers

10. Notice of the filing in Docket No. ER10-588-000 was published in the *Federal Register*, with motions to intervene, comments, and protests due on or before February 2, 2010.⁹ No protests or adverse comments were filed.

11. Notice of the filing in Docket No. ER09-1051-001 was published in the *Federal Register*, with motions to intervene, comments, and protests due on or before

⁸ Filing Parties October 27, 2009 Filing at 5.

⁹ 75 Fed. Reg. 3,721 (2010).

November 10, 2009.¹⁰ EnerNOC, Inc. (EnerNOC) filed a protest, and NEPOOL and Public Systems¹¹ filed answers.

12. In its protest, EnerNOC argues that under Order Nos. 719 and 719-A, ISOs and RTOs are not permitted to discriminate in their own rules between ARCs. It contends that ISO-NE's proposed tariff revisions contain language that creates or condones the ability of utilities who are host to the retail customers aggregated by an ARC to restrict customers to participate only through the host utility or its designated agent.¹² EnerNOC argues that section III.13.1.4.9 of the proposed compliance filing discriminates between ARCs by providing an additional right to condition ARC participation. EnerNOC notes that proposed section III.13.1.4.9 provides in pertinent part that assets cannot be registered if they are composed of:

(a) The customers of Host Utilities that distributed more than 4 million MWh in the previous fiscal year if the relevant electric retail regulatory authority prohibits such customers' demand response to be bid into the ISO-administered markets or programs *unless the Market Participant registering the Real-Time Demand Response Asset, Real-Time Emergency Generation Asset or asset associated with an On-Peak Demand Resource or Seasonal Peak Demand Resource is the Host Utility serving the customers...*

(b) The customers of Host Utilities that distributed 4 million MWh or less in the previous fiscal year, *unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into the ISO-administered markets or programs or the Market Participant registering the Real-Time Demand Response Asset, Real-Time Emergency Generation Asset or asset associated with an On-Peak Demand Resource or Seasonal Peak Demand Resource is, or is acting on behalf of, the Host Utility serving the customers....*¹³

13. EnerNOC argues that the italicized language goes beyond the scope of Order Nos. 719 and 719-A by creating an ISO-sponsored alternative for the host utility to have a special exemption from an otherwise generally applicable prohibition on retail

¹⁰ 74 Fed. Reg. 57,305 (2009).

¹¹ Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, and New Hampshire Electric Cooperative, Inc., collectively filed as Public Systems.

¹² EnerNOC November 10, 2009 Protest at 4.

¹³ *Id.* at 9 (emphasis added by EnerNOC).

aggregation or, in the absence of any general prohibition, a federally sponsored right to appoint itself as the exclusive ARC for its customers. Specifically, EnerNOC asserts that the proposed language creates unnecessary and undesirable barriers to competition by requiring that ARCs cannot be registered unless the Market Participant registering Real-Time Demand Response Assets, Real-Time Emergency Generation Assets, or assets associated with an On-Peak Demand Resource or Seasonal Peak Demand Resource is the Host Utility serving the customers. EnerNOC states that proposed section III.E.1.6 also allows for a similar right for utilities to unilaterally exclude third party ARCs from participation even where the Retail Regulator's regulations might be silent or even allow such participation.¹⁴

14. EnerNOC contends that Order Nos. 719 and 719-A should not be interpreted as permitting after-the-fact restrictions on demand response participation that are not based on existing regulation. EnerNOC argues that utilities might even claim they have a federal right under ISO-NE's new rules to exclude competition in the wholesale market for demand response services. It contends that the Commission has made it clear that it is the responsibility of the Retail Regulator to make an unambiguous determination for the ISO as to whether its customers can or cannot participate in ISO programs.¹⁵

15. EnerNOC further argues that the Commission should not allow ISOs and RTOs to adopt or endorse in their own rules anti-competitive restrictions as to who may be an ARC. It contends that even if the Commission had permitted ISOs and RTOs to create their own rules and restrictions on ARC participation, the Commission should reject the language that ISO-NE included in its proposal because it is antithetical to the accomplishment of the Commission's competitive goals. It argues that any state restrictions or conditions on demand response activities should be narrowly tailored to facilitate non-discriminatory participation by the maximum number of providers. EnerNOC maintains that the restrictions suggested by ISO-NE are not directed toward non-discriminatory participation and will harm the development of demand response.¹⁶

16. Lastly, EnerNOC requests that the Commission clarify that it will exercise its jurisdiction as necessary to protect wholesale power markets from anti-competitive acts and practices. It contends that the interplay between state and federal concerns in the provision of demand response services should not be used as a pretext for anti-competitive interference with provision of demand response service in interstate commerce. EnerNOC argues that the Commission should (a) reject ISO-NE's filing as

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 14.

non-compliant with Order Nos. 719 and 719-A, (b) order ISO-NE to file revised tariff sheets noting that absent a prohibition imposed by the Retail Regulator, there is no restriction on who may qualify as an ARC and (c) clarify that the Commission will exercise its jurisdiction as necessary to ensure that conditions imposed upon ARCs by a Retail Regulator are not unjust and unreasonable under the Federal Power Act.

17. In its answer, Public Systems argues that the language included in ISO-NE's tariff proposals is in compliance with the directives of Order Nos. 719 and 719-A. It contends that EnerNOC errs in claiming that ISOs and RTOs are required to allow ARC participation absent prohibition from the Retail Regulator, noting that Order No. 719-A clearly states that for "smaller systems," demand assets cannot be registered by an ISO or RTO absent a showing by the ARC that it is permitted to bid Host Utility loads into ISO-administered markets. As such, Public Systems state that EnerNOC's claim that the proposed language adopting this requirement (sections III.E.1.6(b) and III.13.1.4.9(b)) is discriminatory represents a challenge to Order No. 719-A and not ISO-NE's compliance with those directives.

18. Public Systems argues that the proposed language is not intended to discriminate against any potential provider or favor the Host Utility. Public Systems explains that the proposed language is intended to address instances in which (a) the Retail Regulator and the Host Utility are the same entity, or (b) the Host Utility already possesses sufficient permission (whether statutory, regulatory, or otherwise) to aggregate the demand response of the retail load it serves.¹⁷ Public Systems further contends that, because instances in which the two entities are not the same, or when the Host Utility does not already provide sufficient information, are isolated or non-existent, the approach taken in the Compliance Filing appears reasonable and pragmatic. Finally, Public Systems states that they would not object to a clarification to note that permission must be obtained for instances in which the Retail Regulator provides evidence to the ISO/RTO that a Host Utility lacks sufficient authorization to provide aggregation services for the retail load it serves.

19. NEPOOL answers that the market rules filed by ISO-NE and NEPOOL are just and reasonable and should be accepted without the modification requested by EnerNOC. It contends that EnerNOC is objecting to the distinction between an ARC generally and a utility that is subject to full regulation by a Retail Regulator, which the Market Rule defines as a Host Utility.¹⁸ NEPOOL argues that EnerNOC's objections are practical acknowledgements of the diversity of the New England marketplace and the fact that New England state regulators permit regulated utilities to provide demand response

¹⁷ Public Systems November 25, 2009 Answer at 6.

¹⁸ NEPOOL November 11, 2009 Answer at 3.

services. NEPOOL also argues that this is consistent with the focus of Order No. 719-A, i.e., third-party ARCs rather than Host Utilities acting pursuant to direction and oversight by their applicable Retail Regulators.

20. NEPOOL also acknowledges that the revisions treat Host Utilities differently than other ARCs, by recognizing the separate and comprehensive regulations of Host Utilities by Retail Regulators, and it argues that this different treatment is reasonable, justified, and not unduly discriminatory. NEPOOL explains that EnerNOC would have the opportunity to seek redress in the event the Retail Regulator affirmatively decides on differing treatment between ARCs and the Host Utility. NEPOOL states that the revisions were discussed in the stakeholder process and were supported by all of the NEPOOL members voting other than EnerNOC and one Participant who abstained from the vote.

III. Discussion

A. Procedural Issues

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and the timely-filed unopposed motions to intervene serve to make the entities filing them parties to this proceeding. 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 a protest unless otherwise ordered by the decisional authority. We will accept the answers filed by the parties because they have provided information that assisted us in our decision-making process.

B. Commission Determination

1. Docket No. ER09-1051-001

a. MMUs Contracting with Market Participants

22. Regarding an MMU that performs market monitoring services for an RTO or ISO, as well as market participants in that RTO or ISO, in Order No. 719-A, the Commission granted rehearing on this issue and found that this arrangement may give an MMU useful information. Consequently, pursuant to Order No. 719-A, an MMU may enter into contracts with the market participants of an RTO or ISO if the following conditions are met: the Commission approves the relationship and scope of work; the contract is filed with the Commission for review and approval; and the parties agree that the Commission must approve the termination of any such contract. The Commission reasoned that its purpose in granting this holding is to prevent potential conflicts of interest that arise when the MMU oversees its own actions. Furthermore, the Commission held that the MMU, without the need for Commission approval, may enter into contracts with market

participants of the RTO it monitors if the scope of the work applies to activities of the market participant that are outside of that RTO.¹⁹

23. Accordingly, the contracts between ISO-NE's external MMU and certain affiliates of ISO-NE's market participants may be permitted under Order No. 719-A. However, the descriptions of these contracts that ISO-NE provided in its compliance filing do not provide sufficient information for us to determine whether the contracts at issue meet all the conditions of Order No. 719-A. We will require ISO-NE to consult with its external MMU to verify that the contracts at issue comply with the requirements of Order No. 719-A. We direct ISO-NE to file, within 60 days of the date of issuance of this order, a further compliance filing that demonstrates that the contracts at issue meet the requirements of Order No. 719-A.

b. ARC Participation

24. Order No. 719-A seeks to eliminate barriers to demand response participation in RTO or ISO markets. Addressing the issue of retail aggregators, Order No. 719-A required RTOs and ISOs to amend their market rules to preclude acceptance of bids:

from ARCs that aggregate the demand response of: (1) the customers of utilities that distributed more than 4 million MWh in the previous fiscal year, where the relevant electric retail regulatory authority (RERRA) prohibits such customers' demand response to be bid into organized markets by an ARC, or (2) the customers of utilities that distributed 4 million MWh or less in the previous fiscal year, unless the relevant electric retail regulatory authority permits such customers' demand response to be bid into organized markets by an ARC.²⁰

25. In their compliance filing, the Filing Parties have proposed language reflecting this requirement. However, as noted previously, beyond the language from Order No. 719-A highlighted here, the Filing Parties add the qualification that precludes registration from ARCs that aggregate the demand response of customers that distributed more than 4 million MWh in the previous fiscal year “*unless* the Market Participant registering the [asset] is the Host Utility serving the customers...”²¹ Similarly, registration is precluded from ARCs that aggregate the demand response of customers of utilities that distributed 4 million MWh or less in the previous fiscal year “*unless...the Market Participant*

¹⁹ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 164.

²⁰ *Id.* P 51.

²¹ Filing Parties October 27, 2009 Filing, Attachment 1 at 4 (emphasis added).

registering the [asset] is, or is acting on behalf of, the Host Utility serving the customers....”²² Similar language provision is proposed for section III.E.1.6.²³

26. We agree with EnerNOC that these qualifications go beyond the requirements of Order No. 719-A. First, neither Order No. 719 nor Order No. 719-A allow RTOs or ISOs to treat third-party ARCs and utility aggregators differently.²⁴ But Filing Parties’ proposal would result in different treatment. Specifically, the revised provision states that an entity cannot register if prohibited by the retail regulator unless the entity is the load-serving entity. This would allow a utility to aggregate its customers’ demand and register in ISO-NE’s demand response programs even in the face of an explicit prohibition by a retail regulator. This provision goes beyond memorializing in the tariff a restriction established by a Retail Regulator, and in fact creates an exception to such a restriction that benefits the load-serving entity. Such an outcome is prohibited under Order No. 719-A.²⁵

27. Further, Filing Parties similarly propose language applicable to small utility territories that precludes registration of the customers of small utilities “*unless* the [Retail Regulator] permits such customers’ demand response to be bid ...*or* the Market Participant registering the [asset] is, or is acting on behalf of, the Host Utility serving the customers....”²⁶ Filing Parties’ added Host Utility language allows an aggregator to register demand response customers absent permission from the Retail Regulator if the aggregator happens to be the load-serving entity or its designee. This language conflicts with Order No. 719-A, which directed that the retail load of customers of small utilities could not be registered in demand response programs absent the permission of the retail regulatory authority.²⁷

28. These two conditions in the Filing Parties’ proposed language are inconsistent with the Commission’s stated intent regarding the Retail Regulator’s prerogative to

²² *Id.* (emphasis added).

²³ *Id.*, Attachment 1 at 5.

²⁴ *See e.g.*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at P 158 (“Demand response bids from an ARC must not be treated differently than the demand response bids of a load-serving entity or large industrial customer.”).

²⁵ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 49-50.

²⁶ Filing Parties October 27, 2009 Filing, Attachment 1 at 4 (emphasis added).

²⁷ Order No. 719-A, FERC Stats. & Regs. ¶ 31,292 at P 49-50.

establish and enforce qualification and requirements for aggregation of demand response within its jurisdiction. If the Retail Regulator does not prohibit aggregation of demand response, an entity, whether a load-serving entity or ARC, cannot be precluded from participation in the markets. RTOs and ISOs may not prohibit participation by one type of aggregator but allow participation by another. However, the Filing Parties' proposed tariff revision would, under certain circumstances, allow participation by a Host Utility and preclude an entity that is not a Host Utility, and is therefore discriminatory. Therefore, we will not accept Filing Parties' filing to the extent that the proposed language goes beyond the requirements of Order Nos. 719 and 719-A. We conditionally accept Filing Parties proposed tariff language, effective June 1, 2010, as requested, and require Filing Parties to file an additional compliance filing within 60 days of the issuance of this order that removes language that goes beyond the scope of what was required by, or conflicts with, Order Nos. 719 and 719-A.²⁸

2. Docket No. ER10-588-000

29. We find that ISO-NE has complied with Order No. 719-A by submitting a revised tariff sheet to respond to the load-serving entity notification requirements of Order No. 719-A. Order No. 719-A requires each RTO or ISO, through the stakeholder process, to develop a mechanism through which an affected load-serving entity would be notified when load served by that entity is enrolled to participate, either individually or through an ARC, as a demand response resource in an RTO or ISO market. RTOs and ISOs were further directed to communicate the expected level of that participation for each enrolled demand response resource and to file a compliance filing.²⁹

30. ISO-NE has responded to these requirements by adding a new section III.13.1.4.10 to the current tariff. Proposed section III.13.1.4.10 provides that ISO-NE will supply, upon request, information on when a retail customer served by the market participant is enrolled to participate either individually or through an ARC as a demand response resource and the expected level of participation. While notification of an enrolled demand response resource is not currently distributable on a recurring, automatic basis, ISO-NE commits to alerting market participants with a registered load asset if future market rule changes necessitate automatic collection of information that would allow ISO-NE to do so. We find that ISO-NE's revisions – to which no party protested – are

²⁸ See also Order No. 719-B, 129 FERC ¶ 61,252 at P 22-24 (rejecting a request seeking to exempt a load-serving entity for a small utility system (or its designated third-party aggregator) from making a showing that the Retail Regulator authorizes the demand response bid).

²⁹ *Id.* P 69.

sufficient to comply with Order No. 719-A, since ISO-NE will offer the specified information if requested.

The Commission orders:

(A) ISO-NE's compliance filings in Docket Nos. ER09-1051-001 and ER10-588-000 are conditionally accepted as discussed in the body of this order.

(B) ISO-NE is directed to file a compliance filing within 60 days of the date of the issuance of this order as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.