

145 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

New England Power Generators Association, Inc.

v.

Docket No. EL13-66-001

ISO New England Inc.

ORDER ON REHEARING

(Issued December 6, 2013)

1. On September 26, 2013, the New England Power Generators Association, Inc. (NEPGA) filed a request for rehearing and clarification of the Commission's August 27, 2013 order¹ granting in part and denying in part NEPGA's May 17, 2013 complaint (May 17 Complaint) alleging that ISO New England Inc. (ISO-NE) impermissibly reinterpreted its Transmission, Markets and Services Tariff (Tariff) to impose a firm fuel obligation on all resources with Capacity Supply Obligations (capacity resources) through the Forward Capacity Market. In this order, the Commission denies rehearing but grants the requested clarification.

I. Background

2. In its May 17 Complaint, NEPGA alleged that ISO-NE impermissibly reinterpreted the Tariff in a memorandum, *Market Participant Performance Obligations* (November 5 Memo),² to require capacity resources to secure firm fuel and transportation around the clock, regardless of the likelihood that ISO-NE will call the resources to run.

¹ *New England Power Generators Assoc., Inc. v. ISO New England Inc.*, 144 FERC ¶ 61,157 (2013) (Complaint Order).

² ISO-NE November 5, 2012 memorandum to New England Power Pool (NEPOOL) Markets Committee, *Market Participant Performance Obligations* (November 5 Memo).

NEPGA argued, in pertinent part, that (1) the Tariff does not impose a firm fuel and transportation requirement but instead requires capacity resources to follow “Good Utility Practice” to procure fuel and transportation;³ and (2) ISO-NE impermissibly interpreted its Tariff to mean that a capacity resource can only be excused from meeting its supply obligation if it is physically unable to do so due to events that are beyond its control.⁴

3. On August 27, 2013, the Commission issued the Complaint Order denying in part and granting in part NEPGA’s May 17 Complaint. The Commission rejected NEPGA’s assertion that Good Utility Practice is the applicable standard for fuel procurement, instead finding that the Tariff imposes a strict performance obligation on capacity resources and that those resources are not permitted to take outages based on economic decisions, such as deciding not to procure fuel or transportation based on cost.⁵ In finding that such “economic outages” are not permissible under the Tariff, the Commission also noted that “the Tariff has not allowed appropriate cost-recovery for fulfilling a Capacity Supply Obligation in all circumstances[,]” and that the Commission

³ Tariff section I.2.2 defines “Good Utility Practice” as “any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather includes all acceptable practices, methods, or acts generally accepted in the region, including those practices required by Federal Power Act section 215(a)(4).” As further detailed below, Tariff section III.1.11.3(d) requires capacity resources to, consistent with Good Utility Practice, exert all reasonable efforts to operate and ensure operation of their resources as close to dispatched output levels as practical.

⁴ Among the Tariff provisions at issue was section III.13.6.1.1.1, which requires that “A Generating Capacity Resource having a Capacity Supply Obligation shall be offered into both the Day-Ahead Energy Market and Real-Time Energy Market at a MW amount equal to or greater than its Capacity Supply Obligation whenever the resource is *physically available*.” (emphasis added.)

⁵ Complaint Order, 144 FERC ¶ 61,157 at P 47.

“addressed one aspect of this issue as it relates to cost recovery for resources that are dispatched in extraordinary circumstances for reliability reasons in *Dominion*[.]”⁶

4. However, the Commission agreed with NEPGA that the November 5 Memo impermissibly narrowed the circumstances under which a capacity resource may be excused from its performance obligation.⁷ The Commission explained that

[t]here is . . . an important distinction between being *unable* to procure fuel or transportation and *making an economic determination* not to procure fuel or transportation. Contrary to ISO-NE’s position, the Commission finds that, under the Tariff, a *demonstrated* inability to procure fuel or transportation for a resource to run beyond (in terms of hours and/or incremental MWs) its day-ahead commitment, or when not scheduled in the day-ahead market, may legitimately affect whether a resource is physically available. If a capacity resource cannot procure fuel or transportation in real time in order to run at dispatch levels beyond its day-ahead commitment (or when not scheduled in the day-ahead market), then the resource is not physically available to perform for a reason beyond the resource’s control for those additional hours and/or incremental MWs; thus the resource may be excused for non-performance.⁸

5. The Commission noted that determining whether a resource was unable to procure fuel or transportation requires a fact-specific inquiry to be made first by the Internal Market Monitor (IMM) and thereafter by the Commission in instances where the IMM believes the resource violated the Tariff.⁹ Given the complexities involved in making such a determination, the Commission directed ISO-NE to submit an informational filing

⁶ *Id.* P 59 (citing *Dominion Energy Marketing, Inc.*, 143 FERC ¶ 61,223, at P 26 (2013) (*Dominion*)). In *Dominion*, the Commission used its authority under FPA section 206 to direct ISO-NE to submit Tariff provisions that allow resources to submit a section 205 filing for cost recovery, including cost recovery of fuel and variable operation and maintenance costs, in extraordinary circumstances where, to address critical reliability needs, a resource is dispatched: (1) beyond its day-ahead schedule, where there is no opportunity to refresh the offer price to reflect current costs; or (2) after the results of the day-ahead market schedule are published, where the resource did not receive a day-ahead market schedule. *Dominion*, 143 FERC ¶ 61,223 at P 26; *see also* Complaint Order, 144 FERC ¶ 61,157 at P 59.

⁷ Complaint Order, 144 FERC ¶ 61,157 at P 47.

⁸ *Id.* P 56 (emphases in original).

⁹ *Id.* P 62.

containing a non-exhaustive list of factors that the IMM typically expects to consider in determining whether there is a reason to believe that a violation has occurred.¹⁰

II. NEPGA's Request for Rehearing and Clarification

6. NEPGA requests that the Commission clarify that the Complaint Order “did not require capacity resources to guarantee fuel availability for the resource’s entire output in real time regardless of day-ahead energy market schedules” and that “[i]f a resource is asked to operate at levels above its day-ahead energy market schedule, it must do everything in its control to procure fuel for the additional request, but it is not a Tariff violation if the resource is unable to obtain fuel or the transportation to deliver fuel to the generator using intra-day measures.”¹¹ NEPGA asserts that the requested clarification is consistent with its reading of the Complaint Order interpreting the Tariff as requiring a capacity resource to ensure only that it has made fuel arrangements sufficient to satisfy its day-ahead schedule, not that it has made fuel arrangements for its entire Capacity Supply Obligation to accommodate a dispatch instruction that differs from the resource’s day-ahead energy market schedule.¹² NEPGA states that capacity resources typically use a combination of long-term contractual arrangements and shorter-term buying strategies to procure gas, and it is reasonable for a resource to procure some fuel using intra-day measures if the resource is dispatched beyond, or without, a day-ahead schedule.¹³ NEPGA argues that a different reading of the Tariff or Complaint Order would constitute an improper modification of the Tariff without the requisite findings under section 206 of the Federal Power Act (FPA).¹⁴

7. NEPGA further asserts that the Commission erred in the Complaint Order by directing ISO-NE to submit an informational filing, rather than an FPA section 205¹⁵ filing, to identify the factors the IMM typically expects to examine in determining whether a capacity resource was unable to procure fuel. NEPGA argues that the IMM’s list of factors establish a fuel procurement standard that will significantly affect the rates, terms, and conditions of service. NEPGA states that the Complaint Order allowed a

¹⁰ *Id.*

¹¹ NEPGA Sept. 26, 2013 Request for Clarification and Rehearing at 5-6 (NEPGA Rehearing Request).

¹² *Id.* at 8.

¹³ *Id.* at 9.

¹⁴ *Id.* at 11; *see also* 16 U.S.C. § 824(e) (2012).

¹⁵ 16 U.S.C. § 824(d) (2012).

Tariff change without proper notice or a finding that the terms are just and reasonable as required by the FPA.¹⁶

8. NEPGA also argues that the Commission erred in finding that the Good Utility Practice standard does not apply to fuel procurement under Tariff section III.1.11.3(d).¹⁷ NEPGA asserts that fuel procurement is a “critical component necessary to ensure a resource’s physical operation” and to find otherwise is inconsistent with the Commission’s finding that an inability to procure fuel may affect whether a resource is physically available.¹⁸ NEPGA states that the Commission’s rejection of the Good Utility Practice standard as applying to fuel procurement creates a hole in the Tariff regarding the applicable standard for determining Tariff compliance (or violations), which, according to NEPGA, further highlights the importance of requiring ISO-NE to file the IMM’s list of factors pursuant to FPA section 205.¹⁹

9. Lastly, NEPGA alleges that the Commission allowed confiscatory rates to continue by requiring generators to procure fuel without a mechanism for cost recovery. NEPGA states that the Tariff currently does not provide adequate compensation for generators’ fuel costs when generators are dispatched beyond their day-ahead schedule. NEPGA contends that the Commission acknowledged this fact in the Complaint Order but, instead of proposing a remedy, the Commission simply noted that the *Dominion* proceeding would address one aspect of this issue.²⁰ NEPGA states that it is not requesting that generators be made whole under normal conditions when purchasing intra-day gas that is more expensive than is reflected in their real time supply offers. However, NEPGA asserts that “there may be other circumstances, beyond those cited in the *Dominion* order, under which generators should be able to request and receive additional compensation.”²¹ NEPGA states that the Commission’s failure to provide a recovery mechanism for those costs results in a confiscatory rate. Similarly, NEPGA asserts that the Complaint Order “essentially requires generators to, at times, procure fuel

¹⁶ NEPGA Rehearing Request at 11-12.

¹⁷ That section states: “Market Participants shall exert all reasonable efforts to operate, or ensure the operation of, their Resources in the New England Control Area as close to dispatched output levels as practical, consistent with Good Utility Practice.”

¹⁸ NEPGA Rehearing Request at 14.

¹⁹ *Id.* at 15.

²⁰ *Id.* (citing *Dominion*, 143 FERC ¶ 61,233).

²¹ NEPGA Rehearing Request at 16.

without any recovery for costs when dispatched in extraordinary circumstances with no ability to reflect those costs in real-time prices,” which, according to NEPGA, also results in a confiscatory rate.²² Thus, NEPGA requests that the Commission direct ISO-NE to establish stakeholder processes to address cost-recovery issues, with a compliance filing due no later than March 26, 2014.²³

III. Commission Determination

A. Procedural Matters

10. On October 15, 2013, ISO-NE filed an answer to NEPGA’s rehearing request. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2013), prohibits answers to a request for rehearing. Therefore, we will reject ISO-NE’s answer.

B. Substantive Matters

11. We deny NEPGA’s request for rehearing but grant NEPGA’s requested clarification regarding the use of intra-day fuel procurement measures, as discussed below.

12. We reject NEPGA’s assertion that the Commission erred in requiring ISO-NE to submit an informational filing, rather than a section 205 filing, containing the non-exhaustive list of factors the IMM typically will consider in analyzing whether fuel was available to a capacity resource. NEPGA’s argument is based on the premise that the list of factors constitutes a new or revised rate, term or condition of service (i.e., a standard for fuel procurement) that must be noticed and expressly set forth in the Tariff. We disagree. The existing Tariff already gives the IMM broad authority to access and assess a range of information from capacity resources -- which would include the type of information on the disputed list -- to identify suspected Tariff violations and determine whether a market participant’s behavior may require investigation. For example, Tariff section III.A.2.1 requires the IMM to, *inter alia*, “[i]dentify and notify the Commission’s Office of Enforcement of instances in which a Market Participant’s behavior . . . may require investigation, including suspected tariff violations[.]”²⁴ To enable the IMM to fulfill its obligations, Tariff section III.A.17.1 requires that “Market Participants shall provide the [IMM] . . . with any and all information within their custody or control that

²² *Id.* at 17.

²³ *Id.*

²⁴ ISO-NE, Transmission, Markets and Services Tariff, § III.A.2.1(c) (26.0.0).

the [IMM] . . . deems necessary to perform its obligations under this *Appendix A*” and the IMM “may use any and all information [it] receive[s] in the course of carrying out [its] market monitor and mitigation functions to the extent necessary to fully perform those functions.”²⁵

13. Whether the IMM identifies some of the information it will typically consider in analyzing a particular type of behavior *ex ante* or *ex post* does not alter either the IMM’s authority or the substance of the Tariff’s terms and conditions. Thus, the IMM’s non-exhaustive list of factors does not establish a new standard for fuel procurement. Rather, the Tariff establishes the applicable standard, as discussed in detail below, and the IMM’s list merely provides examples of the types of information, from the broad range of information that could be pertinent to such a fact-specific analysis, that the IMM will consider in determining whether a resource has met the standard set forth in the Tariff. Therefore, we reject NEPGA’s argument that the list should have been filed under FPA section 205.

14. We further reject NEPGA’s argument that the Complaint Order acknowledged yet allowed “confiscatory” rates to continue without identifying a remedy. The statement in the Complaint Order that the Tariff “has not allowed appropriate cost-recovery for fulfilling a Capacity Supply Obligation in all circumstances”²⁶ referred to capacity resources’ current inability to update their supply offers to reflect changes in fuel costs after ISO-NE completes its day-ahead energy market scheduling. The Commission has addressed that issue in other proceedings.

15. As the Complaint Order explained, the Commission addressed one aspect of the cost recovery issue in the *Dominion* proceeding—cost recovery for resources that are dispatched in extraordinary circumstances for reliability reasons, without the ability to update their supply offers.²⁷ The other aspect the Commission was referring to is resources’ inability to update their supply offers in real time to reflect changes to their operating costs after the reoffer period. That issue has been addressed in Docket No. ER13-1877-000, in which the Commission conditionally accepted ISO-NE’s proposed

²⁵ ISO-NE, Transmission, Markets and Services Tariff, § III.A.17.1 (26.0.0) (emphasis in original).

²⁶ Complaint Order, 144 FERC ¶ 61,157 at P 59.

²⁷ NEPGA argues that “there may be other circumstances, beyond those cited in the *Dominion* order, under which generators should be able to request and receive additional compensation.” NEPGA Rehearing Request at 16. To the extent NEPGA is arguing that the cost recovery provisions at issue in *Dominion* were too narrow, we dismiss that argument as a collateral attack on *Dominion* .

“Offer Flexibility Changes,” which allow market participants to submit cost-related parameters of a supply offer, or a demand bid for a Dispatchable Asset Related Demand resource, that may vary by hour, rather than requiring these parameters to be the same for all hours of an operating day.²⁸ While the implementation date for the Offer Flexibility Changes is December 3, 2014,²⁹ the Commission declines to use this proceeding to direct additional, interim out-of-market cost recovery measures, considering the potential for those measures to distort the region’s markets and hinder ISO-NE’s implementation of the longer-term solution that the Commission has found to be just and reasonable.

16. Moreover, to the extent NEPGA asserts that the Complaint Order instituted new “confiscatory” rates by requiring generators to procure fuel without a mechanism for cost recovery, we disagree. The Complaint Order did not establish a new rate or alter an existing rate; it reiterated that the existing Tariff imposes a strict Capacity Supply Obligation with no exemption for economic outages. Thus, resources with a strict Capacity Supply Obligation have the same, previously-existing opportunity to recover their costs by taking into account those costs—and any risk premiums the resources deem appropriate—when submitting offers.

17. We also reject NEPGA’s contention that the Commission erroneously rejected the Good Utility Practice standard as applicable to fuel procurement and failed to establish the appropriate fuel procurement standard under the Tariff. For the reasons stated in the Complaint Order,³⁰ we reiterate that, under the Tariff, Good Utility Practice is inapplicable to fuel procurement decisions. The pertinent standard applicable in this proceeding is the standard for satisfying a Capacity Supply Obligation, not the standard for procuring fuel. As explained in the Complaint Order, a capacity resource has a strict

²⁸ *ISO New England Inc. and New England Power Pool*, 145 FERC ¶ 61,014, at P 6 (2013).

²⁹ As discussed in ISO-NE and NEPOOL’s filing in Docket No. ER13-1877-000, the implementation delay is necessary to integrate the Offer Flexibility Changes software and modify information technology infrastructures; give stakeholders additional notice of this important change to the way market participants will submit their supply offers; and provide ISO-NE and its stakeholders information that will help facilitate corresponding Tariff changes, including improvements to the Net Commitment Period Compensation mechanism. ISO-NE and NEPOOL, Tariff Filing Transmittal, Docket No. ER13-1877-000, at 8-9, 6 n.10 (filed July 1, 2013).

³⁰ Complaint Order, 144 FERC ¶ 61,157 at PP 53-54.

Capacity Supply Obligation³¹ and failure to satisfy that obligation due to a lack of fuel is excused only in the narrow circumstances where a resource has satisfied its burden to prove³² that it is not physically available to run beyond (in terms of hours and/or incremental MWs) its day-ahead commitment, or when not scheduled in the day-ahead market, due to an inability to procure fuel or transportation.³³

18. While it is necessary to procure fuel to fulfill a Capacity Supply Obligation, the Tariff does not establish a standard for *how* a resource procures fuel and transportation; it merely prescribes that a resource *must* procure fuel to meet its Capacity Supply Obligation if fuel and transportation are available. Stated differently, the Tariff imposes a performance obligation and allows each capacity resource the flexibility to procure fuel and transportation through whatever arrangements it deems most appropriate for fulfilling that obligation. Insofar as the existing Tariff can be characterized as establishing a fuel procurement standard, that standard is simply this: if the fuel and transportation necessary for a capacity resource to run beyond its day-ahead schedule are available, then the resource must procure them. If a capacity resource is unable to procure fuel to run beyond its day-ahead schedule, the fact that the resource must later prove that fuel or transportation was unavailable to it does not impose a standard for how the resource must procure fuel and transportation.

19. Notably, although neither the Complaint Order nor the Tariff explicitly mentions a fuel procurement standard, the Complaint Order recognized that the Tariff provides flexibility in procuring fuel and transportation.³⁴ This flexibility allows capacity

³¹ Capacity resources must “(1) offer into both the day-ahead and real-time energy markets a MW amount equal to or greater than its Capacity Supply Obligation when the resource is physically available; (2) respond to ISO-NE’s directives to start, shutdown or change output levels; and (3) keep supply offers open throughout the operating day.” Complaint Order, 144 FERC ¶ 61,157 at P 49.

³² *Id.* P 56. Consistent with Appendix A of the Tariff, *supra* P 12, the word “demonstrated” in paragraph 56 of the Complaint Order places the burden on a capacity resource to prove to the IMM, and if necessary the Commission, that the resource was unable to procure fuel or transportation.

³³ Complaint Order, 144 FERC ¶ 61,157 at P 56.

³⁴ *Id.* P 54.

resources to use both long-term and short-term, including intra-day, measures to fulfill a Capacity Supply Obligation.³⁵

20. Therefore, we grant NEPGA's clarification request to clarify that if a resource is asked to operate at levels above its day-ahead energy market schedule, it must do everything in its control to procure fuel for the additional request, but it is not a Tariff violation if the resource is unable to obtain fuel or transportation using intra-day measures. Similarly, we clarify that the Complaint Order did not require a capacity resource to *guarantee* fuel availability for the resource's entire Capacity Supply Obligation in real time when dispatch exceeds its day-ahead energy market schedule and fuel is unavailable. In finding that a demonstrated inability to procure fuel or transportation in such circumstances may legitimately affect whether a capacity resource is "physically available," the Complaint Order acknowledged that the Tariff does not require capacity resources to guarantee that fuel will be available; rather, it requires them to purchase the fuel and transportation necessary to satisfy a Capacity Supply Obligation if the fuel and transportation are available. This finding neither alters the performance obligations the Tariff imposes on capacity resources nor expands the limited circumstances under which the Tariff may excuse non-performance.

³⁵ However, we note that Tariff section III.1.7.20(b) requires that market participants "continuously maintain all Offer Data concurrent with on-line operating information[.]" ISO-NE, Transmission, Markets and Services Tariff, § III.1.7.20(b) (16.0.0). Similarly, Tariff section III.13.6.1.1.2 requires that

Day-Ahead Energy Market and Real-Time Energy Market offers for the listed portion of a resource must reflect the then-known unit-specific operating characteristics (taking into account, among other things, the physical design characteristics of the unit) consistent with Good Utility Practice. *Resources must re-declare to the ISO any changes to the offer parameters that occur in real time to reflect the known capability of the resource.*

ISO-NE, Transmission, Markets and Services Tariff, § III.13.6.1.1.2 (emphasis added) (13.0.0); *see also* Complaint Order, 144 FERC ¶ 61,157 at P 62 (citing the above-emphasized language from Tariff section III.13.6.1.1.2 in support of the Commission's "expect[ation] that, going forward, ISO-NE's IMM will refer suspected violations, including any capacity resource's failure to timely notify ISO-NE that the resource is not physically available, to the Commission.").

The Commission orders:

(A) NEPGA's request for rehearing of the Complaint Order is hereby denied, as discussed in the body of this order.

(B) NEPGA's request for clarification of the Complaint Order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.