

156 FERC 61,097  
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. ER13-2266-003

ORDER ON REMAND

(Issued August 8, 2016)

1. On remand, the Commission reconsiders the question of whether ISO New England Inc.'s (ISO-NE) 2013-2014 Winter Reliability Program (Program) provided for just and reasonable rates. In accepting the Program results, the Commission determined that ISO-NE appropriately weighed prospective costs with the need to address pressing reliability risks for the then-imminent winter 2013-2014.<sup>1</sup> On appeal, however, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or court) directed the Commission to better justify accepting the Program results or revise its disposition to ensure that the rates under the Program are just and reasonable. In this order, we direct ISO-NE to request from Program participants the basis for their bids, including the process used to formulate the bids, and to file with the Commission a compilation of this information, an analysis of such information by ISO-NE's Internal Market Monitor (IMM), as well as ISO-NE's recommendation as to the reasonableness of the bids.

**I. Background**

**A. 2013-2014 Winter Reliability Program**

2. On June 28, 2013, ISO-NE and the New England Power Pool (NEPOOL) Participants Committee filed tariff revisions intended to aid ISO-NE in maintaining

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<sup>1</sup> *ISO New England Inc.*, 144 FERC ¶ 61,204 (2013) (WRP Order); *ISO New England Inc.*, 145 FERC ¶ 61,023 (2013) (Bid Results Order).

system reliability during the 2013-2014 winter.<sup>2</sup> ISO-NE explained that increased reliance on natural gas-fired generation and resource performance during periods of stressed system conditions were two of New England's most pressing reliability risks and that interim short-term action was required to aid ISO-NE in maintaining reliability during the 2013-2014 winter. ISO-NE and stakeholders quantified the magnitude of the need for the Program and determined that the region would need 2.4 million MWh from oil-fired generation.<sup>3</sup> Thus, the Program included compensation for demand response assets and oil-fired and dual-fuel generators, selected through a bidding process, to provide demand response and oil inventory services for the duration of the Program. ISO-NE initially estimated that "the costs of providing the Winter Reliability Program services . . . [would] range from \$16 to \$43 million."<sup>4</sup> Because the accepted bids would constitute the Program's rates, ISO-NE agreed to file the bid prices and a description of its evaluation process. However, ISO-NE requested that the Commission approve the Program prior to receiving information regarding the accepted bids, stressing that expedited Commission approval was necessary to ensure the Program was implemented in time for the 2013-2014 winter.

3. Under the Program, selected resources were compensated through a monthly payment derived from the resources' bids under an "as-bid" pricing mechanism, rather than a uniform clearing price, in addition to any compensation they received for capacity (in the Forward Capacity Market), energy, ancillary services, or other services. In selecting resources to provide up to 2.4 million MWh of energy, ISO-NE's tariff required it to assess resources' bids based on cost and several non-cost factors, including historical availability and performance, ability to respond to contingencies and other changed conditions, diversity of location and sensitivity to locational constraints, dual-fuel capability, and oil replenishment capability.<sup>5</sup>

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<sup>2</sup> On August 9, 2013, ISO-NE filed amendments to the Program, pursuant to the "exigent circumstances" provision of the Participants Agreement, because ISO-NE had only received about 60 percent of the MWh bid target for the Program at a cost higher than the total cost estimate during the initial bidding period. ISO-NE stated that the amendments were intended to reduce risk (and correspondingly reduce bid-in risk premiums) in order to encourage greater participation.

<sup>3</sup> ISO-NE 2013-2014 Winter Reliability Program Filing at 5-6 (June 28, 2013).

<sup>4</sup> *Id.* at 25 n.68.

<sup>5</sup> ISO-NE August 12, 2013 Filing at Appendix K, § III.K.6. While ISO-NE did consider the reliability criteria in addition to cost, ISO-NE disclosed in a compliance filing submitted after the completion of bid selection that the least expensive mix of

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4. On September 16, 2013, in Docket No. ER13-1851-000, the Commission accepted the Program, subject to condition.<sup>6</sup> The Commission explained that market-based solutions are generally preferable to out-of-market solutions, but recognized the temporary nature of the program and the need to address particular challenges to reliability for the coming winter, including increased reliance on natural gas-fired generation and poor resource performance during periods of stressed system conditions.<sup>7</sup> The Commission stated that ISO-NE's procurement decisions under the Program remained subject to Commission review and required ISO-NE to file the results of the bid submission and selection process.

**B. 2013-2014 Winter Reliability Program Bid Results**

5. On August 26, 2013, in Docket No. ER13-2266-000, ISO-NE submitted the results of the Program bid selection process (Bid Results), which the Commission conditionally accepted.<sup>8</sup> Of the 2.29 million MWh offered in the auction, ISO-NE proposed accepting 1.995 million MWh at a total cost of \$78.8 million. ISO-NE provided the Commission with information on the prices and energy amounts, stating that more granular information might convey sensitive commercial information.

6. In the Bid Results proceeding, TransCanada Power Marketing Ltd. (TransCanada) argued that the Program required more scrutiny given that actual costs were nearly twice as much as the initial cost estimate. TransCanada also argued that the Commission did not have enough information to determine whether the Bid Results were just and reasonable because ISO-NE did not fully disclose the bid information due to confidentiality concerns. In response to TransCanada and other intervenors' protests, the Commission stated in the Bid Results Order that ISO-NE made a good faith effort to

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resources sufficiently met ISO-NE's reliability criteria. ISO-NE, Compliance Filing, ER13-2266-000, at 5 (filed October 15, 2013) ("Given the ISO's assessment of performance and flexibility, the ISO did not deem it necessary to replace or supplement any of the resources within the selected group with a more expensive resource.").

<sup>6</sup> *ISO New England Inc.*, 144 FERC ¶ 61,204 (2013) (WRP Order). The Commission directed ISO-NE and NEPOOL to amend its cost allocation of the Program from Regional Network Load, which is paid for by transmission owners, to Real Time Load Obligation, which is paid for by load serving entities. On November 11, 2013, the Commission accepted ISO-NE and NEPOOL's compliance filing.

<sup>7</sup> WRP Order, 144 FERC ¶ 61,204 at P 21.

<sup>8</sup> *ISO New England Inc.*, 145 FERC ¶ 61,023 (2013) (Bid Results Order).

develop an estimate, including hiring an independent consultant to calculate projected costs for the information of market participants. However, the Commission required ISO-NE to submit a compliance filing further detailing its evaluation process in selecting winning bids, since the Commission envisioned a more detailed Bid Results filing in conditionally accepting the Program.<sup>9</sup>

7. In its Bid Results compliance filing, ISO-NE reiterated that it considered cost and non-cost factors in selecting bids for the Program.<sup>10</sup> First, ISO-NE explained that it arranged the bids by price (\$/MWh), placing each generator bid block in order from lowest to highest cost of providing the oil storage and demand response services. ISO-NE explained that it then evaluated the supply offer curve and selected a \$31/MWh cut-off point on the price stack because if it were to acquire bids past that cut-off point, the additional program cost would have resulted in a negligible gain in the target procurement amount.<sup>11</sup> ISO-NE further explained its decision to acquire approximately 1.95 million MWh at prices up to \$31/MWh, instead of the targeted 2.4 million MWh, which would have cost \$114.3 million rather than \$78.8 million. Specifically, ISO-NE weighed the additional reliability provided by a slightly greater amount of oil inventory at the beginning of the season against the uncertainty of the exact amount needed and the price differential.<sup>12</sup> Second, ISO-NE explained that it considered the non-cost reliability criteria, including resource performance and flexibility, and did not determine it necessary to replace or supplement any of the resources within the selected group of bids with a more expensive resource. Third, ISO-NE stated that it evaluated the geographical distribution of the final selected resources, taking into account locational constraints.<sup>13</sup>

### C. Program Outcome

8. According to ISO-NE, the Program was instrumental in maintaining reliable system operations during the 2013-2014 winter, as the region faced historically cold

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<sup>9</sup> Bid Results Order, 145 FERC ¶ 61,023 at PP 25-26. On November 13, 2013, the Commission accepted ISO-NE's compliance filing, which explained ISO-NE's bid evaluation and selection process in greater detail.

<sup>10</sup> Bid Results Compliance Filing at 3.

<sup>11</sup> *Id.* at 3-4.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> *Id.* at 5.

weather.<sup>14</sup> High natural gas demand and pipeline constraints resulted in sustained high natural gas prices and the oil inventory procured through the Program was vitally important for reliability. Most of the region's gas pipelines were operating at or near capacity even though a significant amount of the ISO-NE gas-fired generation fleet was either off line due to economics or burning alternate fuel.<sup>15</sup> ISO-NE reported that natural gas prices exceeded oil prices on 57 percent of winter days (despite unusually high oil prices) and oil units' production increased from the average one percent, to nearly a quarter of the region's electricity during cold periods. The Program supported the procurement of more than three million barrels of oil and generators burned approximately 88 percent of it.<sup>16</sup> ISO-NE stated that, given difficulties in replenishing oil supplies mid-winter, it was critical that units had significant inventory at the beginning of the winter.<sup>17</sup>

#### **D. Requests for Rehearing and Rehearing Orders**

9. TransCanada requested rehearing of the WRP and Bid Results Orders, arguing that the Commission failed to determine whether the overall costs of the Program would be just and reasonable or conduct any analysis or make a finding that the rates associated with the Program, as set forth in the Bid Results, were just and reasonable. TransCanada also asserted that the Commission failed to explain the disparity between the estimated Program cost of \$16-\$43 million and the actual cost of \$79 million. TransCanada

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<sup>14</sup> ISO-NE Winter Operations Technical Conference Presentation, at 25 (April 2014), available at [http://www.iso-ne.com/pubs/pubcomm/pres\\_spchs/2014/winter\\_operations\\_technical\\_conference\\_april\\_2014.pdf](http://www.iso-ne.com/pubs/pubcomm/pres_spchs/2014/winter_operations_technical_conference_april_2014.pdf). Several days in January 2014 were among the coldest five percent of days in the last 20 years, with daily average temperatures between 5-12 degrees Fahrenheit. ISO-NE January 2014 Response to Data Request.

<sup>15</sup> ISO-NE January 2014 Response to Data Request at 3. For instance, during a cold snap on January 7-8, 2014, a total of six natural-gas fired generators on the New England system reported to ISO-NE that they were unable to affirm whether they would be able to procure fuel when called. On January 7 alone, 1,280 MW of capacity was lost due to the inability of natural gas generators to confirm a procurement of fuel. *Id.* at 2.

<sup>16</sup> ISO-NE 2014-2014 Winter Reliability Program Filing at 5. In contrast, generators had only about 1.5 million barrels of oil in inventory during the prior winter. ISO-NE Winter Operations Technical Conference Presentation at 25.

<sup>17</sup> ISO-NE Winter Operations Technical Conference Presentation at 25.

asserted that the as-bid payment mechanism alone would increase overall costs by incentivizing resources to bid the highest price they believe will be accepted in the auction, knowing they would only be paid as much as they bid. TransCanada noted that the tariff language specified that ISO-NE would provide “a list of the selected Market Participants and the prices they will be paid, and will include a description of the evaluation process in the filing[.]” arguing that such a list does not provide the Commission with information necessary to accept the Program beforehand or to make a reasoned determination as to the justness and reasonableness of the resulting Program costs.

10. In denying TransCanada’s request for rehearing of the WRP Order, the Commission stated that it appropriately weighted prospective costs with the need to ensure reliability during the then-imminent winter 2013-2014, in determining whether the Program was just and reasonable.<sup>18</sup> The Commission stated that, given that the very purpose of the Program was to help address winter reliability concerns, the Program appropriately allowed ISO-NE to consider criteria other than cost in selecting resources, criteria that likely would affect the Program’s final cost. The Commission reiterated that the purpose of the Program was to address reliability risks that were pressing but somewhat difficult to definitively quantify, and that ISO-NE took a reasonable approach in estimating New England’s upcoming energy needs.<sup>19</sup> The Commission also reiterated that the Program accorded ISO-NE an appropriate level of discretion for the purpose of ensuring system reliability, even though such discretion meant that the actual costs of the Program could not be ascertained with certainty at that time.<sup>20</sup> The Commission asserted that the fact that the Program resulted in an actual cost higher than the estimate does not alone demonstrate that the Program design is unjust and unreasonable.<sup>21</sup>

11. In denying TransCanada’s request for rehearing of the Bid Results Order, the Commission explained that the tariff allowed ISO-NE to consider both price and non-price factors in selecting the winning bids and required ISO-NE to consider the overall cost of providing the service – not only the initial cost to procure fuel, but to account for

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<sup>18</sup> *ISO New England Inc.*, 147 FERC ¶ 61,026, at P 15 (2013) (WRP Rehearing Order).

<sup>19</sup> *Id.* P 16 (citing WRP Order, 144 FERC ¶ 61,204 at PP 30-32).

<sup>20</sup> *Id.* P 18 (citing WRP Order, 144 FERC ¶ 61,204 at PP 30-32).

<sup>21</sup> *Id.* P 21.

additional operating costs, as well.<sup>22</sup> The Commission reiterated that the Program involved a novel approach to addressing reliability concerns, the costs of which could not be easily identified with certainty, and that the Commission balanced the actual costs reflected in the Bid Results with the need to make such expenditures to address pressing reliability risks. The Commission stated that it may consider a wide variety of factors in determining whether rates are just and reasonable.<sup>23</sup> The Commission dismissed as speculative TransCanada's argument that the disparity of estimated and actual costs was due to excessive profit margins. The Commission found that under a competitive as-bid program in which resources are selected based on both price and non-price factors, it is reasonable that participants with greater reliability benefits will be paid higher prices.<sup>24</sup>

### **E. Remand Order**

12. On June 6, 2014, TransCanada appealed the WRP Order and the Bid Results Order to the D.C. Circuit. As relevant here, TransCanada contended that both orders should be overturned because there was insufficient evidence to determine whether the Program and resulting rates were just and reasonable.<sup>25</sup> In the Remand Order, issued December 22, 2015, the court declined to address the Commission's conditional approval of the Program in the WRP Order, finding that the Commission had made clear that its decision in that order was only tentative, depending on the outcome of the Bid Results proceeding.<sup>26</sup> However, with regard to the Bid Results Order, the court agreed with TransCanada's argument that the record was devoid of any evidence regarding how much of the Program's cost was attributable to profit and risk mark-up. The court stated that, without that information, the Commission could not properly assess whether the

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<sup>22</sup> *ISO New England Inc.*, 147 FERC ¶ 61,027, at P 14 (2013) (Bid Results Rehearing Order).

<sup>23</sup> *Id.* P 15.

<sup>24</sup> *Id.*

<sup>25</sup> TransCanada also asserted that the Commission's decision to allocate costs of the Program to Real-Time Load Obligation violated cost causation principles and that the Commission abused its discretion in declining to consolidate the two proceedings. The court rejected the former argument (upholding the Commission's cost allocation) and found that it need not address the latter argument because the court was remanding only the Bid Results Order.

<sup>26</sup> *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 3 (2015).

Program's rates were just and reasonable.<sup>27</sup> The court found unavailing the Commission's statement that concerns regarding excessive profit margins were "speculative and not based on any evidence in this proceeding;" which, according to the court, was precisely the point raised by TransCanada.<sup>28</sup> The court stated: "FERC does not say that the figures for profit and risk mark-up are unavailable. They simply never addressed the matter."<sup>29</sup>

13. Further, the court found that the Commission did not provide an explanation on how non-cost factors were applied in deciding the rates were just and reasonable. The court stated that while the Commission referred to reliability benefits, "as if to suggest that certain suppliers should be free to command high prices because of their reliability . . . neither [ISO-NE] nor FERC explained this in a way that demonstrates that there would be no excess of profits."<sup>30</sup> In response to intervenors' argument that the Commission may rely on competitive market forces to ensure that profits are not excessively high, the court held that the Commission did not explain why the Program was competitive or explain the economic forces that the Commission believed restrained the suppliers in their confidential bid offers. The court also found that the Commission did not attempt to define the relevant market or determine the participants' market power.<sup>31</sup>

14. Accordingly, the court granted TransCanada's petition in part so that the Commission may either better justify its determination or revise its disposition to ensure that the rates under the Program are just and reasonable.<sup>32</sup>

## II. Discussion

15. In light of the D.C. Circuit's view that the Commission could not properly assess whether the Program's rates were just and reasonable without a thorough assessment of the Program participants' bid information or an assessment of the competitiveness of the

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 12 (citing Bid Results Rehearing Order, 147 FERC ¶ 61,027 at P 15).

<sup>29</sup> *Id.* at 13.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1,004-05 (D.C. Cir. 1990) (substantial evidence did not support a finding that the market was competitive where the Commission had made no finding regarding market power)).

<sup>32</sup> *Id.* at 3-4, 13.

Program, we direct ISO-NE to request from Program participants the basis for their bids, including the process used to formulate the bids, and to file with the Commission a compilation of this information, an analysis of such information by ISO-NE's IMM, as well as ISO-NE's recommendation as to the reasonableness of the bids, as discussed below.

16. Specifically, ISO-NE should request from Program participants information that will enable ISO-NE's IMM to evaluate the competitiveness of the Program and whether any amounts exceeding a participant's cost of providing the winter reliability service are indicative of market participants exercising market power in that Program. We note that ISO-NE may choose to request from participants, and have the IMM analyze, similar cost components to the ones it used to calculate the payment rate for the 2014-2015 Winter Reliability Program and subsequent programs approved by the Commission (i.e. carrying costs, price risk, availability cost, and liquidity risk),<sup>33</sup> as well as any other relevant bid components.

17. We direct ISO-NE to compile such information and to submit the compilation, the IMM's analysis and conclusions, and ISO-NE's recommendation as to the reasonableness of the Bid Results, to the Commission within 120 days of the date of this order, so that the Commission may further consider the question of whether the Bid Results were just and reasonable. As ISO-NE has previously stated that the underlying cost information is commercially sensitive, ISO-NE may seek privileged treatment, pursuant to the Commission's regulations,<sup>34</sup> when filing the compilation of information with the Commission.

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<sup>33</sup> See *ISO New England Inc.*, 148 FERC ¶ 61,179, at P 7 (2014).

<sup>34</sup> See 18 C.F.R. § 388.112 (2015). All Program participants (and any other intervening parties) would be required to execute protective agreements to obtain the non-public information.

The Commission orders:

ISO-NE is hereby directed to compile and submit the information, the IMM's analysis and conclusions, and ISO-NE's recommendation, as discussed in the body of this order, within 120 days of the date of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.