147 FERC ¶ 61,027
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. ER13-2266-002

ORDER DENYING REHEARING

(Issued April 8, 2014)

1. On October 7, 2013, the Commission conditionally accepted ISO New England Inc.'s (ISO-NE) Winter Reliability Program (Winter Reliability Program or Program) bid selection process results (Bid Results), subject to ISO-NE submitting a compliance filing further describing ISO-NE's evaluation process.[1] TransCanada seeks rehearing of the Commission's October 7, 2013 Order. As discussed below, we will deny rehearing.

I. Background

2. By order issued September 16, 2013, the Commission conditionally accepted the Winter Reliability Program in Docket No. ER13-1851-000, *et al.*, contained in a new Appendix K to ISO-NE's Transmission, Markets and Services Tariff (Tariff), effective for an interim period from September 6, 2013 through February 28, 2014, as ISO-NE requested.[2] The Winter Reliability Program set forth a competitive bidding process for ISO-NE to purchase services intended to provide the equivalent of 2.4 million MWh of energy for winter 2013-2014 from a combination of select oil-fired generators, dual-fuel generators, and demand response resources. Relevant here, section III.K.6 of Appendix K set forth the criteria ISO-NE would consider in selecting resources to participate in the Program, including: (1) the cost of providing the oil inventory and demand response services; (2) an asset's historical availability and performance; (3) an asset's ability to respond within the Operating Day to contingencies and other changed

[1] *ISO New England Inc.*, 145 FERC ¶ 61,023 (2013) (October 7, 2013 Order).

[2] *ISO New England Inc.*, 144 FERC ¶ 61,204 (2013) (September 16, 2013 Order). The Commission also conditionally accepted for an indefinite period ISO-NE's proposed Tariff provisions regarding market monitoring (contained in Appendices A and K of the Tariff) to become effective September 6, 2013.

conditions; (4) diversity of location and sensitivity to North/South and East/West constraints; (5) dual-fuel capability; and (6) replenishment capability. Further, while the Program accorded ISO-NE a certain level of discretion in selecting resources, it also required ISO-NE to make a subsequent filing under section 205 of the Federal Power Act (FPA),[3] i.e., the Bid Results filing, reflecting a "list of the selected Market Participants and the prices that they will be paid, and . . . a description of the evaluation process" in selecting the winning bids.[4]

3. ISO-NE submitted the requisite Bid Results filing on August 26, 2013 in this Docket No. ER13-2266-000, *et al*. ISO-NE stated that market participants submitted bids totaling 2.29 million MWh, or 96 percent of the 2.4 million target, at a total offer price of $114.3 million. ISO-NE proposed to accept 1.995 million MWh, or 83.1 percent of the target, at a total price of $78.8 million. The selected bids included 3,780 MWh of demand response with the remaining MWh provided by the oil inventory service. The oil inventory service included 907,144 MWh provided by dual-fuel units.

4. In explaining its evaluation process for selecting the winning bids, ISO-NE stated that it first reviewed all bids to ensure they were eligible based on the rules of the Winter Reliability Program and then assessed the bids in accordance with the aforementioned criteria outlined in Tariff section III.K.6. ISO-NE further asserted that it "was not required to pick and choose from different points on the bid stack to meet these criteria."[5]

5. In the October 7, 2013 Order, the Commission conditionally accepted the Bid Results. Noting that section III.K.2 of the Tariff required that the Bid Results contain: (1) "a list of the selected Market Participants and the prices that they will be paid," and (2) "a description of the evaluation process,"[6] the Commission found that ISO-NE fully complied with the first of these two requirements. However, explaining that it had envisioned a more detailed description of the evaluation process in conditionally accepting the Program, the Commission directed ISO-NE to: (1) describe how its bid evaluation process encountered each criterion covered in its Tariff; (2) explain how the minimum energy output target of 4,000 MW per hour was achieved; (3) explain ISO-NE's statement that it "was not required to pick and choose from different points on

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[3] 16 U.S.C. § 824d (2012).

[4] ISO-NE, Transmission, Markets, and Services Tariff, Appendix K, § III.K.2 (3.0.0).

[5] ISO-NE August 26, 2013 Filing at 3.

[6] ISO-NE, Transmission, Markets, and Services Tariff, Appendix K, §§ III.K.2 (3.0.0).

the bid stack" to meet its selection criteria, and; (4) further explain ISO-NE's choice of $31 per MWh-month or 81.3 percent of the targeted procurement as the proper cutoff point beyond which all further bids were rejected.[7]

6. While protestors continued to challenge the validity of the entire Program by pointing to the disparity between its estimated and actual costs as reflected in the Bid Results, the Commission explained that the Winter Reliability Program is a novel approach to addressing reliability concerns that manifested the previous winter. The Commission stated that, although ISO-NE made a good faith effort to develop an estimate, such a Program does not easily lend itself to precise cost predictions.[8]

7. On October 15, 2013, ISO-NE submitted an undisputed compliance filing addressing the issues outlined in the October 7, 2013 Order, which was accepted by delegated letter order on November 13, 2013.[9]

II. Request for Rehearing

8. TransCanada argues that the Commission should not have accepted the Bid Results because the Commission did not properly determine whether the Program itself was just and reasonable. In short, TransCanada asserts that the Commission should not have accepted the Program from the outset. To that end, TransCanada states that the Commission did not have any data available to evaluate the actual costs of providing services under the Program or whether the prices to be charged in furtherance of the Program were just and reasonable. TransCanada states that, in accepting the Program, it was unreasonable for the Commission to rely on ISO-NE's good faith effort to develop a cost estimate because the estimate excluded risk premiums and profit margins.

9. TransCanada further argues that the Commission should not have conditionally accepted the Bid Results because ISO-NE did not comply with the criteria in its Tariff in evaluating the bids. TransCanada asserts that ISO-NE wrongly considered the market participants' as-bid prices rather than the cost to participants of procuring the oil to be used in the oil inventory service.

10. TransCanada further argues that the Commission did not conduct any analysis or make a finding that the rates associated with the Winter Reliability Program, as set forth

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[7] October 7, 2013 Order, 145 FERC ¶ 61,023 at P 30.

[8] *Id.* P 25.

[9] *ISO New England Inc.*, Docket No. ER13-2266-001 (Nov. 13, 2013) (delegated letter order).

in the Bid Results, are just and reasonable. TransCanada asserts that the Commission's rejection of protestors' arguments regarding the disparity between the estimated cost and actual price of the Winter Reliability Program was arbitrary, capricious, and not based on reasoned decision-making. TransCanada further states that the Commission did not have any information that would enable it to separate the costs of providing the service from the amount of profit providers would make. Additionally, TransCanada states that the Commission erred in requiring a compliance filing that would not provide any useful information to enable the Commission to determine whether the costs of the Program are just and reasonable.

11. TransCanada further argues that the Commission erred in declining to grant TransCanada's request to consolidate this proceeding with the Winter Reliability Program proceeding in Docket Nos. ER13-1851-000 and ER13-1851-001.

III. Procedural Matters

12. 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.[10] On November 27, 2013, National Grid submitted an answer to TransCanada's motion to lodge.

13. We will deny TransCanada's motion to lodge, as it does not provide information that has assisted us in our decision-making process.[11] Because we deny TransCanada's motion to lodge, we also reject National Grid's answer.

IV. Discussion

14. We will deny TransCanada's request for rehearing. We first turn to TransCanada's assertion that the Commission's conditional acceptance of the Bid Results was in error because, according to TransCanada, ISO-NE did not comply with Appendix K, section III.K.6(a) in evaluating the bids. While section III.K.6(a) allows ISO-NE to consider both price and non-price factors in selecting the winning bids, the Tariff does not, contrary to TransCanada's assertion, require ISO-NE to consider "the

[10] 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 . . . ."

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

amount it would cost participants to *procure* the oil," as TransCanada alleges.[12] Rather, it requires ISO-NE to consider the overall cost of *providing* the services. The Tariff states, in relevant part, "[i]n making its selections, the ISO shall consider relevant factors, including: (a) Cost (dollars/MWh) of providing the oil storage and demand response services . . ."[13] There is a distinction between the cost of procuring fuel and the cost of providing a fuel service. For example, providing a service may include additional operational costs to satisfy response requirements or additional costs associated with risk. Therefore, the costs of providing the service could be higher than just the fuel procurement costs. ISO-NE reasonably followed its Tariff in interpreting the provision to mean it was required to consider the cost of providing services when selecting the winning bids.

15. As to TransCanada's argument that the Commission failed to appropriately find that the rates associated with the Bid Results are just and reasonable, we disagree. In addressing cost concerns, including concerns about the disparity between the estimated and actual overall costs of the Program, the Commission in the October 7, 2013 Order emphasized that the Winter Reliability Program involved a novel approach to addressing reliability concerns, the costs of which could not be easily identified with certainty. In conditionally accepting the Bid Results, the Commission balanced the actual costs reflected in the Bid Results with the need to make such expenditures to address pressing reliability risks. The balancing of cost with other critical considerations is in keeping with the FPA, under which the Commission may consider a wide variety of factors in determining whether rates are just and reasonable.[14] The mere fact that the actual costs of the program exceeded the cost estimate does not serve to make the Bid Results unjust and unreasonable. To that end, we are unpersuaded by TransCanada's assertion that the disparity indicates that market participants included "excessive profit margins" in their bids. This argument is speculative and not based on any evidence in this proceeding. Under a competitive as-bid program in which resources are selected based on both price and non-price factors, it is reasonable that participants with greater reliability benefits will be paid higher prices, and the record in this case does not persuade us that participants included *excessive* profits "unrelated to actual risks and costs"[15] in submitting their bids.

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[12] *See* TransCanada Rehearing Request at 13.

[13] ISO-NE, Transmission, Markets, and Services Tariff, Appendix K, § III.K.6(a) (3.0.0).

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

[15] *See* TransCanada Rehearing Request at 14.

16. Regarding TransCanada's challenges to the usefulness of the compliance filing directed in the October 7, 2013 Order, the Tariff required ISO-NE to provide a more detailed description of the bid evaluation process for transparency and informational purposes. The October 7, 2013 Order held ISO-NE to the terms of its Tariff.

17. The remainder of TransCanada's challenges to the Commission's acceptance of the Program are more appropriately raised in a request for rehearing of the Commission's September 16, 2013 Order in that proceeding. Indeed, TransCanada has sought rehearing of that order based in part on arguments similar to those it asserts here, and those arguments will be addressed in the Commission's order on rehearing in that case. To that end, while TransCanada continues to assert that the two proceedings should be consolidated, we disagree. 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. Docket No. ER13-1851-000 involves the Winter Reliability Program itself, while this proceeding involves the Bid Results and whether the Bid Results comport with the Tariff. Accordingly, we will not consolidate them.[16]

<u>The Commission orders</u>:

TransCanada's request for rehearing of the October 7, 2013 Order 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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[16] *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 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)).