

150 FERC ¶ 61,067
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Exelon Corporation and
Calpine Corporation

Docket No. EL15-23-000

v.

ISO New England Inc.

ORDER DENYING COMPLAINT

(Issued January 30, 2015)

1. On November 26, 2014, Exelon Corporation and Calpine Corporation (Complainants) filed a complaint against ISO New England Inc. (ISO-NE) pursuant to sections 206 and 306 of the Federal Power Act (FPA),¹ alleging that certain provisions of ISO-NE's Transmission, Markets and Services Tariff (Tariff) relevant to the Forward Capacity Market (FCM) are unjust, unreasonable, and unduly discriminatory. Specifically, Complainants challenge the Tariff provisions that require new entrants electing to "lock-in" the clearing price from the first Forward Capacity Auction (FCA) in which they clear to submit what are, in effect, zero-price offers into subsequent FCAs during the relevant lock-in period. Complainants allege that the provisions result in unjust and unreasonable price suppression and are unduly discriminatory. Complainants request that the Commission remedy the impacts of this price suppression on other suppliers and the market consistent with the approach taken in the PJM Interconnection, L.L.C. (PJM) market with respect to its New Entry Price Adjustment (NEPA). In this order, we find that Complainants have not shown that the Tariff rules requiring zero-price offers result in unjust, unreasonable, or unduly discriminatory price suppression, and thus we deny the complaint.

¹ 16 U.S.C. §§ 824(e), 825(e) (2012).

I. Background

2. ISO-NE administers the FCM, in which eligible resources compete in annual FCAs, to provide capacity three years in advance of the relevant capacity commitment period. To determine the amount of capacity that ISO-NE needs to procure in an FCA, the New England region is modeled both as a whole, i.e., as the system-wide New England Control Area, and as a collection of distinct zones, known as Capacity Zones.

3. Although the FCA is intended to produce a single Capacity Clearing Price for all cleared resources, under certain conditions the prices paid to cleared resources may be administratively determined by ISO-NE and differ based on whether a resource is new or existing. One instance in which prices would be administratively determined occurs when the Capacity Carry Forward Rule² is triggered. This can occur when some but not all of a new resource's offered capacity is needed in an FCA and that resource elects not to prorate its offered capacity down to the level needed, resulting in the resource's excess capacity being carried forward into the subsequent FCA. When the Capacity Carry Forward Rule is triggered, the Capacity Clearing Price for the relevant Capacity Zone is the lesser of the following: (1) \$0.01 below the price at which the last New Generating Capacity Resource, New Import Capacity Resource, or New Demand Resource in the Capacity Zone withdrew from the FCA; or (2) the applicable net Cost of New Entry (Net CONE) value.³

4. Relevant here, the Capacity Commitment Period Election provision of the Tariff⁴ can affect the administrative prices paid to existing resources. Under that provision, a new resource offering capacity into the FCM must specify whether, if its new capacity offer clears in the FCA, the associated Capacity Supply Obligation and Capacity Clearing Price (indexed for inflation) shall continue to apply after the Capacity Commitment Period associated with the FCA in which the offer clears, for up to six additional and consecutive Capacity Commitment Periods (this option is referred to here as "New Entrant Pricing").⁵ The Tariff allows a new entrant to lock in the first auction clearing

² ISO-NE Tariff section III.13.2.7.9.

³ The Tariff defines Net CONE as the estimated gross cost of entry for a new capacity resource net of revenues from energy, reserve, and other markets. *Id.* section I.2.2.

⁴ *Id.* section III.13.1.1.2.2.4.

⁵ *Id.* Prior to June 1, 2014, the price lock-in period was five years. However, by order issued May 30, 2014, the Commission accepted ISO-NE's proposal to extend the lock-in period to seven years. *ISO New England, Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,173, at P 54 (2014) (reh'g pending).

price for up to six additional auctions in order to mitigate price risk. If a new resource elects New Entrant Pricing, the resource may not submit any type of de-list or export bid in subsequent FCAs for Capacity Commitment Periods for which the resource owner elected to have the New Entrant Pricing apply.⁶ In other words, in order to lock-in the first-year price, the Tariff requires that the capacity be offered as a price-taker (i.e., at a zero-price offer) in all future years for which it receives the first-year capacity price. Thus, FCM revenues for the new entrant are guaranteed during the lock-in period regardless of whether capacity clearing prices in subsequent auctions over that period exceed or fall short of the initial FCM clearing price.

5. In October 2013, the New England Power Generators Association (NEPGA) filed a complaint, in Docket No. EL14-7-000, against ISO-NE challenging certain of the administrative pricing mechanisms applicable in the then-upcoming eighth FCA for the 2017/2018 Commitment Period (FCA 8), including the Capacity Carry Forward Rule. In concurrently-issued orders dated January 24, 2014, the Commission granted NEPGA's complaint in part, but denied the complaint as it related to the Capacity Carry Forward Rule.⁷ In the NEPGA Complaint Order, the Commission reasoned that carrying forward the capacity from a resource with a multi-year price lock-in will not necessarily suppress prices below competitive levels because there is not necessarily a link between the capacity carried forward in a zone and the amount of excess capacity remaining in that zone.⁸ In response to NEPGA's argument that ISO-NE's zero-price offer requirement is inconsistent with the Commission's rejection of zero-price offers in PJM, the order noted that ISO-NE's and PJM's tariffs differed substantially at the time, including, most importantly, PJM's use of a sloped demand curve.⁹ The Commission also directed ISO-NE to submit a sloped demand curve by April 1, 2014, to allow sufficient time for implementation prior to FCA 9.¹⁰

6. On May 30, 2014, in Docket No. ER14-1639-000, the Commission accepted, subject to condition, ISO-NE's proposal to implement a system-wide sloped demand

⁶ ISO-NE Tariff section III.13.1.1.2.2.4.

⁷ *New England Power Generators Association, Inc. v. ISO New England Inc.*, 146 FERC ¶ 61,039 (2014) (NEPGA Complaint Order); *see also ISO New England, Inc.*, 146 FERC ¶ 61,038 (2014).

⁸ NEPGA Complaint Order, 146 FERC ¶ 61,039 at P 57.

⁹ *Id.* P 58.

¹⁰ *ISO New England Inc.*, 146 FERC ¶ 61,038, at P 30 (2014).

curve starting in FCA 9.¹¹ As part of these changes, the Commission accepted an extension of the lock-in period from five years to seven years.

II. The Complaint

7. Complainants state that failure to address the price-suppressing effect of the New Entry Pricing Rule makes the existing FCM rules unjust, unreasonable and unduly discriminatory, and request that the Commission address the impact of the lock-in when coupled with the zero-price offer requirement on other suppliers, consistent with the approach taken in PJM. Complainants argue that both the price lock-in itself and the zero-price offer requirement unreasonably and artificially suppress capacity prices and result in undue discrimination because new entrants are paid higher prices than are paid to other resources for providing the same capacity services. They further argue that the price lock-in suppresses the clearing price in the entry FCA because new entrants will offer at an artificially low price knowing that they will receive up to six additional installment payments in subsequent FCAs. Complainants state that they are not asking the Commission to eliminate the New Entry Pricing Rule, but rather only to remedy the impacts of the resulting price suppression on other suppliers and the market by implementing either an approach consistent with that taken in PJM, or an alternative remedy such as offering some type of lock-in option to existing resources as well.

8. Complainants state that the Commission acknowledged the price-suppressing effect of the New Entry Pricing Rule when it approved the extension of the lock-in period, where the Commission stated that the rule “may result in lower market clearing prices.”¹² Complainants state that the price suppression is artificial because without the seven-year lock-in, a new entrant would have required a much higher payment in year one to compensate for its view of likely market payments in years two through seven.

9. Complainants argue the Commission consistently has recognized that existing and new suppliers are similarly situated with respect to capacity markets and thus both should receive the same price so that price signals are not skewed in favor of new entry,¹³ but that the FCM rules treat these similarly situated suppliers differently by allowing new entrants to lock-in pricing, resulting in undue discrimination.

10. Complainants assert that the Commission already has determined, in the context of PJM’s NEPA rule, that treating price-locked resources as price-takers is unjust,

¹¹ *ISO New England, Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,173 (2014) (Demand Curve Order) (reh’g pending).

¹² Complaint at 11 (citing Demand Curve Order, 147 FERC ¶ 61,173 at P 56).

¹³ Complaint at 11 (citing *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 102 (2009) (PJM Order)).

unreasonable and unduly discriminatory. Complainants explain that, under PJM's NEPA rule, an eligible new entrant may lock-in the clearing price for two additional commitment periods, and further explain that PJM provides a mechanism to address the price-suppressing effects of the NEPA rule. Specifically, Complainants state that under the PJM Tariff, a price-locked resource is required to offer its capacity into the two subsequent Base Residual Auctions (analogous to an FCA) at a price "equal to the lesser of A) the price in such seller's Sell Offer for the BRA in which such resource qualified [for the lock-in]; or B) 0.90 times the Net CONE applicable in the first BRA in which ... [it] cleared"¹⁴

11. Complainants state that the differences between the PJM and ISO-NE Tariffs that the Commission relied upon in the earlier NEPGA complaint proceeding noted above are no longer valid.¹⁵ In particular, Complainants note that ISO-NE will implement a sloped demand curve in FCA 9, thus removing what they believe to be the major difference between the two capacity markets.

12. At the same time, Complainants state that there are two noteworthy differences between ISO-NE's New Entry Pricing rule and PJM's NEPA. First, the lock-in period in ISO-NE's program is seven years, versus three years in PJM, and second, ISO-NE's lock-in option is generally available to any new entrant while PJM's lock-in applies only in narrow circumstances and thus is rarely triggered. These differences, according to Complainants, result in greater price suppression under ISO-NE's New Entry Pricing Rule than under PJM's NEPA mechanism. Additionally, Complainants assert that because the Capacity Carry Forward Rule will not be triggered in FCA 9, and is slated for elimination in FCA 10, that mechanism will not provide a remedy for price suppression.

III. Notice and Responsive Pleadings

13. Notice of the complaint was published in the *Federal Register*, 79 Fed. Reg. 73,063 (2014), with interventions and protests due on or before December 16, 2014.

14. Consolidated Edison Energy, Inc. and Consolidated Edison Solutions, Inc., CPV Towantic, LLC, Dominion Resources Services, Inc., Dynegy Marketing and Trade, LLC and Casco Bay Energy Company, LLC, Emera Energy Services Inc., LS Power

¹⁴ Complaint at 7-8 (citing PJM Tariff, Attachment DD, § 5.14(c)(4)).

¹⁵ Complaint at 15-16 (quoting *NEPGA*, 146 FERC ¶ 61,039 at P 58).

Associates, L.P., NRG Companies,¹⁶ PSEG Companies,¹⁷ and United Illuminating Company filed motions to intervene. Electric Power Supply Association (EPSA) filed a motion to intervene, and also filed joint comments with New England Power Generators Association. Entergy Nuclear Power Marketing, LLC filed a motion to intervene and comments. New England Power Pool Participants Committee (NEPOOL) filed a motion to intervene and response. Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. (collectively, Public Systems) and New England States Committee on Electricity (NESCOE) filed motions to intervene and protests. The Connecticut Public Utilities Regulatory Authority (CT PURA) and the Massachusetts Department of Public Utilities filed notices of intervention, and CT PURA also filed a protest.

15. On December 16, 2014, ISO-NE filed an answer to the complaint. On December 31, 2014, Complainants filed an answer to ISO-NE's answer.

A. ISO-NE's Answer

16. ISO-NE argues that the complaint raises issues that are duplicative of those raised in other proceedings currently before the Commission, specifically the requests for rehearing in the NEPGA Complaint Order and Demand Curve Order proceedings. ISO-NE states that Complainants' attempt to distinguish their complaint from these existing proceedings, as required under Rule 206(b)(6),¹⁸ is unconvincing, noting that the issue of eliminating the price suppressing effects of the lock-in provision and the zero-price offer requirement was raised on rehearing in both proceedings. ISO-NE argues that Complainants fail to support their assertion that changes in fact have occurred since FCA 8 that materially alter the analysis with respect to FCA 9. ISO-NE also states that Complainants have failed to explain, as also required under Rule 206(b)(6), why timely resolution of their concern cannot be achieved in those other proceedings, arguing that the Commission cannot dispose of those proceedings without addressing the sole issue raised in the instant complaint. Thus, ISO-NE concludes, the complaint is simply an untimely supplement to prior rehearing requests.

17. ISO-NE further states that Complainants have not demonstrated, as required under FPA section 206, that the existing rules are unjust and unreasonable. Contrary to Complainants' assertions, ISO-NE states, the Commission has not found that the

¹⁶ NRG Power Marketing LLC, and GenOn Energy Management, LLC.

¹⁷ PSEG Power LLC, PSEG Power LLC, PSEG Energy Resources & Trade LLC, PSEG Energy Resources & Trade LLC, PSEG Power Connecticut LLC, and PSEG Power Connecticut LLC.

¹⁸ 18 C.F.R. § 385.206(b)(6) (2014).

zero-price offer requirement causes price suppression. Rather, ISO-NE argues, the Commission has recognized that the zero-price offer requirement may lower clearing prices, which is not synonymous with price suppression. ISO-NE states that the Commission's statement, taken in context, explicitly reaches the opposite conclusion from what Complainants assert. In other words, ISO-NE states, the Commission expressly approved the extended lock-in period as just and reasonable while acknowledging the possibility of lower market clearing prices, which refutes arguments that the lock-in suppresses prices.

18. ISO-NE explains that lower prices in a year in which a resource locks in its capacity price is an intended result because the price stability provided by the lock-in allows the resource to be offered without an excessive risk premium and closer to its true competitive cost of entry. ISO-NE adds that, while any price suppression in subsequent years of the lock-in theoretically could be economically inefficient, such price suppression is unlikely to occur because a well-designed and efficient new resource is unlikely to submit a de-list bid at a price higher than the auction clearing price during its first seven years of operation.

19. ISO-NE states that Complainants' reliance on PJM precedent to establish that the zero-price offer requirement is unjust and unreasonable is misplaced. Specifically, ISO-NE states that the Commission has rejected attempts to extend the PJM Order's holding to the ISO-NE capacity market, including in light of the changed circumstances of implementation of a sloped demand curve in ISO-NE. ISO-NE states that Complainants ignore the Commission's explanations in the NEPGA Complaint Order and Demand Curve Order that distinguish the ISO-NE and PJM capacity markets.

20. ISO-NE further argues that the PJM lock-in rules have the same effect as requiring locked-in resources to offer at zero. ISO-NE continues, explaining that, although the PJM rules require a resource that has elected a price lock-in under NEPA to offer its capacity during the lock-in period at the lower of its initial clearing price or 90 percent of Net CONE, if the resource does not clear at this offer price, its offer is resubmitted at a lower price so that it does clear, which the complaint does not acknowledge. ISO-NE states that reducing the offer of a locked-in resource until it clears would have an identical effect as offering the resource at zero. However, according to ISO-NE, if PJM's lock-in rules worked as represented in the complaint, in other words, the offers were not reduced if they did not initially clear, it would result in difficulties, particularly related to what to do with a locked-in resource that does not clear, such as how to address the resource's Capacity Supply Obligation.

21. ISO-NE also disputes the efficacy of Complainants' alternative proposals, stating that they would exacerbate the harms Complainants allege and would create additional problems, including introducing significant market power concerns. Finally, ISO-NE states that, even if the Commission were to grant the requested relief, it would be impossible to implement the necessary Tariff, process, and software changes for the upcoming FCA 9.

B. Protests and Comments

22. CT PURA, Public Systems, and NESCOE protest the complaint, arguing that the complaint is a collateral attack on the recent Commission order accepting the sloped demand curve and related rules at issue. These parties further state that Complainants failed to show that the existing Tariff is unjust, unreasonable, or unduly discriminatory, or that the Complainants' proposed remedies are just and reasonable and not unduly discriminatory.

23. NEPOOL states that the Commission has approved the rules for FCA 9, the issues raised in the complaint are not new, and thus, in order to prevail here, Complainants must show that sufficient changes have occurred since the Commission considered and rejected similar arguments.

24. EPSA and Entergy Nuclear generally support the complaint, reiterating the arguments contained therein, and request that the Commission address the unjust, unreasonable, and unduly discriminatory impact of the New Entry Pricing Rule when combined with the zero-price offer requirement.

C. Answer to Answer

25. Complainants argue that ISO-NE and others are incorrect in suggesting that the complaint is a collateral attack on, or procedurally barred by, prior Commission orders. Complainants restate their position that there have been material changes in circumstances since those orders were issued that invalidate the bases upon which the Commission distinguished PJM precedent. Complainants also state that efforts to distinguish the PJM precedent are inapposite.

26. Complainants argue that ISO-NE has not adequately supported its economic theories with evidence, and that ISO-NE has failed to rebut Complainants' hard evidence in the form of sworn testimony by the Complainants' expert witness. Complainants also state that ISO-NE mischaracterized PJM's NEPA as having the same effect as ISO-NE's zero-price offer requirement. Specifically, Complainants state that the PJM NEPA would never have the same effect as a zero-price offer requirement when the price-locked resource's offer clears and sets the clearing price. Finally, Complainants state that ISO-NE failed to support its statement that it would be impossible to implement the changes Complainants propose in time for FCA 9, and suggest that even if the Commission agrees with ISO-NE, it is essential that the Commission act on the complaint in order to implement changes prior to the subsequent Capacity Commitment Period.

IV. Commission Determination

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We accept Complainants' answer because it provided information that assisted us in our decision-making process.

B. Substantive Matters

29. We deny the complaint. As discussed below, we find that Complainants have not met their burden under section 206 of the FPA to show that the challenged rules are unjust, unreasonable, and unduly discriminatory. The instant complaint raises many of the same issues as presented in the NEPGA complaint in Docket No. EL14-7-000, which we denied in part as noted above, and whose request for rehearing we are denying in a separate order issuing concurrently with the instant order.¹⁹

30. As we state in that rehearing order, a competitive offer into the FCM would reflect the going-forward costs of the resource. When each resource offers to supply capacity at its going-forward costs, the auction can select the set of resources with the lowest costs and reject the set of resources with the highest costs, so that capacity is procured at the lowest total cost. A resource whose construction has recently been completed, and that has accepted a price lock-in, typically has very low going-forward costs. It is efficient for such a resource to offer as a price-taker (effectively submitting a \$0 price offer), because it is efficient for such a resource to be selected in the auction over resources with higher going-forward costs.

31. Much of Complainants' argument as to why ISO-NE's current Tariff is unjust and unreasonable focuses on the fact that ISO-NE's requirement that a lock-in resource must offer as a price-taker is inconsistent with PJM's Commission-approved offer price requirements for lock-in resources. We agree with Complainants that under certain limited circumstances, PJM's NEPA rules may result in higher prices than those under ISO-NE's zero-price offer requirement. However, while the Commission has found PJM's rules to be just and reasonable, we find that the Complainants have not shown ISO-NE's zero-price offer requirement to be unjust and unreasonable, for the reasons discussed below.

¹⁹ *New England Power Generators Association v. ISO New England Inc.*, 150 FERC ¶ 61,064 (2015)

32. In both ISO-NE and PJM, the capacity offered by a new resource that opts for the lock-in feature may, in its first auction, simultaneously be the marginal resource and have less than its full offered capacity clear the market. The mechanisms at issue here relate to how that portion of the resource's capacity that did not clear initially is treated in future auctions for purposes of determining the clearing price and the total procured quantity of capacity. Because Complainants point to the scenario where at least a portion of the lock-in resource's capacity clears the future auction at its mandated initial offer price – and, under PJM's rules, can set the price that other cleared resources receive – we address this scenario below.

33. Under PJM's rules, if a portion of the lock-in capacity does not clear in future auctions at the price resulting from the intersection of the supply and demand curves, PJM procures the uncleared portion out-of-market as additional capacity. By procuring the uncleared portion out-of-market, PJM ensures that it does not displace any capacity with lower going-forward costs.

34. Under ISO-NE's rules, ISO-NE does not procure additional capacity beyond the amount indicated by the intersection of the supply and demand curves, while lock-in capacity must offer as a price-taker at \$0. As a result, lock-in capacity, which, as noted above, is likely to have low going-forward costs, may “displace” existing capacity with higher going-forward costs. This is an efficient result because it is likely to yield the lowest total cost for the capacity procured.

35. Therefore, while we acknowledge that ISO-NE's and PJM's differing mechanics may, in certain limited circumstances, yield different prices paid to existing resources, we are not persuaded that this difference, in itself, renders ISO-NE's rules unjust and unreasonable. As the Commission has recognized, market design and rules need not be identical among the regions to be just and reasonable, and there can be more than one just and reasonable rate.²⁰ Despite highlighting a difference between the PJM and ISO-NE

²⁰ See, e.g., *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,063 at P 39 (2007) (“[T]he Commission has permitted different just and reasonable rate designs reflective of particular system characteristics and stakeholder input. In this regard, we have stated our deference to regional preferences a number of times, for instance in Order No. 2000, and in *PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,060, at 61,220 (2001), as well as in our approval of rate designs for different regional markets.” (Citing *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, at 61,397 (2004); *Southwest Power Pool, Inc.*, 111 FERC ¶ 61,118, at 61,653 (2005); *California Independent System Operator Corp.*, 109 FERC ¶ 61,301 (2004), *reh'g denied*, 111 FERC ¶ 61,337 (2005); *New England Power Pool and ISO New England, Inc.*, 109 FERC ¶ 61,252 (2004), *order granting clarification*, 110 FERC ¶ 61,003 (2005)); *Midwest Independent Transmission System Operator, Inc.*, 127 FERC ¶ 61,109, at P 20 (2009) (It is well established that there can be more than one just and reasonable rate); *New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320, at P 40 (2009) (“there can be more than one just and reasonable planning process and RTOs (continued...)”)

markets, Complainants have not demonstrated why it is unjust and unreasonable for a new resource electing the price lock-in to be treated as a price-taker in the ISO-NE market for the remainder of the lock-in period. ISO-NE's treatment of those resources simply reflects the design and efficiency advantages that a resource that recently cleared an FCA as a new resource would be expected to have over the rest of the New England fleet. In fact, even if such a resource does not have a price lock-in, it would typically submit a zero-price offer in the ISO-NE market, consistent with its low going-forward costs and in order to ensure that it is taken in the auction.

36. For these reasons, we find that Complainants have not met their burden in showing that ISO-NE's existing pricing rules governing lock-in capacity are unjust, unreasonable, and unduly discriminatory.

The Commission orders:

The complaint is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

and ISOs [Independent System Operators] are not required to have identical planning processes’’)).