

147 FERC ¶ 61,110
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. ER14-616-002

ORDER DENYING REHEARING

(Issued May 12, 2014)

1. By order issued February 11, 2014,¹ the Commission accepted in part and rejected in part ISO New England, Inc.'s (ISO-NE) 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 First Wind Energy, LLC (First Wind Energy), Conservation Law Foundation, and Renewable Energy New England, Inc. (RENEW) (collectively, Petitioners) seek rehearing of the February 11, 2014 Order. As discussed below, we will deny rehearing.

I. Background

2. On December 13, 2013, pursuant to section 205 of the Federal Power Act (FPA),³ ISO-NE submitted proposed revisions to its FCM ORTP provisions to apply to the ninth Forward Capacity Auction (FCA 9) for the 2018-2019 Capacity Commitment Period. Prior to the annual FCA, ISO-NE uses ORTPs as benchmark prices to which capacity supply offers from new resources are compared, in order to protect against the exercise of buyer-side market power that could inappropriately suppress capacity prices. 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.

¹ *ISO New England, Inc.*, 146 FERC ¶ 61,084 (2014) (February 11, 2014 Order).

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 16 U.S.C. § 824d (2012).

3. Under the current framework, for generation resources, ISO-NE uses a publicly available capital budgeting model to calculate ORTPs equal to the FCM revenue required in the first year for a new project to break even. The model considers likely non-capacity revenues and expected capital and operating costs, along with assumptions regarding depreciation, taxes, and the discount rate, to reach a specific ORTP for each technology type. ISO-NE has articulated, and the Commission has accepted, a principle of setting “ORTPs at the low end of the competitive range of expected offers in order to subject resources to unit-specific review only when it appears that their offers could not be commercially plausible, absent out-of-market (OOM) revenues.”⁴

4. In the February 11, 2014 Order, the Commission accepted in part and rejected in part updates to the Tariff framework for calculating ORTPs for FCA 9. Relevant here, the February 11, 2014 Order rejected without prejudice ISO-NE’s proposed ORTPs for onshore wind resources. Specifically, the Commission rejected ISO-NE’s proposed use of Production Tax Credit revenues in calculating the ORTP for onshore wind resources, explaining that the Production Tax Credit has expired and is thus not a likely source of revenue for new wind resources. The Commission noted that while Congress has previously renewed the Production Tax Credit, it is currently unavailable to wind projects that did not begin construction by December 31, 2013. The Commission further stated that, given the relatively short construction period for onshore wind resources, it is unlikely that a wind resource participating as a new resource in FCA 9 will have begun construction by the December 31, 2013 deadline.⁵

5. The Commission directed ISO-NE to make a compliance filing removing the rejected tariff language.⁶ On March 14, 2014, ISO-NE made a compliance filing removing such language.⁷

6. In response to the Commission’s February 11, 2014 Order, ISO-NE submitted proposed revisions to the ORTPs for onshore wind resources, demand resources with distributed generation, and resources comprised of multiple technology types. The

⁴ February 11, 2014 Order, 146 FERC ¶ 61,084 at P 4 (citing *ISO New England, Inc.*, 142 FERC ¶ 61,107, at P 38 (2013) (February 12, 2013 Order)).

⁵ February 11, 2014 Order, 146 FERC ¶ 61,084 at P 33.

⁶ *Id.* PP 30, 47, Ordering Paragraph B.

⁷ See *ISO New England Inc.*, Docket No. ER14-616-001 (May 12, 2014) (accepted by Delegated Letter Order).

Commission is addressing the proposed tariff revisions in a concurrent order in Docket No. ER14-1477-000.⁸

II. Request for Rehearing

7. On rehearing, Petitioners argue that, even though the Production Tax Credit has expired, the Commission erred in finding that it should not be considered a source of expected non-capacity revenue for new wind resources participating in FCA 9. Petitioners state that since its enactment in 1992, the Production Tax Credit has consistently been extended by Congress and that this consistent history of extending the Production Tax Credit provides compelling evidence that the Production Tax Credit will be extended again. Petitioners assert that because ORTPs should be set at the low end of the spectrum and are intended to address only offers that appear commercially implausible, any uncertainty that the Production Tax Credit will again be extended should be resolved in favor of retaining the Production Tax Credit as an expected source of non-capacity revenue for onshore wind resources.

8. Petitioners further argue that the Commission should not have assumed that an onshore wind resource participating as a new resource in FCA 9 would not qualify for the Production Tax Credit. Petitioners assert that it is entirely possible that a new onshore wind resource may have commenced construction before January 1, 2014 and may seek to participate in FCA 9 as a new resource. Petitioners state that the construction period can vary due to a number of reasons and that the Internal Revenue Service's safe harbor allows onshore wind resources that incurred at least five percent of the facility costs before the end of 2013 and which maintain continuous efforts toward completion to remain eligible for the Production Tax Credit. According to Petitioners, due to permitting uncertainty and the interconnection process, it is common for a wind resource to enter the FCA within one to two years of its commercial operation date. Finally, petitioners assert that onshore wind resources that are already operational and qualify for the Production Tax Credit may opt to participate in the FCM for the first time in FCA 9.

III. Discussion

9. We will deny Petitioners' request for rehearing. We first turn to Petitioners' assertion that the expired Production Tax Credit should be considered a source of expected non-capacity revenues for new wind resources participating in FCA 9 because Congress has consistently extended the Production Tax Credit in the past. We find this argument unpersuasive. As the Commission stated in the February 11, 2014 Order, it is inappropriate to consider the Production Tax Credit a source of "expected non-capacity revenues" in the FCA 9 ORTP calculation for onshore wind resources because the Production Tax Credit has expired and is currently unavailable to wind projects that did

⁸ See *ISO New England Inc.*, 147 FERC ¶ 61,109 (2014).

not begin construction by December 31, 2013.⁹ Although Petitioners point to the number of times that the Production Tax Credit has been renewed since its enactment in 1992 to support the notion that it will likely be extended again, it would be inappropriate for the Commission to rely on such assertions as a basis for approving the proposed tariff revisions. In determining the ORTP values to apply in future capacity commitment periods, ISO-NE must include certain assumptions in its calculations. The assumptions on which ISO-NE relies in these calculations are most appropriately based on current law—which does not provide the Production Tax Credit to onshore wind resources—not speculation that the Production Tax Credit will be extended again. Including in its calculations an assumption that a federal tax credit will be extended has the potential to cause a broad distortionary impact on the FCA results.

10. While ISO-NE has stated, and the Commission has accepted, a principle of setting ORTPs “at the low end of the competitive range of expected offers,”¹⁰ this point is not relevant here as there is currently no Production Tax Credit in effect and therefore no basis for including that revenue in the calculation of “expected” non-capacity revenue in the first place.¹¹ In calculating the ORTP values to apply in a particular FCA for a future commitment period, it is more appropriate for ISO-NE to base its assumptions on current law rather than assuming the existence of a tax incentive that is not currently in effect.

11. Moreover, we reject Petitioners’ argument that because a new onshore wind resource entering FCA 9 could have begun construction prior to January 1, 2014, the Production Tax Credit should be considered a source of expected non-capacity revenue for onshore wind resources entering in FCA 9. Petitioners take exception to the Commission’s determination in the February 11, 2014 Order that it is unlikely that a wind resource participating as a new resource in FCA 9 will have begun construction by the December 2013 deadline.¹² While it is possible that there could be some new onshore wind resources entering in FCA 9 that began construction or incurred at least five percent of facility costs before January 1, 2014, we disagree with the Petitioners that the expired Production Tax Credit should be included in the FCA 9 benchmark ORTP calculation for an entire class of resources—which has the potential to broadly distort the FCA results—merely because a possibility exists that some resources may qualify for the tax incentive. Those wind resources may continue to utilize the unit-specific review process to justify to the Internal Market Monitor (IMM) an offer below the ORTP based on their qualification

⁹ February 11, 2014 Order, 146 FERC ¶ 61,084 at P 33.

¹⁰ *Id.* P 4 (citing February 12, 2013 Order, 142 FERC ¶ 61,107 at P 38).

¹¹ ISO-NE, Transmission, Markets and Services Tariff, Section III.A.21.1.2(b).

¹² Rehearing Request at 7.

for the Production Tax Credit on a case-by-case basis.¹³ Use of the unit-specific review process ensures that any wind resources that did begin construction by December 31, 2013 will not be harmed while also avoiding the distortionary effect on FCA outcomes that could result from including the Production Tax Credit in the ORTP calculation for all onshore wind resources.

12. In addition, as we stated in the order issued concurrently with this one in Docket No. ER14-1477-000, should the Production Tax Credit be revived, ISO-NE is not precluded from submitting a proposal to incorporate the Production Tax Credit into its ORTP calculation in a future filing pursuant to section 205 of the FPA. For these reasons, we reject Petitioners' arguments.

The Commission orders:

Petitioners' request for rehearing of the February 11, 2014 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ The unit-specific review provision of the Tariff allows 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, app. A, §§ 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. § III.A.21.2(b) (27.0.0).