

151 FERFC ¶ 61,056
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New England States Committee on Electricity

Docket No. EL13-34-001

v.

ISO New England Inc.

ORDER DENYING REHEARING

(Issued April 20, 2015)

1. The New England States Committee on Electricity (NESCOE), the Massachusetts Department of Public Utilities (Mass DPU), and the Connecticut Public Utilities Regulatory Authority (Connecticut PURA) seek rehearing¹ of the Commission's order denying NESCOE's complaint.² The Complaint Order found that NESCOE failed to show that ISO New England, Inc.'s (ISO-NE) buyer market power mitigation mechanism is unjust and unreasonable without an exemption for certain renewable resources. For the reasons discussed below, the requests for rehearing are denied.

I. Background

A. FCM and Buyer Market Power Concerns

2. ISO-NE operates a Forward Capacity Market (FCM) that procures capacity on a three-year forward basis. Capacity suppliers make offers into a Forward Capacity Auction (FCA), in which ISO-NE procures the amount of capacity needed in a one-year period (the Installed Capacity Requirement or ICR), and suppliers of the capacity that

¹ In their rehearing requests, Mass DPU and Connecticut PURA adopt and incorporate NESCOE's rehearing arguments. Therefore, we will refer only to NESCOE's rehearing request in the discussion below.

² *New England States Committee on Electricity v. ISO New England Inc.*, 142 FERFC ¶ 61,108 (2013) (Complaint Order).

clears each auction are committed to, and receive payment for, providing capacity for that period three years in the future.

3. In a series of orders addressing revisions to the FCM market rules,³ the Commission has addressed, as relevant here, ISO-NE's proposals to prevent the exercise of buyer market power. Buyer market power is exercised when "some market buyers may have an incentive to depress market clearing prices by offering supply at less than a competitive level [because] . . . the reduction in capacity prices across the market participant's entire load achieved by a below-market bid for a new generating resource offsets any losses suffered on the individual new entrant being bid into the market below its true competitive cost."⁴

4. To protect against the exercise of buyer market power in the FCM, in its April 2011 Order, the Commission required ISO-NE to develop a benchmark pricing method,⁵ also known as the Minimum Offer Price Rule (MOPR) mechanism. Under this mechanism, a benchmark price is developed for each type of resource that provides capacity, in order to determine whether a resource is offering at a competitive price. That benchmark then serves as a floor for resource offers, and offers below that benchmark are mitigated (i.e., replaced with a competitive price). The Commission responded to concerns about how, in some cases, the price floor might interact with state policies supporting the construction of particular kinds of resources; resources that receive revenues as a result of those state policies could offer at a relatively lower price, which might result in mitigation of those resources. However, rather than wholly exempting particular types of resources from the buyer market power mitigation mechanism, the Commission allowed for case-by-case review, stating:

³ *ISO New England Inc. and New England Power Pool Participants Committee*, 131 FERC ¶ 61,065 (2010) (April 2010 Order); *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011) (April 2011 Order); *ISO New England Inc.*, 138 FERC ¶ 61,027 (2012) (January 2012 Order).

⁴ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 24 (2011), footnote omitted. *See also PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 21 n.18 (2013) ("[S]uppose a large buyer has a load of 1,000 MWs, and the competitive market price is \$20/MW, producing a total cost to load of \$20,000. If load finances an uneconomic new entrant that produces 100 MWs at a cost of \$5,000 (\$50/MW) . . . and that new entry reduces the market price by \$5.00, the total cost to load is less, even though its new generator is more expensive than a market purchase. Under these circumstances, load would pay a total cost of \$13,500 to the market and an additional \$5,000 to the generator for a total of \$18,500.").

⁵ April 2011 Order, 135 FERC ¶ 61,029 at P 165.

We recognize that states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals and, therefore, argue that certain resources that receive payments pursuant to state programs, which would otherwise trigger the offer floor price, should nonetheless be exempt. Whether to grant an exemption is based on each case's unique facts. . . . [N]othing in this order eliminates any rights entities may have under section 206 of the [Federal Power Act (FPA)]⁶ to request a mitigation exemption. At that time, we will evaluate the merits of a proposed exemption.⁷

B. Relevant Proceedings

1. ISO-NE December 3, 2012 Filing

5. In response to the Commission's directives, ISO-NE submitted a compliance filing on December 3, 2012 (December 3, 2012 filing) in Docket No. ER12-953-000, which included a buyer market power mitigation mechanism reflecting a benchmark price for each type of asset offering into the FCM. A resource offering capacity into the FCM at or above the benchmark price for that resource type may do so without review of its costs by the Internal Market Monitor (IMM).⁸ If a resource wishes to offer capacity at a lower price, the IMM will review that resource's costs and revenues, and if it determines that the resource is not offering at a competitive price, the IMM will substitute a mitigated price. In order to determine whether a resource's offer is competitive, the IMM will review the resource's costs and the revenues it will receive outside of the FCM, and will exclude any out-of-market revenue sources from the cash flows used to evaluate the requested offer price.⁹

⁶ 16 U.S.C. § 824e (2006).

⁷ April 2011 Order, 135 FERC ¶ 61,029 at P 171.

⁸ *ISO New England Inc.*, 142 FERC ¶ 61,107 (2013).

⁹ ISO-NE defines out-of-market revenues as "any revenues that are: (a) not tradable throughout the New England Control Area or that are restricted to resources within a particular state or other geographic sub-region; or (b) not available to all resources of the same physical type within the New England Control Area, regardless of the resource owner." ISO-NE Tariff Appendix A, section III.A.21.2(b)(i).

6. NESCOE protested the December 3, 2012 filing because it did not include a blanket exemption from the MOPR for certain renewable resources.¹⁰ NESCOE also concurrently filed a separate complaint in this proceeding alleging that the then-pending December 3, 2012 filing was unjust and unreasonable without such an exemption.

2. NESCOE Complaint

7. In its complaint, NESCOE noted that all six New England states have enacted Renewable Portfolio Standards (RPS), have required the purchase of energy generated by renewable resources,¹¹ or have required utilities to enter into long-term contracts to support those resources.¹² NESCOE therefore sought to exempt from buyer market power mitigation renewable resources that would either be eligible for RPS credit or supported by comparable state policies. It proposed that only small resources would receive this exemption (capped at 10 MW for all resources other than hydro, which would have a cap of 30 MW), and that only 225 MW of resources would receive this exemption in a given year.¹³

8. NESCOE alleged that application of the then-pending ISO-NE MOPR rule to renewable resources would “likely completely exclude many, if not all new renewable resources from the FCM.”¹⁴ NESCOE explained that, under the MOPR, the minimum offer prices of new resources are stratified by resource type. NESCOE states that “renewable resources tend to be priced higher than other traditional resources,”¹⁵ and

¹⁰ During the stakeholder process leading up to the December 3, 2012 filing, NESCOE had unsuccessfully pursued a categorical exemption for certain renewable resources from ISO-NE’s proposed offer floor mitigation rules. New England Power Pool Participants Committee, Comments, Docket No. ER12-953-001 at 8-12 (filed Dec. 21, 2012).

¹¹ Five of the six New England states have enacted legislation requiring load-serving entities within those states to purchase Renewable Energy Certificates (RECs) in proportion to their load. Those five states also require utilities to enter into long-term contracts. The sixth state, Vermont, requires its electric distribution companies to enter into long-term contracts with renewable resources for a certain portion of the companies’ loads. Affidavit of Jeffrey W. Bentz, Attachment A, NESCOE Complaint, Docket No. EL13-34-000 (Bentz Testimony) at 7-8.

¹² Bentz Testimony at 9.

¹³ Bentz Testimony at 21-22.

¹⁴ NESCOE Complaint at 10.

¹⁵ *Id.*

thus, generally have higher offer floors than gas-fired resources, and therefore, are unlikely to clear the FCA.¹⁶

9. NESCOE further argued that state policies supporting new renewable resources were enacted to promote and facilitate their development without regard to the FCM clearing price and corresponding revenue, so those resources will be constructed and placed in service despite being excluded from the FCM due to the MOPR.¹⁷ Thus, NESCOE asserted, those resources will in fact be providing capacity to customers, but will not be taken in the FCM and will not receive capacity payments. Because, according to NESCOE, the FCM will fail to account for those renewable resources, not granting the requested exemption will result in procurement of more capacity than necessary, which, according to NESCOE, would violate the “bedrock” principle of procuring no more capacity than the ICR and result in consumers paying for excess capacity.¹⁸ NESCOE additionally posited that the MOPR would frustrate or undermine state policies promoting renewable resources.

3. Order on Complaint

10. The Commission denied NESCOE’s complaint in the Complaint Order. The Commission disagreed with NESCOE’s argument that, without an exemption for state-sponsored resources, the FCM would procure capacity above the ICR. Noting that the FCM cannot and will not procure more than the ICR, the Commission added that it would be the states, not the FCM, that would be responsible for procuring uneconomic, redundant capacity in excess of the ICR. The Commission additionally found that NESCOE had not provided any evidentiary support for its assertion that the exemption it urged would have only a limited price-suppression impact.¹⁹

¹⁶ Bentz Testimony at 12-13 (citing, for example, ISO-NE’s proposed benchmark prices for resources that use natural gas, such as a combustion turbine (\$10.00/kW-month) and a combined cycle gas turbine (\$11.00/kW-month), with biomass benchmark-priced at \$24.00/kW-month, and on-shore wind at \$14.00/kW-month). Mr. Bentz further noted that other resource types were evaluated by the IMM, but were not included in ISO-NE’s tariff amendments to implement the MOPR, so that, for example, off-shore wind would have been assigned a \$61/kW-month benchmark price.

¹⁷ NESCOE Complaint at 10.

¹⁸ NESCOE Complaint at 10 n.38 (citing April 2011 Order, 135 FERC ¶ 61,029 at P 164).

¹⁹ Complaint Order, 142 FERC ¶ 61,108 at PP 32-34.

11. In considering NESCOE's requested exemption for renewables, the Commission stated that it "must balance two considerations. The first is its responsibility to promote economically efficient markets and efficient prices, and the second is its interest in accommodating the ability of states to pursue other legitimate state policy objectives."²⁰ The Commission further noted that, although it had accepted PJM Interconnection, L.L.C.'s (PJM) proposal to exempt renewables from its MOPR, there were differences between PJM and ISO-NE that affected the balancing of those two considerations. The Commission noted that the addition of new out-of-market capacity that would occur by granting the exemption proposed by NESCOE would have a more significant price-suppressive effect than was the case in PJM, since ISO-NE's capacity market used a vertical demand curve at the time, while PJM's capacity market relied on a sloped demand curve. The Commission found that, because the New England market is substantially smaller than the PJM market, an exemption for renewables is likely to have a greater depressing effect on capacity prices in New England than in PJM.²¹ Finally, the Commission noted that NESCOE stated in its complaint that state energy policies "promote the development of new renewable resources irrespective of the FCM rules and related price signals,"²² and therefore found that NESCOE had not adequately supported its assertion that ISO-NE's MOPR would undermine or deter states from continuing their renewable resource policies.

12. On the same day, the Commission issued its order in Docket No. ER12-953-001, accepting ISO-NE's December 3, 2012 filing and rejecting NESCOE's parallel arguments in that proceeding.²³

C. Request for Rehearing

13. On rehearing of the Complaint Order, NESCOE argues that, rather than satisfying its statutory mandate to ensure just and reasonable rates, the Commission sought to place responsibility on the state for the procurement of capacity in excess of ICR, and in doing so failed to address the argument that consumers will be charged excessive prices by virtue of purchasing more capacity through the FCM than is necessary for resource adequacy. NESCOE argues that while the FCM is intended to limit procurement of

²⁰ *Id.* P 35.

²¹ *Id.* ("The additional capacity associated with meeting the New England RPS through 2021 will exceed load growth in New England over that same period").

²² *Id.* P 36 (citing NESCOE Complaint at 7).

²³ *ISO New England Inc.*, 142 FERC ¶ 61,107, at PP 96-97 (2013). The Commission is today ruling on pending requests for rehearing of that order in a separate order, *ISO New England Inc.*, 151 FERC ¶ 61,055 (2015).

capacity to no more than the ICR, customers will in fact pay for total capacity on the system that exceeds the ICR. Thus, according to NESCOE, the Complaint Order “accords the FCM a primacy over resource adequacy that places the theoretical purity of the price signal above the actual impact of requiring customers to purchase more than is necessary,”²⁴ fails to give ratepayers the full value of their investments in capacity resources, and results in an energy market blind to the requirements of state law.

14. NESCOE further asserts that even though the Commission stated that it was required to balance its responsibility to promote economically efficient markets with its interest in accommodating state policy initiatives, it failed to do so in a meaningful way.²⁵ NESCOE states that, to distinguish between PJM (in which renewables are exempt from MOPR) and ISO-NE, the Commission cites the facts that (a) PJM uses a sloped demand curve while ISO-NE has a vertical demand curve, and (b) the PJM market is larger than the ISO-NE market. As to the different demand curves, NESCOE argues that the Complaint Order in effect made a core market design change (such as changing the demand curve) a prerequisite to accommodating state policy initiatives, and that this does not constitute a fair or reasonably articulated balancing of obligations and interests. With regard to the different sizes of the two regions and the amount of price suppression that might occur as a result, NESCOE contends that states’ RPS requirements are proportional to load and vary from state to state, and are influenced by multiple factors. It argues that a capped exemption in a smaller market with more aggressive RPS goals and energy efficiency programs will not necessarily have a greater price suppression impact than an uncapped exemption in a larger market. It continues that, to the extent that price suppression was a relevant factor in deciding whether or not to accommodate public policies in the FCM, the Commission did not explain what level of price suppression is permissible and why.²⁶

15. According to NESCOE, the Commission erred by failing to consider witness testimony that detailed that much of the new capacity developed to meet RPS requirements would not count toward the region’s resource adequacy requirements

²⁴ NESCOE Request for Rehearing at 6.

²⁵ NESCOE points to the Commission’s Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, at P 203 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh’g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), in which it has required ISO-NE and other regions to “spend time and resources” to accommodate transmission projects driven by state public policies, and contends that the Commission’s position in Order No. 1000 is inconsistent with its treatment of state policy initiatives here. NESCOE Request for Rehearing at 7.

²⁶ *Id.* at 9.

because of the MOPR.²⁷ NESCOE asserts that the witness testimony also explained how NESCOE's proposed renewables exemption achieves the proper balance between the Commission's interests in promoting competitive outcomes in the wholesale electricity markets and supporting public policies. NESCOE asserts that the Commission failed to consider this record support, which, according to NESCOE, reflected an abuse of discretion and failure to engage in reasoned decision-making.²⁸

16. Finally, NESCOE asserts that, in rejecting NESCOE's argument that the MOPR would undermine state statutes and regulations, the Commission misconstrued NESCOE's statement that state energy policies would promote the development of new renewable resources "irrespective of the FCM rules and related price signals."²⁹ NESCOE clarifies that "there are many factors, across a wide spectrum, that could impede renewable generating projects from becoming operational. . . . [and b]y effectively precluding renewable resources from receiving capacity payments, the MOPR withholds an additional market-based revenue stream from renewable resources developed pursuant to state statutory mandates," thus making power purchase agreements from such resources more expensive and compounding the challenge of supporting new technologies that are still in the early stages of development.³⁰ NESCOE similarly asserts that, because operation of the MOPR will result in the development of more gas-fired resources and fewer renewable resources in New England, it will undermine state policies supporting fuel diversity, make the region even more dependent on natural gas, and thus ultimately reduce reliability.

D. Demand Curve Changes

17. Subsequent to NESCOE's request for rehearing, on April 1, 2014, ISO-NE and the New England Power Pool Participants Committee submitted proposed revisions to ISO-NE's Transmission, Markets and Services Tariff (Tariff) to establish a system-wide sloped demand curve and related parameters for use in ISO-NE's FCM (Demand Curve Changes). On May 30, 2014, the Commission conditionally accepted the Demand Curve Changes.³¹ The Demand Curve Changes included a limited, 200 MW per year,

²⁷ *Id.* at 10 n.21 (citing Bentz Testimony at 10-19).

²⁸ *Id.*

²⁹ *Id.* at 10 (citing Complaint Order, 142 FERC ¶ 61,108 at P 36).

³⁰ *Id.* at 11, footnotes omitted.

³¹ *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,173 (2014) (Demand Curve Order), *order on reh'g and clarification*, 150 FERC ¶ 61,065 (2015) (Demand Curve Rehearing Order).

exemption for Renewable Technology Resources.³² In the Demand Curve Order, the Commission stated that the exemption is consistent with the Commission's guidance to ISO-NE in possibly developing a MOPR exemption for renewable resources, and allowing such an exemption is consistent with the Commission's acceptance of a similar exemption in the PJM capacity market.³³ The Commission conditionally accepted the Demand Curve Changes effective June 1, 2014, subject to a compliance filing clarifying how new resources would qualify for the Renewable Technology Resource exemption in future auctions.³⁴

18. On rehearing, petitioners argued that the Renewable Technology Resource exemption is inconsistent with Commission precedent, including the Complaint Order, in which the Commission denied NESCOE's complaint seeking a blanket exemption from buyer-side mitigation for renewable resources that qualify under state renewable portfolio programs. In the Demand Curve Rehearing Order, which denied the rehearing requests, the Commission noted that nothing in the Complaint Order prevented ISO-NE from subsequently proposing a similar exemption.³⁵ Further, the Commission noted that complainants in the Complaint Order failed to meet their burden under section 206 of the FPA³⁶ to show that then-existing buyer-side mitigation provisions in ISO-NE's Tariff were unjust, unreasonable, unduly discriminatory or preferential absent the requested exemption.³⁷

³² The proposed Tariff provisions provided that a Renewable Technology Resource is a resource that qualifies as a renewable or alternative energy generating resource in the state in which it is geographically located and is receiving an out-of-market revenue source supported by a state- or federally-regulated rate, charge, or other regulated cost recovery mechanism. Tariff section III.13.1.1.1.7. The Renewable Technology Resource exemption allows any unused portion of the 200 MW not subject to the minimum offer price rule to carry forward for up to three years for a possible total of 600 MW.

³³ Demand Curve Order, 147 FERC ¶ 61,173 at P 81.

³⁴ On July 11, 2014, ISO-NE submitted the required compliance filing in Docket No. ER14-1639-002. The compliance filing was accepted via delegated letter order on November 13, 2014.

³⁵ Demand Curve Order, 147 FERC ¶ 61,173 at P 86 (citing Complaint Order, 142 FERC ¶ 61,108 at P 37).

³⁶ 16 U.S.C. § 824e (2012).

³⁷ Demand Curve Rehearing Order, 150 FERC ¶ 61,065 at P 17 (citing Complaint Order, 142 FERC ¶ 61,108 at PP 32-33).

II. Discussion

A. Procedural Issues

19. The New England Power Generators Association (NEPGA) filed an answer to NESCOE's request for rehearing. Under Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2014), the Commission rejects this answer to a request for rehearing.

B. Analysis

20. Subsequent to the filing of the request for rehearing, the Commission issued the Demand Curve Order and the Demand Curve Rehearing Order in Docket Nos. ER14-1639-000 and ER14-1639-001. We find that the Commission's rulings in those two orders have superseded our previous rulings in this proceeding.³⁸

21. In the Demand Curve Order, the Commission found that an exemption from the MOPR for resources that qualify as Renewable Technology Resources is just, reasonable, and not unduly discriminatory or preferential.³⁹ The Commission found that the exemption is consistent with the Commission's guidance to ISO-NE in possibly developing a MOPR exemption for renewable resources,⁴⁰ and that allowing such an exemption is consistent with the Commission's acceptance of a similar exemption in the PJM capacity market.⁴¹ The Commission noted that the exemption is available to all consumer-owned utilities that build renewable resources, and recognizes state programs promoting renewable resources.⁴² We find that, in light of these rulings, NESCOE's arguments on rehearing in favor of a renewable resource exemption are now moot. Accordingly, the requests for rehearing are denied.

³⁸ As stated earlier, although the Commission found that complainants in the Complaint Order failed to show that then-existing buyer-side mitigation provisions in ISO-NE's tariff were unjust, unreasonable, unduly discriminatory or preferential absent the requested exemption, that finding does not preclude either ISO-NE from proposing a similar provision at a later date or the Commission from accepting it if it is shown to be just and reasonable. *See, e.g., Cities of Bethany, et al. v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995).

³⁹ Demand Curve Order, 147 FERC ¶ 61,173 at P 81.

⁴⁰ *Id.* (citing *ISO New England Inc.*, 142 FERC ¶ 61,107, at P 97 (2013)).

⁴¹ *Id.* (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 166 (2013)).

⁴² *Id.* P 82.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.