

147 FERC ¶ 61,109
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. ER14-1477-000

ORDER ON PROPOSED TARIFF REVISIONS

(Issued May 12, 2014)

1. On March 13, 2014, pursuant to section 205 of the Federal Power Act (FPA),¹ ISO New England Inc. (ISO-NE), joined by the New England Power Pool (NEPOOL) Participants Committee, submitted proposed revisions to the Forward Capacity Market (FCM) Offer Review Trigger Price (ORTP) provisions in ISO-NE's Transmission, Markets and Services Tariff (Tariff).² As set forth below, we accept in part and reject in part the proposed Tariff revisions, with the accepted revisions to become effective May 13, 2014, as requested.

I. Background

2. ISO-NE administers a forward market for capacity, the FCM, in which resources compete in an annual Forward Capacity Auction (FCA) to provide capacity to New England. Resources whose capacity clears the FCA acquire capacity supply obligations, which they must fulfill three years later during the Capacity Commitment Period.³

3. Prior to the FCA, ISO-NE compares capacity supply offers from new resources to benchmark prices in order to protect against the exercise of buyer-side market power that could inappropriately suppress capacity prices. ISO-NE calculates a benchmark price, known as an ORTP, for each resource technology type (e.g. combustion turbine) based on

¹ 16 U.S.C. § 824d (2012).

² The FCM rules are set forth in section 13 of Market Rule 1 of ISO-NE's Tariff. Capitalized terms used but not defined herein are intended to have the meaning given to such terms in the Tariff.

³ The Capacity Commitment Period is "the one-year period from June 1 through May 31 for which obligations are assumed and payments are made in the Forward Capacity Market." Tariff, § I.2.2 (54.0.0).

certain revenue and cost assumptions. When market participants submit supply offers for new resources, the ORTP acts as a screen: offers at or above the relevant ORTP are accepted into the FCA with no further review; offers below the relevant ORTP may be accepted into the FCA, but must first be justified to the Internal Market Monitor during a unit-specific review process. Pursuant to its Tariff, ISO-NE conducts a full recalculation of ORTPs for all resource technology types using updated data at least once every three years.

4. By order issued February 11, 2014, the Commission accepted in part and rejected in part updates to the Tariff framework for calculating ORTPs for FCA 9.⁴ As relevant here, the February 11, 2014 Order rejected without prejudice ISO-NE's proposed ORTPs for onshore wind resources, demand resources with distributed generation,⁵ and demand resources comprised of multiple technology types.⁶ The Commission rejected ISO-NE's proposed use of federal Production Tax Credit revenues in calculating the ORTP for onshore wind resources, noting that the Production Tax Credit has expired and is thus not a likely source of revenue for new wind resources.

5. The Commission rejected ISO-NE's proposal to set the ORTP for demand resources with distributed generation equal to the corresponding ORTP for the distributed generation asset's generation technology type, explaining that distributed generation resources participating in the FCM for the first time do not necessarily constitute newly-installed generators. Because the incremental costs for an existing resource "will likely be far less than the capital costs associated with a new merchant generation resource" and in light of ISO-NE's goal to set ORTPs at the low end of the competitive range of expected offers, the Commission concluded that using the ORTP for the distributed generation asset's technology type was inappropriate.⁷

6. The Commission rejected ISO-NE's proposal to set the ORTP for demand resources comprised of multiple technology types at the highest ORTP for those technology types, finding that demand resources comprised of both load management and

⁴ *ISO New England, Inc.*, 146 FERC ¶ 61,084, *reh'g pending* (2014) (February 11, 2014 Order).

⁵ As the Commission explained in its February 11, 2014 Order, "ISO-NE's Tariff defines distributed generation as 'generation resources directly connected to end-use customer load and located behind the end-use customer's meter, which reduce the amount of energy that would otherwise have been produced by other capacity resources on the electricity network[.]'" *Id.* P 10 n.10.

⁶ *Id.* PP 30-33, 47-49.

⁷ *Id.* P 48.

distributed generation assets could have dramatically higher ORTPs because they would use the higher ORTP associated with distributed generation, even where load management constitutes the majority of the demand resource's total supply offer.⁸

II. Instant Filing

7. In the instant proceeding, ISO-NE again proposes revisions to the ORTPs for onshore wind resources, demand resources with distributed generation, and resources comprised of multiple technology types. ISO-NE also proposes grammatical changes, non-substantive clarifications, and lower-casing of terms that are not defined Tariff terms.

A. ORTP for Onshore Wind Resources

8. ISO-NE proposes Tariff revisions to (1) change the ORTP for onshore wind to \$10.32/kW-month⁹ to reflect removal of the Production Tax Credit from the calculation; and (2) require the Internal Market Monitor to update the ORTP for onshore wind resources annually (during years in which a full recalculation is not conducted) to reflect changes to federal tax law. As to the second proposed Tariff revision, the proposed language states:

Federal production and/or investment tax credit values in the capital budgeting model for the on-shore wind technology type shall be updated based upon the federal production and/or investment tax credit or similar tax credits then in effect, if applicable, on the condition that the tax credit is applicable to on-shore wind resources that are qualifying as new resources for the corresponding Capacity Commitment Period.¹⁰

B. ORTP for Demand Resources with Distributed Generation

9. In consideration of the Commission's concern that distributed generation offered into the FCA as part of a demand resource might not be newly-installed generation, ISO-NE proposes to divide the ORTPs for demand resources with distributed generation into two groups: new distributed generation and previously installed distributed generation.

⁸ *Id.* P 49 & n.46.

⁹ The currently-effective value is \$14.00/kW-month. The Commission rejected a proposed value of \$0.00/kW-month in the February 11, 2014 Order.

¹⁰ ISO-NE Filing, ISO-NE, Transmission, Markets and Services Tariff, app. A § III.A.21.1.2(e)(6) (34.0.0).

New distributed generation would have an ORTP value based on the ORTP of a newly installed generator of the same technology type, using the generator classifications and values accepted in the February 11, 2014 Order.¹¹ Previously installed generation would use the same ORTP value as load management, which is \$1.145/kW-month.¹²

10. In order to distinguish between new and previously installed distributed generation, ISO-NE proposes the following definition of new distributed generation:

- (1) The Project Sponsor for the new Demand Resource has participated materially in the development, installation or funding of the Distributed Generation during the five years prior to commencement of the Capacity Commitment Period for which the resource is being qualified for participation, and
- (2) the Distributed Generation has not been assigned to a Demand Resource with a Capacity Supply Obligation in a prior Capacity Commitment Period.¹³

C. ORTP for Resources Composed of Multiple Technology Types

11. In response to the Commission's concern that setting an ORTP for a resource composed of multiple technology types at the highest ORTP for the resource's constituent technology types could lead to an ORTP that is not representative of that resource's actual costs,¹⁴ ISO-NE proposes instead to use a weighted average of the

¹¹ ISO-NE Filing at 6-7.

¹² *Id.* at 7.

¹³ *Id.* at 7 (citing Tariff, app. A § III.A.21.1.1 (34.0.0)).

¹⁴ Although the Commission raised this concern in the context of demand resources comprised of multiple technology types, ISO-NE notes that this concern applies more generally to any capacity resource composed of assets with more than one technology type.

ORTPs for the resource's underlying technology types.¹⁵ Under this proposal, a project sponsor would need to provide documentation that supports the percentage allocation among its constituent technology types.¹⁶

III. Notice of Filing and Responsive Pleadings

12. Notice of the filing was published in the *Federal Register*, 79 Fed. Reg. 15,737 (2014), with interventions, comments, and protests due on or before April 3, 2014. First Wind Energy, LLC, NRG Companies (NRG),¹⁷ Northeast Utilities Service Company, and the New England Power Generators Association, Inc. (NEPGA) filed timely motions to intervene. On April 4, 2014, NextEra Energy Resources, LLC (NextEra) filed a motion to intervene out of time. Protests were filed by NEPGA and NextEra. On April 18, 2014, ISO-NE filed a motion for leave to answer and answer to NEPGA's and NextEra's protests.

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely-filed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), we will grant NextEra's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the

¹⁵ For example, ISO-NE explains that instead of a demand resource comprised of 90 percent load management and 10 percent combustion turbine distributed generation receiving an ORTP of \$13.424/kW-month (the ORTP for a combustion turbine), the resource would receive an ORTP of $0.9 \times \$1.145/\text{kW-month} + 0.1 \times \$13.424/\text{kW-month}$, or \$2.373/kW-month. *Id.* at 8.

¹⁶ *Id.*

¹⁷ NRG is comprised of NRG Power Marketing LLC, GenOn Energy Management, LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, NRG Canal LLC, and Energy Curtailment Specialists Inc.

decisional authority. We will accept ISO-NE's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

16. As an initial matter, we find that ISO-NE has supported as just and reasonable its proposed recalculated ORTP values for onshore wind, demand resources with distributed generation, and resources composed of multiple technology types, and we will accept the relevant Tariff provisions, to become effective May 13, 2014, as requested. With respect to the ORTP value for onshore wind resources, ISO-NE has accurately removed the Production Tax Credit from the calculation to reach the new \$10.32/kW-month value. With respect to the ORTP for distributed generation, ISO-NE has proposed a method of distinguishing between new and previously installed distributed generation that sufficiently addresses our concern that previously installed distributed generation resources should not be assigned an ORTP equal to that of a newly installed distributed generation resource. In addition, ISO-NE's proposal to use a weighted-average ORTP for resources composed of multiple technology types sufficiently addresses our concern that tying the ORTP for such a resource to the highest ORTP of its associated technology types could result in an inappropriately high value. Thus, we find that ISO-NE has addressed the concerns identified by the Commission in the February 11, 2014 Order, and we note that no party disputes these aspects of ISO-NE's proposed Tariff revisions. We also accept the proposed grammatical and capitalization changes and the non-substantive clarifications.

17. As discussed below, however, we will reject the proposed Tariff revisions that require the Internal Market Monitor to update the ORTP for onshore wind resources annually based on changes to federal tax law. Accordingly, we will require ISO-NE to submit a compliance filing to remove the rejected Tariff language, within 30 days of the date of this order.

ORTP Updating for Changes to Federal Tax Incentives

a. Protests

18. NEPGA and NextEra (collectively, Protestors) state that ISO-NE's proposal requires the Internal Market Monitor to adjust the ORTP based on several subjective criteria, including whether a tax credit is "similar" to an undefined "production and/or investment tax credit," and whether such credit is "applicable" to an onshore wind

resource offering into FCAs 10 or 11.¹⁸ Protestors argue that the Internal Market Monitor will interpret and apply the law based on ambiguous standards, and such subjective judgments are distinct from the other, Commission-approved annual update provisions, which will use widely-accepted indices to change discrete values in the capital budgeting model.

19. Protestors argue that it is inappropriate for ISO-NE to make a potentially significant change to the ORTP – particularly one that they argue could result in a \$0.00/kW-month ORTP and an effective minimum offer price rule exemption – without New England Power Pool stakeholder notice and review. They argue that if the Internal Market Monitor overstates the amount of federal tax incentives for which a resource qualifies, it could distort the FCA outcome with little meaningful remedy. Protestors argue that the only recourse for a party that disagrees with the Internal Market Monitor’s evaluation of federal tax law changes would be to file a complaint with the Commission under section 206 of the FPA.

20. Protestors state that if the Commission rejects this aspect of ISO-NE’s filing and federal tax incentives become applicable to onshore wind resources, ISO-NE would still be able to propose tariff revisions under section 205 of the FPA to reflect any such tax incentives. Protestors argue that, in this scenario, all parties will properly have the opportunity to test ISO-NE’s assumptions. NEPGA also points out that if the Production Tax Credit is reinstated by Congress, an onshore wind resource that wishes to include that revenue in the calculation of its FCA offer may seek unit-specific review of its offer by the Internal Market Monitor.

b. Answer

21. ISO-NE states that the proposed Tariff revisions neither bestow discretion nor impose an obligation on the Internal Market Monitor to interpret tax law. Instead, according to ISO-NE, under its proposed Tariff revisions the Internal Market Monitor would “update the ORTP only if the amount/percentage of the credit is clear and the tax credit’s statutory scope encompasses *all* new on-shore wind resources that will be in operation for the corresponding Capacity Commitment Period.”¹⁹ ISO-NE states that incorporating future federal tax incentives into an ORTP is not like situations where the Commission has rejected proposals to exclude formula rates from stakeholder review or to incorporate changed circumstances, such as environmental regulations, into buyer-side mitigation.

¹⁸ Protestors reference these two auctions because they are the next two for which an automatic annual update of the ORTP – rather than a full recalculation – would apply. FCA 9 will use the fully-recalculated trigger prices.

¹⁹ ISO-NE Answer at 4.

c. Commission Determination

22. We will reject ISO-NE's proposal to require the Internal Market Monitor to update the onshore wind ORTP annually based on changes to applicable production or investment tax credit law. We are concerned that this provision will require the Internal Market Monitor to subjectively interpret federal tax law, potentially resulting in a significant change to the ORTP for an onshore wind resource. While ISO-NE argues that statutes have historically included precise language as to eligibility for a given federal tax incentive, it is not apparent that specific guidance is always provided in statutes, or that it will continue to be provided in the future. Whether a tax incentive applies to a representative new onshore wind capacity resource may raise legitimate questions, and any misapplication of a tax incentive could distort FCA results. Given the uncertainties regarding the parameters and applicability of any future tax credits, we do not find it is reasonable for the Internal Market Monitor to account for tax credits in the ORTP without review by stakeholders or the Commission.

23. We also agree with NEPGA and NextEra that determining the applicability of future tax incentives to a representative new onshore wind resource is more akin to assessments made during the full ORTP recalculation process, which involves stakeholder input and Commission review, than to the annual updating process, in which the Internal Market Monitor uses objective index values and market prices to update line items in the capital budgeting model. We agree that ORTP updates reflecting changes in federal tax incentives applicable to an entire resource class should be vetted through the stakeholder process and filed with the Commission pursuant to section 205 of the FPA. The proposal here would circumvent that process by effectively allowing ISO-NE to unilaterally change the ORTP for onshore wind resources based on the Internal Market Monitor's evaluation of a currently non-existent tax law. For these reasons we reject the proposed Tariff revisions requiring the Internal Market Monitor to update the ORTP for onshore wind resources annually based on changes to federal tax law, and we will direct ISO-NE to submit a compliance filing within 30 days of the date of this order to remove the relevant Tariff language.

24. We note that individual onshore wind resources may still seek to offer below the ORTP by justifying their qualification for federal tax incentives to the Internal Market

Monitor through the unit-specific review process.²⁰ The unit-specific review process requires the Internal Market Monitor to assess tax incentive eligibility for an individual resource on a case-by-case basis, and involves a more particularized review than determining whether a tax incentive should apply in calculating the benchmark ORTP for an entire resource class.

25. While we reject ISO-NE's proposal to automatically update the onshore wind resource ORTP to reflect currently non-existent federal tax incentives in this proceeding, should the Production Tax Credit be revived or if ISO-NE believes it is necessary to incorporate a specific tax incentive in effect for new onshore resources offering into a given FCA in order to achieve the most accurate auction results, ISO-NE is not precluded from submitting such a proposal in a future filing pursuant to section 205 of the FPA. This filing may be submitted as part of ISO-NE's triennial recalculation of ORTPs, or as a separate, stand-alone filing. We also note that, should the timing of the passage of a new federal tax incentive make immediate action necessary, ISO-NE may seek waiver of the 60-day notice period or request expedited Commission action on such a filing.

The Commission orders:

(A) The proposed Tariff revisions are hereby accepted in part and rejected in part, with the accepted provisions to be effective May 13, 2014, as requested, as discussed in the body of this order.

²⁰ The unit-specific review provision of the Tariff allows new capacity resources that seek to submit offers in the FCA at prices below the relevant ORTP to justify their offer prices by providing to the Internal Market Monitor "supporting documentation justifying that price as competitive in light of the resource's costs." Tariff, §§ III.13.1, III.13.1.1.2.2.3(a), III.13.1.4.2.4 (21.0.0). The Tariff further provides that the Internal Market Monitor, using the documentation provided by the capacity resource,

shall enter all relevant resource costs and non-capacity revenue data, as well as assumptions regarding depreciation, taxes, and discount rate into the capital budgeting model used to develop the relevant Offer Review Trigger Price and shall calculate the break-even contribution required from the Forward Capacity Market to yield a discounted cash flow with a net present value of zero for the project. The Internal Market Monitor shall compare the requested offer price to this capacity price estimate.

Id., app. A, § III.A.21.2(b) (27.0.0).

(B) ISO-NE is hereby directed to submit a compliance filing within 30 days of the date of this order to remove the rejected Tariff language, as discussed in the body of this order.

By the Commission. Commissioner Moeller is dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket No. ER14-1477-000

(Issued May 12, 2014)

MOELLER, Commissioner, *dissenting in part*:

I disagree with the majority's decision to reject the proposed tariff revisions that would have permitted the Internal Market Monitor (IMM) to annually update the Offer Review Trigger Price (ORTP) for on-shore wind resources based on changes to federal tax law. The majority expresses concern that the IMM would "subjectively interpret federal tax law", but I find this concern to be exaggerated. As the ISO-NE explained in its answer, "[t]he language of the proposed revision neither affords nor requires the IMM to utilize discretion", as the IMM would update the amount of the credit applicable to on-shore wind resources *only* when that amount is clear.¹ Hence, the proposal to update the ORTP for any on-shore wind federal tax credit is as straightforward and objective as a tariff provision can possibly be. While I commend the ISO-NE's for attempting to propose a solution that anticipates an event before it occurs, I regret that the majority does not share my view.

Philip D. Moeller
Commissioner

¹ ISO-NE Answer at 4.