

153 FERC ¶ 61,378  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER15-1137-001

ORDER DENYING REHEARING

(Issued December 30, 2015)

1. On June 18, 2015, the Commission issued an order finding that the capacity rates resulting from the ninth Forward Capacity Auction (FCA) conducted by ISO New England Inc. (ISO-NE) were just and reasonable.<sup>1</sup> The Utility Workers Union of America Local 464 and Robert Clark (jointly, UWUA) filed a request for rehearing. For the reasons discussed below, the Commission denies UWUA's request for rehearing.

**I. Background**

**A. FCA 8**

2. ISO-NE administers a Forward Capacity Market (FCM), in which capacity resources compete in an annual FCA to provide capacity for a one-year Capacity Commitment Period three years in the future. Pursuant to its Transmission, Markets and Services Tariff (Tariff), ISO-NE is required to submit a filing with the Commission detailing the FCA results, including the capacity prices resulting from that auction.<sup>2</sup>

3. In 2014, ISO-NE conducted the eighth FCA (FCA 8), for the June 1, 2017 through May 31, 2018 Capacity Commitment Period, and filed the results of that auction with the Commission in Docket No. ER14-1409-000. Certain protesters in that proceeding, including UWUA, alleged that the capacity prices resulting from FCA 8 had been affected by market manipulation. Energy Capital Partners (Energy Capital), the owners of the Brayton Point Power Station (Brayton Point) and other plants, withdrew Brayton Point from FCA 8, and protesters alleged that Energy Capital did so in order to raise the capacity

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<sup>1</sup> *ISO New England Inc.*, 151 FERC ¶ 61,226 (2015) (June 18 Order).

<sup>2</sup> June 18 Order, 151 FERC ¶ 61,226 at P 2.

prices that would be paid to Energy Capital's other assets. ISO-NE's filing of the results of FCA 8 became effective by operation of law.<sup>3</sup>

4. Relevant here, in an order in a separate proceeding that primarily addressed other aspects of the FCM, the Commission acknowledged a non-public investigation by the Office of Enforcement related to FCA 8:

Following a non-public referral from ISO-NE and its [Internal Market Monitor] shortly after the . . . FCA 8 auction, the Commission's Office of Enforcement began a non-public investigation into the bidding behavior in FCA 8. Although Brayton Point was not the focus of the referral, the Office of Enforcement conducted a limited review of Brayton Point's bidding behavior to determine whether investigation of Brayton Point was warranted. . . . [T]he owners of Brayton Point submitted a Non-Price Retirement Request, permanently removing Brayton Point from the FCM. OE staff found credible justifications for the owners' retirement decision and elected not to widen its investigation to include Brayton Point.<sup>4</sup>

#### **B. FCA 9**

5. ISO-NE conducted its ninth FCA (FCA 9) on February 2, 2015, for the June 1, 2018 through May 31, 2019 Capacity Commitment Period, and submitted the FCA 9 results on February 27, 2015 (FCA 9 Results Filing).

6. UWUA protested and sought rejection of the FCA 9 Results Filing because, according to UWUA, Energy Capital's alleged market manipulation with respect to FCA 8 also affected the results of FCA 9. UWUA argued that the retirement of Brayton Point prior to FCA 8 constituted market manipulation and a Tariff violation, in that Energy Capital could have earned a profit by offering Brayton Point's capacity into both FCA 8 and FCA 9, but instead withheld that capacity, with the intent of raising the profits earned by Energy Capital's other assets.<sup>5</sup> UWUA requested that the Commission stay the FCA 9

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<sup>3</sup> Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER14-1409 (Sept. 16, 2014); Notice of Dismissal of Pleadings, *ISO New England Inc.*, Docket No. ER14-1409 (Oct. 24, 2014).

<sup>4</sup> *ISO New England Inc.*, 148 FERC ¶ 61,201, at P 11 (2014) (September 16 Order); *see also ISO New England Inc.*, 149 FERC ¶ 61,227, at P 67 (2014), *reh'g denied*, 153 FERC ¶ 61,096, at P 5 (2015).

<sup>5</sup> UWUA April 13, 2015 Protest, Docket No. ER15-1137-000 at 4.

Results Filing and allow the parties to conduct discovery and adjudicate the legality of Energy Capital's actions.

7. UWUA also argued that the Tariff requires a retiring resource to show an economic justification in circumstances where “the retirement will result in a huge price increase for the owner's remaining generation units, and . . . there is substantial public information already available indicating that the plant is immensely profitable and can reasonably be expected to remain so in the near future.”<sup>6</sup> Specifically, UWUA argued that, pursuant to the Tariff, a resource that is needed for reliability but is seeking to retire has the right to retire only “as permitted by . . . law” and that uneconomic withholding of a resource for the purpose of increasing prices for an owner's remaining units in the same market is an act of illegal market manipulation and is not “permitted by law.”<sup>7</sup>

8. In the June 18 Order, the Commission found that ISO-NE had demonstrated that the results of FCA 9 were just and reasonable, and accordingly, accepted the FCA 9 Results Filing. With regard to UWUA's protest, the Commission first stated that this proceeding was limited to the FCA 9 Results Filing, and thus it would not consider arguments regarding FCA 8. The Commission did note, however, that it was “not persuaded by UWUA's allegations that market manipulation affected FCA 9, as the record is devoid of any evidence to that effect.”<sup>8</sup>

9. The Commission further found that UWUA's argument was erroneously “premised on the possibility that Brayton Point would be able to participate in FCA 9, which is not the case.”<sup>9</sup> The Commission stated that the owners of Brayton Point had submitted a Non-Price Retirement Request prior to FCA 8, which permanently removed Brayton Point from the FCM.<sup>10</sup> The Commission pointed to Tariff language providing that “[a] Non-Price Retirement Request is a *binding request to retire* all or part of a Generating Capacity Resource. . . [and o]nce submitted, a Non-Price Retirement Request *may not be withdrawn*.”<sup>11</sup> The Commission explained that this binding obligation to retire ensures

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<sup>6</sup> UWUA May 13, 2015 Answer at 5.

<sup>7</sup> *Id.* at 7 (citing ISO-NE Tariff, § III.13.2.5.2.5.3(a)(iii) (Retirement of Resources) (32.0.0)).

<sup>8</sup> June 18 Order, 151 FERC ¶ 61,226 at P 22.

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

<sup>10</sup> *Id.* P 22 n.37.

<sup>11</sup> *Id.* P 22 n.38 (citing to Tariff, § III.13.1.2.3.1.5.1) (emphasis added).

that a resource did not inappropriately “toggle” between cost-based and market-based compensation (i.e., leaving the market in some years to receive cost-based compensation, and re-entering it in others to receive market-based compensation).<sup>12</sup>

10. Finally, the Commission addressed UWUA’s assertion that Brayton Point’s withdrawal from the FCM constituted an act of market manipulation that affected the FCA 9 results, stating that “[t]he alleged act of market manipulation of which UWUA complains. . . took place in the context of FCA 8, and the Commission’s actions with regard to the results of FCA 8 were taken in Docket No. ER14-1409-000 and are currently pending appeal.”<sup>13</sup> The Commission dismissed UWUA’s protest, and accepted the results of FCA 9.

11. UWUA filed a timely request for rehearing.

## **II. Discussion**

12. UWUA makes, in essence, three arguments in its request for rehearing: (1) it asserts that the Commission should have set UWUA’s allegations of market manipulation for hearing and instead erroneously relied on the pending appeal regarding the FCA 8 results to avoid addressing the allegation of market manipulation in this proceeding; (2) it states that the Commission should have required ISO-NE to show that it was uneconomic for Brayton Point to run during the relevant Capacity Commitment Period and that Brayton Point’s retirement was “proper” under the Tariff;<sup>14</sup> and (3) it challenges the Commission’s finding that Brayton Point could not participate in FCA 9. The Commission finds none of these arguments compelling, and we therefore deny rehearing.

### **A. Allegations of Market Manipulation**

#### **1. Request for Rehearing**

13. UWUA asserts that the Commission erroneously refused to consider allegations of market manipulation affecting FCA 9. UWUA argues that the pendency of the FCA 8 proceedings before the U.S. Court of Appeals for the D.C. Circuit has no bearing upon the Commission’s responsibility to determine whether market manipulation affected FCA 9.

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<sup>12</sup> *Id.* P 22.

<sup>13</sup> June 18 Order, 151 FERC ¶ 61,226 at P 22 n.40 (citing *Public Citizen, Inc., and George Jepsen, Attorney General of Conn. v. FERC*, Nos. 14-1244 and 14-1246 (D.C. Cir. filed 11/14/2014)).

<sup>14</sup> Request for Rehearing at 6-7.

According to UWUA, the Commission “appears to be engaging in a shell game between the FCA 8 proceeding and this proceeding, to avoid a substantive reviewable adjudication of this fundamental issue which directly affects both the FCA 8 results and the FCA 9 results.”<sup>15</sup>

14. According to UWUA, determining whether Brayton Point engaged in market manipulation is essential to determining whether the FCA 9 results are just and reasonable, and the Commission should have ordered discovery and a hearing on that issue prior to accepting the FCA 9 Results Filing. UWUA challenges the Commission’s finding that the record is devoid of evidence of market manipulation, stating that extensive publicly available information shows that Brayton Point could be profitably run in the future. UWUA reiterates the projections of Brayton Point’s annual future operating profits previously provided in its April 13, 2015 Protest.<sup>16</sup> According to UWUA, this information is the central determinant of whether the alleged market manipulation and non-compliance with the Tariff occurred and the Commission erred by failing to address that information in the June 18 Order.

## 2. Commission Determination

15. UWUA’s argument that the Commission has never addressed its allegations against Brayton Point is incorrect. As noted in the June 18 Order, and the above-referenced September 16 Order, the Commission’s Office of Enforcement reviewed Brayton Point’s bidding behavior in FCA 8 to determine whether further investigation of Brayton Point was warranted, and Enforcement staff “found credible justifications for the owners’ retirement decision and elected not to widen its investigation to include Brayton Point.”<sup>17</sup> This conclusion remains valid for FCA 9.

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<sup>15</sup> Request for Rehearing at 27-28 (citing, *inter alia*, *Cal. ex rel. Harris v. FERC*, 784 F.3d 1267, 1275 (9th Cir. 2015) (rejecting contention that the Commission may refuse to address critical issues because they are allegedly addressed in another proceeding, and agreeing that the agency was “playing a shell game, artificially limiting the scope of [the] proceedings and promising that excluded claims will be addressed elsewhere.”) and *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007) (“[a]n agency’s ruling will be deemed arbitrary and capricious where the agency entirely failed to consider an important aspect of the problem”)).

<sup>16</sup> UWUA April 13, 2015 Protest, Docket No. ER15-1137-000, at 4-5.

<sup>17</sup> June 18 Order, 151 FERC ¶ 61,226 at n.35; September 16 Order, 148 FERC ¶ 61,201 at P 11. *See also ISO New England Inc.*, 149 FERC ¶ 61,227 at P 67, *reh’g denied*, 153 FERC ¶ 61,096 at P 5.

16. As to UWUA's argument that record evidence supports a finding that Brayton Point engaged in market manipulation, we continue to disagree. UWUA itself describes the proffered information as showing that "Brayton Point could be run profitably in the future,"<sup>18</sup> which, even if true, is not dispositive of whether market manipulation occurred or whether that issue should be set for hearing. As discussed in the June 18 Order, the record here also includes persuasive evidence that the results of FCA 9 are just and reasonable. That evidence includes a certification from ISO-NE's Internal Market Monitor (IMM) that all offers and bids required by the Tariff to be reviewed by the Internal Market Monitor were properly reviewed, and that the outcome of FCA 9 system-wide was the result of a competitive auction. Furthermore, the IMM certified that no anti-competitive behavior in FCA 9 was evident. As noted in the June 18 Order, the IMM makes this finding based on rigorous qualification requirements, the competitive bidding of new resources, and the absence of any anti-competitive behavior affecting the auction outcome.<sup>19</sup>

17. For these reasons, we reject UWUA's arguments on this issue.

**B. Whether Brayton Point's Retirement Was Economic**

**1. Request for Rehearing**

18. UWUA argues that the Commission erred by not requiring ISO-NE to demonstrate that Brayton Point was uneconomic, and thus, its retirement was proper, and in conformity with ISO-NE's Tariff. UWUA states that, under sections 205(d) and (e) of the Federal Power Act (FPA),<sup>20</sup> ISO-NE has the burden of demonstrating that the FCA 9 results are just and reasonable and in compliance with the Tariff.<sup>21</sup> To satisfy that burden, according to UWUA, ISO-NE was required to show that the plant was not "economic" to run in the 2017-18 Capacity Commitment Period and beyond, and therefore was properly excluded from FCA 8 and FCA 9.<sup>22</sup> UWUA asserts that the retirement of a particular resource by a

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<sup>18</sup> Request for Rehearing at 11.

<sup>19</sup> June 18 Order, 151 FERC ¶ 61,226 at PP 20-21.

<sup>20</sup> 16 U.S.C. §§ 824d(d) and (e) (2012).

<sup>21</sup> Request for Rehearing at 6-7 (citing section 205(e) ("At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be on the public utility"))).

<sup>22</sup> Request for Rehearing at 7 (citing UWUA April 13, 2015 Protest at 8-10, citing to Tariff section III.13.2.5.2.5.3. (a)(iii)).

fleet owner for the purpose of reducing supply and increasing prices for the fleet's remaining units in the same market is an act of illegal market manipulation under the FPA. Therefore, UWUA argues, the retirement of Brayton Point was not "as permitted by law," and does not constitute a permitted retirement in accordance with the ISO-NE Tariff.

## **2. Commission Determination**

19. UWUA avers that under the Tariff, ISO-NE was required to demonstrate that Brayton Point was uneconomic before allowing it to retire. This argument is without merit. The Tariff contains no provision requiring a resource to demonstrate that it is uneconomic before it is allowed to retire, and UWUA does not point to any such provision. There is no test as to whether the unit can economically provide capacity, nor is there a mechanism by which ISO-NE can compel the resource to continue operating under any circumstances. Neither ISO-NE nor the Commission can, under the Tariff, compel a resource to stay in the FCM.

### **C. Whether Brayton Point Could Participate in FCA 9**

#### **1. Request for Rehearing**

20. UWUA challenges the Commission's finding that, having retired prior to FCA 8, Brayton Point could not participate in FCA 9. UWUA posits that, if the original retirement was an act of market manipulation, the resource is not only allowed to offer its capacity into subsequent auctions under the Tariff, it is required to do so.<sup>23</sup> UWUA further states that the Tariff provision stating that a Non-Price Retirement Request is a binding request that, once submitted, may not be withdrawn means only that the request is "binding" on the requester. UWUA argues that the Tariff cannot reasonably be construed as rendering an attempted retirement that complies with neither the Tariff nor the anti-manipulation provisions of the FPA, a valid "retirement" which *must* occur as requested.

21. UWUA additionally argues that the Commission erred in relying on concerns regarding "togglng" between market-based and cost-of-service rates. UWUA states that "[t]he Commission's anti-togglng principles are intended to prohibit a resource which properly qualifies to 'retire' from a given auction under the Tariff from thereafter opportunistically moving from market rates to cost of service rates then back to market rates as markets change," but Brayton Point did not properly retire from the FCM in

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<sup>23</sup> Request for Rehearing at 23 n.17 (citing June 18 Order, 151 FERC ¶ 61,226 at P 22.).

FCA 8, and has also not sought cost-of-service payments. Thus, UWUA argues, the continued participation of Brayton Point in FCA 9 is not prohibited by anti-toggling principles.<sup>24</sup>

## 2. Commission Determination

22. UWUA essentially argues that Brayton Point could and should have participated in FCA 9 because, according to UWUA, Brayton Point's retirement prior to FCA 8 was invalid in the first place. However, that argument is based on the presumption that in seeking to retire Brayton Point engaged in market manipulation, a premise that, as noted above, was considered and rejected. Accordingly, we need not further address UWUA's arguments on this point.

23. We again emphasize, nevertheless, that the Tariff does not require ISO-NE or the Commission to examine the economics underlying a Non-Price Retirement Request, and the Tariff provides no mechanism to force continued participation in the FCM, regardless.

### The Commission orders:

UWUA's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>24</sup> Request for Rehearing at 24.