147 FERC ¶ 61,026
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc. Docket No. ER13-1851-005

ORDER DENYING REHEARING

(Issued April 8, 2014)

1. By order issued September 16, 2013,[1] the Commission conditionally accepted ISO New England Inc.'s (ISO-NE)[2] proposed revisions to its Transmission, Markets and Services Tariff (Tariff) intended to aid ISO-NE in maintaining reliability during winter 2013-2014 (the Winter Reliability Program, or Program), subject to ISO-NE submitting a compliance filing allocating costs of the Program to Real-Time Load Obligation. TransCanada Power Marketing Ltd. (TransCanada) and Retail Energy Supply Association (RESA) seek rehearing of the September 16, 2013 Order. As discussed below, we will deny rehearing.

I. Background

2. On June 28, 2013, ISO-NE submitted the Winter Reliability Program for filing[3] as a temporary out-of-market solution to facilitate ISO-NE in purchasing services intended to provide the equivalent of up to 2.4 million MWh of energy for winter 2013-2014 from

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[1] *ISO New England Inc., et al.*, 144 FERC ¶ 61,204 (2013) (September 16, 2013 Order).

[2] This order refers to ISO-NE as the filing party; however, as detailed in the September 16, 2013 Order, the New England Power Pool Participants Committee (NEPOOL) also sponsored the original filing.

[3] On August 9, 2013 and August 12, 2013, ISO-NE filed amendments to the Winter Reliability Program.

a combination of oil-fired generators, dual-fuel generators, and demand response assets.[4] ISO-NE stated that two of New England's most pressing reliability risks were increased reliance on natural gas-fired generation, and resource performance during periods of stressed system conditions. ISO-NE stated that it was working with its stakeholders to address these risks in the longer term, but events during winter 2012-2013 made it apparent that interim short-term action was required to aid ISO-NE in maintaining reliability during winter 2013-2014.

3. With the Winter Reliability Program, ISO-NE sought to compensate demand response assets and oil-fired (including dual-fuel) resources for their ability to provide demand response and oil inventory services for the duration of the Program as well as to compensate dual-fuel generators for successful testing of their switching capability.[5] Relevant here, selected resources would be compensated through a monthly payment derived from the resources' as-bid price, rather than a uniform clearing price, and such compensation would be in addition to any compensation they receive for capacity (in the Forward Capacity Market), energy, ancillary services, or other services. In selecting resources, ISO-NE would assess resources' bids based on several criteria (resource selection criteria), including cost, historical availability and performance, ability to respond to contingencies and other changed conditions, diversity of location and sensitivity to locational constraints, dual-fuel capability, and oil replenishment capability.[6]

[4] The Winter Reliability Program also targeted a minimum output capability for oil and dual-fuel units providing the oil inventory service of 4,000 MW per hour in order to ensure sufficient diversity among the units providing the oil inventory service. ISO-NE June 28 Transmittal at 23.

[5] ISO-NE also proposed certain market monitoring changes intended to increase fuel-switching flexibility. Specifically, ISO-NE sought to remove the Tariff requirement that a resource seek the Internal Market Monitor's (IMM) approval before switching to a higher-cost fuel and instead allow the resource to notify the IMM of its intention to switch fuels and provide an ex-post justification for the switch.

[6] ISO-NE August 12, 2013 Filing at Appendix K, § III.K.6.

4. ISO-NE proposed to allocate the costs of the Winter Reliability Program to Regional Network Load, which is paid for by transmission owners, rather than to Real-Time Load Obligation, which is paid for by load-serving entities (LSEs).[7] ISO-NE stated that the costs of the Winter Reliability Program "do not fit neatly in either bucket[,]" but that allocating to Regional Network Load is more appropriate because the Program is an out-of-market, discrete program to address reliability concerns.[8]

5. In the September 16, 2013 Order, the Commission conditionally accepted the proposed Tariff revisions regarding demand response, oil inventory, and dual-fuel testing services effective September 6, 2013 through February 28, 2014, as requested. Explaining that market-based solutions are generally preferable to out-of-market solutions like the Winter Reliability Program, the Commission recognized the particular challenges to reliability for the coming winter and the interim nature of the proposed Tariff provisions in making its determination.[9] The Commission encouraged ISO-NE to commence a stakeholder process for its anticipated 2014-2015 winter program as soon as possible and to consider market-based solutions as part of that process.[10]

6. In response to concerns about the overall costs of the Program, including concerns that ISO-NE will use its discretion to procure energy at a total cost far exceeding the $16-$43 million estimate mentioned in the filing, the Commission noted that ISO-NE cannot purchase services greater than the Program target of the equivalent of 2.4 million MWh.[11] The Commission further noted that ISO-NE's procurement decisions under the Winter Reliability Program remain subject to Commission review, because under the terms of

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[7] ISO-NE and NEPOOL Participants Committee explain that, in New England, the load-serving entities are generally suppliers that enter into contracts with local distribution companies and end-users to serve load. ISO-NE and NEPOOL Participants Committee state that those suppliers are compensated through their contracts, while the transmission owners pass their costs through via Regional Network Service charges.

[8] ISO-NE June 28 Transmittal at 25.

[9] September 16, 2013 Order, 144 FERC ¶ 61,204 at P 21.

[10] *Id.* P 42.

[11] To convert barrels of oil to MWh, the ISO assumed that, in aggregate, the generation to meet the additional demand has a heat rate of 10,000 Btu/kWh and oil has a heat content of 137,000 BTU/gallon. *See* June 28, 2013 Joint Testimony of Robert G. Ethier and Peter Brandien on Behalf of ISO New England Inc. at 18.

the Program, ISO-NE must file, and had filed on August 26, 2013 in Docket No. ER13-2266-000, the results of the bid submission and selection process (Bid Results).[12]

7. As to cost allocation, the Commission conditioned its acceptance of the Program on ISO-NE submitting revised Tariff sheets to allocate costs of the Program to Real-Time Load Obligation which is paid for by load-serving entities (LSEs), rather than Regional Network Load, which is paid for by transmission owners. The Commission stated that long-standing cost-causation and benefits/burdens principles provide that costs should be allocated to those who benefit from their incurrence.[13] The Commission explained that, as an interim program designed to ensure sufficient resources to meet real-time load during the coming winter, the Winter Reliability Program addresses generation-related reliability concerns, not transmission-related concerns. Since real-time load is the primary beneficiary, and the primary cost-driver, of the Winter Reliability Program, the Commission found that associated costs should be allocated accordingly to real-time load.[14]

II. Request for Rehearing

8. TransCanada and RESA timely sought rehearing of the September 16, 2013 Order. On rehearing, TransCanada argues that the Commission failed to determine whether the overall costs of the Winter Reliability Program would be just and reasonable. TransCanada states that while ISO-NE asserted that the Program would cost between $16 and $43 million, that estimate was broad and unsupported. TransCanada argues that the as-bid payment mechanism alone will increase overall costs by incentivizing resources to bid the highest price they believe will be accepted in the auction, knowing they will only be paid as much as they bid. Moreover, TransCanada posits that the as-bid payment mechanism and resource selection criteria together compound costs, arguing that resources meeting the resource selection criteria have an incentive to raise the price of their bid knowing they would probably be accepted and paid their as-bid price.

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[12] The Commission accepted the Bid Results subject to condition on October 7, 2013. *See ISO New England Inc.*, 145 FERC ¶ 61,023 (2013).

[13] *See, e.g.*, *ISO New England Inc.*, *et al.*, 113 FERC ¶ 61,220 (2005) (Winter 2005-2006 Order), *order on reh'g*, 115 FERC ¶ 61,145 (2006).

[14] On October 16, 2013, ISO-NE submitted the requisite compliance filing in Docket No. ER13-1851-004, and it was accepted for filing by Delegated Letter Order issued on November 13, 2013.

9. TransCanada further posits that Commission review of the Bid Results filing after acceptance of the Winter Reliability Program does not cure any failings in accepting the Program in the first place. Noting that Appendix K, section III.K.2, of the Tariff requires the Bid Results to include "a list of the selected Market Participants and the prices they will be paid, and will include a description of the evaluation process in the filing," TransCanada asserts that such a list does not provide the Commission with information necessary to accept the Program beforehand or to make a reasoned determination as to the just and reasonableness of the resulting Program costs.

10. Aside from challenging the Program itself, TransCanada and RESA additionally argue that the costs should be allocated to Regional Network Load, as ISO-NE proposed, rather than to Real-Time Load Obligation as the Commission required on compliance. TransCanada and RESA assert that ISO-NE met its burden of proof under section 205 of the Federal Power Act (FPA)[15] to show that allocating costs to Regional Network Load was just and reasonable. TransCanada states that the costs of the Program should be allocated to transmission owners to align cost causation by load with load's cost responsibility. TransCanada argues that the Commission should not have rejected ISO-NE's and commenters' arguments that allocating costs to Real-Time Load Obligation will cause an unnecessary increase in costs to consumers because LSEs will include risk premiums in their charges to customers.

11. RESA adds that, in directing changes to the cost allocation, the Commission failed to consider the importance of the stakeholder process that resulted in approval of the proposed cost allocation; failed to consider RESA's arguments in favor of the proposed cost allocation; and failed to engage in analysis under section 206 of the FPA[16] to find that the rate on file and the proposed cost allocation was unjust and unreasonable and that the required modification was just and reasonable.

12. Finally, TransCanada argues that the Commission should have granted its request to consolidate this case with the then-pending Bid Results filing in Docket No. ER13-2266-000.

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[15] 16 U.S.C. § 824d (2012).

[16] 16 U.S.C. § 824e (2012).

III. Procedural Matters

13. On November 12, 2013, in furtherance of its request for rehearing, TransCanada filed a motion to lodge a Winter Solutions Update presentation that ISO-NE published on November 8, 2013.[17] On November 27, 2013, National Grid submitted an answer to TransCanada's motion to lodge.

14. We will deny TransCanada's motion to lodge, as it does not provide information that has assisted us in our decision-making process.[18] Because we deny TransCanada's motion to lodge, we also reject National Grid's answer.

IV. Discussion

15. We will deny TransCanada's and RESA's requests for rehearing. We first address TransCanada's argument that the Commission failed to adequately consider the costs of the Program before accepting it. We disagree. The Commission may consider a wide variety of factors in determining whether rates are just and reasonable under the FPA,[19] and in this case, the Commission weighted prospective costs, as well as the need to ensure reliability during the then-imminent winter 2013-2014.

16. As detailed in the September 16, 2013 Order, the purpose of the Program was to aid ISO-NE in maintaining reliability in the face of pressing reliability risks, including increased reliance on natural gas-fired generation and a history of problems with resource performance during periods of stressed system conditions. ISO-NE studied and calculated the amount of oil inventory and demand response services, measured in MWh of energy, it would need from oil-fired generators, dual-fuel generators, and demand response assets in order to help ensure reliability, and ISO-NE additionally attempted to estimate the costs to participants of providing Winter Reliability Program services. But, given that the very purpose of the Program was to help address winter reliability concerns, the Commission found that the proposal appropriately allowed ISO-NE to

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[17] TransCanada excerpts the following statements from the presentation as being relevant here: "The ISO is not moving forward with a specific new auction proposal for Winter 2014-2015"; "[A]ttention is more appropriately focused on mid- and longer-term solutions . . . ."; and "Winter Reliability Program for 2013-14 showed the complexity with trying to put a program in place in a short timeframe . . . ."

[18] *See, e.g., ISO New England Inc.*, 123 FERC ¶ 61,290, at P 12 (2008).

[19] *See Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945).

consider criteria other than cost in selecting resources, criteria that likely would affect the Program's final cost.

17. The Commission additionally addressed ISO-NE's deterministic needs assessment in estimating the amount of energy it would need to meet the demand during winter 2013-2014, which some protestors challenged as unnecessarily high. The Commission explained in the September 16, 2013 Order that, in conducting a needs assessment, ISO-NE appropriately considered resource performance rather than resource adequacy, as resource adequacy would be unlikely to reflect the unpredictability of fuel shortages and the likelihood that outages resulting from fuel shortages will simultaneously affect multiple resources. Again considering that the purpose of the Program was to address reliability risks that were pressing but somewhat difficult to definitively quantify, the Commission explained that ISO-NE took a reasonable approach in estimating New England's upcoming energy needs.[20]

18. While TransCanada continues to challenge the resource selection criteria as affecting overall costs, the Commission explained in the September 16, 2013 Order and reiterates here that the criteria were appropriately driven by reliability concerns, such as the ability to respond to contingencies and other changed conditions, diversity of location and sensitivity to locational constraints, dual-fuel capability, and oil replenishment ability.[21] Thus, the Commission found in the September 16, 2013 Order and reaffirms here that the Program accorded ISO-NE an appropriate level of discretion for the purpose of ensuring system reliability, even though such discretion meant that the actual costs of the Program could not be ascertained with certainty at that time.[22]

19. While TransCanada also challenges the as-bid payment mechanism, arguing that resources with favorable resource selection criteria could submit higher bids knowing they would be selected and paid their as-bid price, the Commission previously addressed that argument in the September 16, 2013 Order,[23] stating:

> Because the selected resources will provide resource-specific levels of reliability benefits, they are not similarly situated and it is reasonable that

[20] September 16, 2013 Order, 144 FERC ¶ 61,204 at PP 30-32.

[21] September 16, 2013 Order, 144 FERC ¶ 61,204 at P 23.

[22] *Id.* PP 30-32.

[23] *Id.* P 54.

> they be paid different (non-uniform) prices as well. Ideally, ISO-NE would have developed a proposal that would have allowed it to distinguish between resources within a market-based construct. However, given the urgency of the need to protect reliability, and the interim nature of the Winter Reliability Program, we find ISO-NE's proposed compensation mechanism just and reasonable.

20. TransCanada raises no new arguments on rehearing that persuade us that it is unreasonable under the Winter Reliability Program for resources providing varying levels of reliability benefits to be paid different prices. As with the resource selection criteria, the Commission properly considered reliability concerns, not just final Program costs, in determining whether the Program, including the as-bid payment mechanism, was just and reasonable.

21. TransCanada further points to the Bid Results that ISO-NE submitted in Docket No. ER13-2266-000, and, specifically, the disparity between the estimated costs and actual costs of the Program, as conclusive evidence that the entire Program is unjust and unreasonable.[24] As stated above, the Commission properly considered a range of factors in determining whether the Program was just and reasonable, and the fact that the Program resulted in an actual cost higher than the estimate does not alone demonstrate that the Program design is unjust and unreasonable.

22. Turning to cost allocation, TransCanada and RESA argue that, prior to directing that the Program's costs be allocated to Real-Time Load Obligation, the Commission had a burden under section 206 of the FPA to find that both the existing Tariff and the Winter Reliability Program as proposed were unjust and unreasonable and that allocating the costs to Real-Time Load Obligation is just and reasonable. They argue that the Commission failed to meet that burden. However, the September 16, 2013 Order set forth a detailed analysis on each point,[25] which we expound upon here.

23. In accepting subject to condition the Winter Reliability Program, the Commission in the September 16, 2013 Order recognized the importance of the proposed Tariff

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[24] TransCanada also filed a request for rehearing of the Commission's order in Docket No. ER13-2266-000 accepting subject to condition the Bid Results. *See ISO New England Inc.*, 145 FERC ¶ 61,023 (2013).

[25] *See FPC v. Sierra Pacific Power*, 350 U.S. 348, 353 (1956); *Papago v. FERC*, 723 F.2d 950, 956 (1983) ("The Supreme Court has told us to look to the substance of section 206 requirements rather than its rigid formalities.").

revisions as a change from the then-existing Tariff in addressing reliability concerns for the coming winter. Indeed, as noted above, the very purpose of the Program was to address resource unavailability during previous times of system stress, which had occurred under the then-existing Tariff. While certain parties challenged the need for the Program at all, the Commission specifically addressed those concerns, finding, as noted above, that ISO-NE had properly considered resource performance during winter weather by conducting a deterministic needs assessment.[26] Moreover, although expressing a preference for market-based solutions, the Commission accepted the Program as a temporary out-of-market solution to fortify the then-existing Tariff and assist ISO-NE in immediately addressing reliability risks that were not adequately addressed at that time.

24. As to ISO-NE's proposal to allocate costs to Regional Network Load, we reaffirm the Commission's long-standing principle that costs should be allocated to those who benefit from the incurrence of the costs.[27] As detailed below, the Winter Reliability Program is designed to ensure adequate electric energy supply to meet real-time load during the winter of 2013-2014; therefore, Real-Time Load Obligation should be allocated the costs. Thus, by the same token, we cannot find that the costs should be allocated to transmission customers because, although the Program indirectly enhances transmission system reliability, there is no *direct* benefit to Regional Network Load.[28]

25. As to RESA's argument that ISO-NE's proposed cost allocation to Regional Network Load was broadly supported by stakeholders, we acknowledge the importance of the stakeholder process in formulating rates. Nevertheless, stakeholder consensus is not conclusive evidence of the just and reasonableness of a rate proposal.[29] As noted above, the Commission may consider several factors in determining whether a proposal satisfies the requirements of the FPA, and as explained in the September 16, 2013 Order and expounded upon here, the Commission primarily considers cost causation principles in determining appropriate allocation of costs.

26. To that end, as to the Commission's acceptance of the Program subject to ISO-NE submitting a compliance filing allocating costs to Real-Time Load Obligation, the Commission explained that such an allocation is indeed consistent with long-standing

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[26] September 16, 2013 Order, 144 FERC ¶ 61,204 at P 30.

[27] *See* Winter 2005-2006 Order, 113 FERC ¶ 61,220 at P 34.

[28] *Id.*

[29] *See Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083, at P 172 (2008).

cost causation principles and Commission precedent. As detailed in the September 16, 2013 Order, the Commission previously addressed similar cost-causation issues in the context of a winter reliability program that ISO-NE proposed for winter 2005-2006 (Winter Package) which was designed to protect reliability through demand response and out-of-market resource posturing. In that proceeding, the Commission accepted ISO-NE and NEPOOL's proposal to allocate the costs of the resource posturing component of the program to Real-Time Load Obligation.[30] As the Commission stated with regard to the 2005-2006 Winter Package, generation-related costs are appropriately allocated to Real-Time Load Obligation.[31] The Commission's reasoning in the Winter 2005-2006 Order is apt here. The Winter Reliability Program is designed to ensure adequate electric energy supply to meet real-time load during the winter of 2013-2014. Thus, like the 2005-2006 Winter Package, the Program is a time-sensitive out-of-market reliability measure with real-time load as the primary beneficiary and the costs of the Program are appropriately allocated to Real-Time Load Obligation.

27. We are unpersuaded by TransCanada's bare reassertion of the argument that LSEs should not bear the costs of the Program because they cannot recover the costs from their customers. As the Commission has previously stated in response to this argument and reaffirms here, LSEs have entered into contracts assuming Real-Time Load Obligation under the ISO-NE Tariff. These contracts "contain inherent risk associated with unforeseeable future costs," such as the costs of the Winter Reliability Program, and we "expect that risk to be captured in bilateral contracts between LSEs and end-use customers."[32]

28. Finally, we deny TransCanada's repeated request for consolidation of this proceeding with the Bid Results proceedings in Docket No. ER13-2266-000. Although the proceedings are closely related, they present separate factual and legal issues as to the just and reasonableness of two distinct section 205 filings. This proceeding involves the Winter Reliability Program itself, while Docket No. ER13-2266-000 involves the Bid Results and whether the Bid Results comport with the Tariff. Accordingly, we will not consolidate them.[33]

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[30] *See* Winter 2005-2006 Order, 113 FERC ¶ 61,220 at P 34.

[31] *Id.* P 70.

[32] *ISO New England Inc., et al.*, 115 FERC ¶ 61,145, at P 15 (2006) (order on rehearing of Winter 2005-2006 Order).

[33] *Boston Edison Co.*, 39 FERC ¶ 61,001, at 61,002 (1987) ("The decision of whether to consolidate dockets when cases may involve common questions of law and

(continued…)

<u>The Commission orders</u>:

TransCanada's and RESA's requests for rehearing of the September 16, 2013 Order are 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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fact is within the sole discretion of this Commission.") (citing *New Orleans Public Service Commission v. FERC*, 659 F.2d 509, 516 (5th Cir. 1981)).