

153 FERC ¶ 61,096  
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.

ISO New England Inc.

Docket Nos. EL14-99-001  
ER15-117-003

ORDER DENYING REHEARING

(Issued October 28, 2015)

1. In an order issued September 16, 2014, in Docket No. EL14-99-000, the Commission instituted a proceeding under section 206 of the Federal Power Act (FPA) to direct ISO New England Inc. (ISO-NE) to either revise its Transmission, Markets and Services Tariff (Tariff) to provide for the review and potential mitigation of importers' supply offers prior to each annual Forward Capacity Auction (FCA) or show cause why it should not be required to do so.<sup>1</sup> Pursuant to the Show Cause Order, ISO-NE submitted proposed Tariff revisions in Docket No. ER15-117-000. By order issued December 15, 2014, the Commission conditionally accepted ISO-NE's proposed Tariff revisions submitted pursuant to the Show Cause Order.<sup>2</sup> Public Citizen, Inc. (Public Citizen) seeks rehearing of the December 2014 Order. The Commission denies rehearing.

**I. Background**

2. ISO-NE administers the Forward Capacity Market (FCM), in which resources compete in annual FCAs to provide capacity three years in advance of the relevant delivery year. In each FCA, ISO-NE seeks to procure the Installed Capacity Requirement (the "level of capacity required to meet the reliability requirements defined for the New England Control Area").<sup>3</sup> In the FCA, existing resources submit de-list bids

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<sup>1</sup> *ISO New England Inc.*, 148 FERC ¶ 61,201 (2014) (Show Cause Order).

<sup>2</sup> *ISO New England Inc.*, 149 FERC ¶ 61,227 (2014) (December 2014 Order). The December 2014 Order reflected both Docket Nos. EL14-99-000 and ER15-117-000.

<sup>3</sup> Tariff § I.2.2. Before procuring the Installed Capacity Requirement, ISO-NE nets out certain credits, *see* Tariff § III.13.2.2.

that reflect the lowest price in \$/kW-month at which they are willing to supply capacity. The FCA is conducted as a descending price auction; a resource exits the auction if the clearing price falls below its de-list bid.

3. The eighth FCA (FCA 8) took place on February 3, 2014, and through this auction, ISO-NE procured capacity for the 2017-2018 Capacity Commitment Period. Some intervenors, including Public Citizen, alleged that the capacity prices resulting from FCA 8 were the result of market manipulation by the owners of the Brayton Point generating plant – namely, that Brayton Point owners withdrew that plant from FCA 8 and from the FCM,<sup>4</sup> with the intention of raising the capacity prices that would be received by their other generation.<sup>5</sup> ISO-NE's filing of the results of FCA 8, in Docket No. ER14-1409-000, became effective by operation of law on September 15, 2014,<sup>6</sup> and Public Citizen's appeal of that outcome is currently pending.<sup>7</sup>

4. In the Show Cause Order, the Commission instituted a section 206 proceeding regarding the Tariff's treatment of import resources. Noting the changing balance of supply and demand in New England, the Commission expressed concern that future capacity auctions could begin with a very small surplus, if any, above the net Installed Capacity Requirement. The Commission stated that, under tight capacity conditions, existing Tariff provisions might not fully protect customers against the exercise of market power by import resources.<sup>8</sup> Accordingly, the Commission required ISO-NE to either submit Tariff revisions that provide for the review and potential mitigation of importers' offers in a manner similar to the manner in which other, existing resources are reviewed and mitigated, or show cause why it should not be required to do so.

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<sup>4</sup> The Brayton Point owners submitted a Non-Price Retirement Request prior to FCA 8, permanently removing Brayton Point from FCA 8 and all future capacity auctions. ISO New England Inc., Forward Capacity Auction Results Filing, Docket No. ER14-1409-000, Transmittal, Attachment B, Testimony of Stephen J. Rourke at 6 (Feb. 28, 2014).

<sup>5</sup> See, e.g., protests of Public Citizen, Eastern Massachusetts Consumer-Owned Systems, and the Connecticut Attorney General in Docket No. ER14-1409-000.

<sup>6</sup> See Notice of Filing Taking Effect by Operation of Law (Sept. 16, 2014) and Notice of Dismissal of Pleadings (Oct. 24, 2014), Docket No. ER14-1409-000.

<sup>7</sup> *Public Citizen, Inc., and George Jepsen, Attorney General of Conn. v. FERC*, Nos. 14-1244 and 14-1246 (D.C. Cir. filed Nov. 14, 2014).

<sup>8</sup> Show Cause Order, 148 FERC ¶ 61,201 at P 10.

5. The Commission also noted that following a non-public referral from ISO-NE and its Internal Market Monitor, the Commission's Office of Enforcement began a non-public investigation into the bidding behavior in FCA 8. As stated in the Show Cause Order, although Brayton Point was not the focus of the referral, the Office of Enforcement conducted a limited review of Brayton Point's bidding behavior and, finding credible justifications for the owners' retirement decision, elected not to widen its investigation to include Brayton Point.<sup>9</sup>

6. On October 16, 2014, in response to the Show Cause Order, ISO-NE submitted new Tariff revisions in Docket No. ER15-117-000. The revisions were designed to determine which New Import Capacity Resources have market power (that is, which are "pivotal") and to apply mitigation to those suppliers in a manner consistent with the mitigation that is applied to existing resources, as contemplated by the Commission.<sup>10</sup>

7. In both its protest in Docket No. EL14-99-000 (submitted in response to the Order to Show Cause) and its protest in Docket No. ER15-117-000 (submitted in response to ISO-NE's proposed Tariff revisions), Public Citizen reiterated its prior arguments, submitted in the FCA 8 results proceeding in Docket No. ER14-1409-000, that the capacity prices produced by FCA 8 were the result of market manipulation by the owners of Brayton Point. Public Citizen urged the Commission to expand its show cause proceeding to determine whether FCA 8 produced just and reasonable capacity rates, and if necessary, to determine and implement just and reasonable rates.<sup>11</sup>

8. In the December 2014 Order, the Commission conditionally accepted ISO-NE's proposed Tariff revisions.<sup>12</sup> It stated that "ISO-NE's proposal is a significant step toward decreasing the opportunity for importers to exercise market power, because pivotal suppliers will be required to submit offers consistent with their net risk-adjusted going

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<sup>9</sup> *Id.* P 11.

<sup>10</sup> Transmittal at 2-3. ISO-NE clarified that the revisions address only the treatment of New Import Capacity Resources because Existing Import Capacity Resources are already effectively mitigated. ISO-NE stated that Existing Import Capacity Resources and Existing Generating Capacity Resources are subject to the same qualification process which provides for the submission of de-list bids and for the review of these bids by the Internal Market Monitor.

<sup>11</sup> Public Citizen Comment and Protest, Docket No. EL14-99-000, at 9.

<sup>12</sup> December 2014 Order, *supra*, issued in both Docket Nos. ER15-117-000 and EL14-99-000.

forward and opportunity costs,” although the Commission also required ISO-NE to submit further compliance filings.<sup>13</sup>

9. The Commission refused to expand the scope of the proceedings as requested by Public Citizen. It stated that the capacity rates resulting from FCA 8 went into effect by operation of law, noting that the requests for rehearing in that case were dismissed.<sup>14</sup> The Commission further stated:

We are unable to reopen the question of the justness and reasonableness of the eighth FCA rates. We also reiterate that, contrary to Public Citizen’s assertions, there is no evidence that the owners of Brayton Point engaged in any inappropriate behavior in the eighth FCA. Rather, as stated in the Show Cause Order, the Commission’s Office of Enforcement found credible justifications for the owners’ decision to permanently remove Brayton Point from the FCM.<sup>15</sup>

## **II. Request for Rehearing and Answer**

10. Public Citizen seeks rehearing of the December 2014 Order. It challenges the Commission’s refusal to expand the scope of the show cause proceeding, and the Commission’s assertion that it is unable to reopen the question of the justness and reasonableness of FCA 8 rates on the basis that those rates went into effect by operation

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<sup>13</sup> December 2014 Order, 149 FERC ¶ 61,227 at P 24. In response to the Commission’s compliance requirements (December 2014 Order at PP 45 and 53), ISO-NE filed on January 14, 2015, to correct an error in the language proposed in its October 16, 2014 filing that misidentified the Tariff section explaining the pivotal supplier test. The Commission accepted the filing. *ISO New England Inc.*, Docket No. ER15-117-001 (May 5, 2015) (delegated letter order). ISO-NE made a second compliance filing on April 1, 2015, revising its Tariff to allow New Import Capacity Resources to submit up to five price-quantity pairs as part of their offer information for the FCA, which the Commission also accepted. *ISO New England Inc.*, Docket No. ER15-117-004, (May 5, 2015) (delegated letter order).

<sup>14</sup> December 2014 Order, 149 FERC ¶ 61,227 at P 67 (citing Notice of Filing Taking Effect by Operation of Law, Docket No. ER14-1409-000, September 16, 2014 and Notice of Dismissal of Pleadings, Docket No. ER14-1409-000, October 24, 2014 (*appeal pending sub nom. Public Citizen, Inc., and George Jepsen, Attorney General of Conn. v. FERC*, D.C. Cir. Nos. 14-1244 and 14-1246)).

<sup>15</sup> December 2014 Order, 149 FERC ¶ 61,227 at P 67.

of law. Public Citizen argues that the “[t]he purpose of Section 206 complaint proceedings, such as the instant Show Cause proceeding, is to address the lawfulness of rates that are already in effect.”<sup>16</sup>

11. Public Citizen further argues that the Commission should not have relied on the Office of Enforcement’s finding that the owners of Brayton Point provided “credible justifications” for their decision to remove the plant from the FCM. Public Citizen states that those findings did not answer the factual questions raised as to the timing of that decision and its impact on the rates, and does not excuse the failure to order a hearing under section 206. Public Citizen asserts that “the impact of the owners’ decisions was clearly to raise the final prices from the auction,” and the related factual questions should have been examined in a rate hearing, whether or not the Office of Enforcement satisfied its own standards for an enforcement proceeding.<sup>17</sup>

12. On January 26, 2015, the New England Power Generators Association (NEPGA) filed a request for leave to answer and an answer to Public Citizen’s request for rehearing.

### **III. Discussion**

#### **A. Procedural Issue**

13. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. Accordingly, we reject NEPGA’s answer.

#### **B. Analysis**

14. We deny Public Citizen’s request for rehearing.

15. As described above, the Commission’s focus in instituting a section 206 proceeding and in the December 2014 Order was on the appropriate treatment of imports and establishing just and reasonable review and mitigation procedures for import capacity on a going forward basis. Public Citizen does not challenge or reference the Commission’s rulings on that question in any way. Rather, it seeks to enlarge the section 206 proceeding to include an entirely different matter – the capacity prices generated by FCA 8 in 2014 (which were, according to Public Citizen, the result of market manipulation by the owners of Brayton Point, an internal resource). The Commission previously stated that there was no evidence that the owners of Brayton Point engaged in

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<sup>16</sup> Request for Rehearing at 2.

<sup>17</sup> Request for Rehearing at 3.

any inappropriate behavior in FCA 8, and Public Citizen has provided no argument or evidence that causes us to reconsider this finding. Further, as noted above, ISO-NE filed the results of FCA 8 with the Commission in an earlier proceeding, Docket No. ER14-1409-000, and the capacity prices resulting from that filing became effective by operation of law. Public Citizen filed an appeal in that proceeding which is currently pending before the U.S. Court of Appeals for the D.C. Circuit.<sup>18</sup>

The Commission orders:

Public Citizen's request for rehearing is hereby denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>18</sup> *Public Citizen, Inc., and George Jepsen, Attorney General of Conn. v. FERC*, Nos. 14-1244 and 14-1246 (D.C. Cir. filed Nov. 14, 2014).