

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

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

NextEra Energy Resources, LLC
PSEG Companies

Docket No. EL16-93-000

v.

ISO New England Inc.

ORDER DISMISSING COMPLAINT

(Issued August 31, 2016)

1. On June 24, 2016, NextEra Energy Resources, LLC and PSEG Companies (collectively, Complainants) filed a complaint (Complaint) against ISO New England Inc. (ISO-NE) pursuant to section 206 of the Federal Power Act (FPA)¹ and Rule 206 of the Commission's regulations.² Complainants allege that state regulators in Massachusetts, New Hampshire, Connecticut, and Rhode Island are on the verge of implementing a manipulative scheme intended to suppress prices artificially in the wholesale energy and capacity markets in New England. Complainants request fast track processing of their Complaint and Commission action by August 23, 2016, with any resulting tariff modifications effective no later than February 6, 2017. As discussed below, we dismiss the Complaint without prejudice because it is not ripe for Commission review.

¹ 16 U.S.C. §§ 824e (2012).

² 18 C.F.R. § 385.206 (2016).

I. Complaint

2. Complainants state that the Massachusetts Department of Public Utilities (Massachusetts DPU) has before it precedent agreements for review filed by electric distribution companies (EDCs) NSTAR Electric Company and Western Massachusetts Electric Company (together, Eversource EDCs), and Massachusetts Electric Company and Nantucket Electric Company (together, National Grid EDCs).³ The precedent agreements allow the Eversource and National Grid EDCs to buy natural gas pipeline capacity on the Algonquin Pipeline system created from the proposed Access Northeast Project⁴ and to recover the costs from retail ratepayers, even though the EDCs cannot use that capacity themselves.⁵ The Complaint states that the EDCs have filed precedent agreements at both the Massachusetts DPU and the New Hampshire Public Utilities Commission and that Connecticut and Rhode Island are also expected to review EDC contracts soon. However, the Complaint focuses on only Massachusetts, noting that the proposed remedy will be equally effective in other states.⁶ Complainants assert that, if the contracts are approved, the EDCs will release the unneeded procured pipeline capacity at below market rates, first to the natural gas-fired electric generators, subject to Commission approval,⁷ and any remainder to the marketplace.

³ Complaint at 1.

⁴ The Access Northeast Project is currently under pre-filing review in Docket No. PF16-1-000. Complainants state that the Access Northeast Project is intended to enhance the Algonquin and Maritimes & Northeast (Algonquin) pipeline systems using existing routes and will include two new LNG storage tanks and liquefaction and vaporization facilities in Acushnet, Massachusetts which will be connected to the Algonquin gas pipeline. Complaint at 15.

⁵ Complaint at 1.

⁶ *Id.* at 1-2, 6 n.15, 20, 25.

⁷ In a related filing in Docket No. RP16-618-000, Algonquin submitted tariff provisions to exempt from capacity release bidding requirements certain types of capacity releases of firm transportation capacity by EDCs that are participating in state-regulated electric reliability programs. By order issued March 31, 2016, the Commission accepted and suspended the proposed tariff revisions for five months, to become effective September 1, 2016, subject to refund and the outcome of a technical conference. *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,269 (2016). Concurrent with the instant order, the Commission is issuing an order in Docket No. RP16-618-000 rejecting Algonquin's proposal to exempt from bidding capacity releases by an EDC or its asset

(continued ...)

3. The state regulators' intent, according to Complainants, is to flood the market with unnecessary natural gas pipeline capacity in order to reduce the price of natural gas delivered to New England generators, in turn resulting in artificially low electric wholesale clearing prices in the ISO-NE market and, ultimately, creating net benefits to retail ratepayers via lower overall electricity rates.⁸ Complainants allege that the resulting rates will be unjust and unreasonable because they will reflect a cost shift, requiring generators to effectively pay for the pipeline expansion through revenues lost as a result of lower clearing prices. Complainants further allege that state approval of the precedent agreements would be inconsistent with the Commission's fuel neutrality policy and will result in preferential treatment for natural gas-fired generators connected to the Access Northeast Project and unduly discriminate against natural gas-fired generators that are not connected to the Project as well as against other fuel types, such as nuclear and renewable resources.

4. Complainants also contend that the "admitted intent of the parties involved"⁹ is to use the EDC contracts as a means to lower wholesale prices in ISO-NE and therefore constitutes manipulation prohibited under FPA section 222 and the Commission's Anti-Manipulation Rule.¹⁰ Complainants state that they are not requesting that the Commission direct its Office of Enforcement to take action against the state agencies at this time but that the Commission could choose to initiate an investigation of the Eversource and National Grid EDCs' conduct. Complainants argue that, because the nature of manipulation is known in advance, it can be mitigated by the potential solutions

manager to gas-fired generators and approving Algonquin's proposed bidding exemption for releases by an EDC to an asset manager to carry out the EDC's obligations under a state-regulated electric reliability program. However, any asset manager to whom an EDC releases its capacity must comply with all applicable capacity release bidding requirements. *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,151 (2016).

⁸ Complaint at 30.

⁹ *Id.* at 46.

¹⁰ 16 U.S.C. § 824v(a) (2012); 18 C.F.R. § 1c.2 (2016). These rules prohibit an entity from: (1) using a fraudulent device, scheme, or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; and (3) in connection with the purchase, sale or transmission of electric energy subject to the jurisdiction of the Commission.

they propose in Appendix A of the Complaint. Complainants state that this was the path followed in the Minimum Offer Price Rule (MOPR) cases.¹¹

5. Complainants request an order directing ISO-NE to propose tariff revisions intended to neutralize the price suppressive effects of the precedent agreements, which would be further explored through a technical conference, with final Commission action on or before January 21, 2017,¹² in advance of ISO-NE's next capacity auction in February 2017.¹³ Complainants further state that expeditious action is critical because the Massachusetts DPU may act on the contracts as early as October 2016.

II. Related State Proceedings

6. Eversource and National Grid negotiated the precedent agreements pursuant to an order issued by the Massachusetts DPU in October 2015, finding that it has the authority under Massachusetts law "to approve gas capacity contracts entered into by [EDCs]," and setting forth the standards it would use to decide whether to approve such contracts.¹⁴ The Massachusetts Supreme Judicial Court (SJC) issued an order on appeal on August 17, 2016, finding that the Massachusetts DPU erred in determining that it had the authority "to review and approve ratepayer-backed, long-term contracts by electric distribution companies for natural gas capacity" and, accordingly, vacating the

¹¹ Complaint at 46 (citing *New England Power Generators Assn' v. ISO New England, Inc.*, Complaint, Docket Nos. EL10-50-000, *et al.*, at 3-4 (filed Mar. 23, 2010)).

¹² Complaint at 11.

¹³ *See* Complaint, Appendix A. Complainants provide two potential alternative fixes to the energy market: (1) a form of MOPR for natural gas resources connected to the Access Northeast Project or (2) uplift payments assessed against load-serving entities, such as the EDCs, and paid to generators participating in the wholesale markets. For the capacity markets, Complainants suggest that ISO-NE and the Internal Market Monitor review offers by all new and existing resources with access to the Access Northeast Project and review and adjust net cost of new entry and the relevant energy and ancillary services offset calculations accordingly.

¹⁴ *Order Determining Department Authority Under G.L.C. 164, § 94A*, Docket No. 15-37 (Mass. DPU) at 27 (Oct. 2, 2015) (Massachusetts DPU October 2015 Order), *vacated*, *Engie Gas & LNG LLC vs. Dept. of Pub. Utilities*, No. SJC-12051-2 (Mass. Aug. 17, 2016), <http://www.mass.gov/courts/docs/sjc/reporter-of-decisions/new-opinions/12051.pdf>.

Massachusetts DPU order.¹⁵ Subsequently, on August 22, 2016 Eversource and National Grid EDCs withdrew their petitions for Massachusetts DPU approval of long-term contracts related to the Access Northeast Project, reserving their right to seek approval of the same or similar agreements in the future to the extent that there is a change in the Massachusetts DPU's legal authority to approve such agreements.¹⁶

III. Notice and Responsive Pleadings

7. Notice of the complaint was published in the *Federal Register*, 81 Fed. Reg. 43,595 (2016) with answers, interventions, and protests due on or before July 14, 2016. Extension of time was granted until July 28, 2016. Various entities filed motions to intervene, notices of intervention, comments, protests, answers, and other pleadings. The appendix to this order lists the responsive pleadings. The entity abbreviations listed in the appendix will be used throughout this order.

A. ISO-NE's Motion to Dismiss

8. ISO-NE filed a motion to dismiss the complaint stating that, because the proceedings and actions that Complainants assert will produce distorted energy prices in New England are merely pending at this time, the Commission should dismiss the complaint as unripe. ISO-NE argues that the allegations of potential harm are premature, speculative, and unsupported and that the complaint fails to demonstrate that any provisions of ISO-NE's existing tariff are unjust and unreasonable at the present time. ISO-NE states that the alleged harm in the Complaint is based on the outcome of several contingent future events: (1) the states have not approved the precedent agreements that would allow the EDCs to purchase firm pipeline capacity on the Access Northeast Project; (2) the Commission has not ruled on Algonquin's proposed waiver from the Commission's capacity release regulations; and (3) the Access Northeast Project has not received the necessary federal and state permits.¹⁷

¹⁵ *Engie Gas & LNG LLC vs. Dept. of Pub. Utilities*, No. SJC-12051-2 (Mass. Aug. 17, 2016), <http://www.mass.gov/courts/docs/sjc/reporter-of-decisions/new-opinions/12051.pdf>.

¹⁶ *Mass. Elec. Co.*, Motion to Withdraw Petitions, Docket No. 16-05 (Mass. D.P.U. filed Aug. 22, 2016); *NSTAR Elec. Co.*, Motion to Withdraw Petitions, Docket No. 15-181 (Mass. D.P.U. filed Aug. 22, 2016).

¹⁷ ISO-NE June 28, 2016 Motion to Dismiss at 4.

B. Responses to Motion to Dismiss

9. Connecticut PURA and OCC support ISO-NE's motion to dismiss the Complaint.¹⁸ Algonquin argues that the Commission should reject ISO-NE's motion to dismiss on ripeness grounds and, instead, dismiss the complaint on the merits as soon as possible.¹⁹ Algonquin argues that the Commission should unequivocally reject Complainants' attempt to use the Commission's processes to interfere unlawfully in the state commissions' legitimate and fully authorized retail proceedings to approve contracts that will support the building and funding of the Access Northeast Project.²⁰ Eversource and National Grid oppose ISO-NE's motion to dismiss the complaint on ripeness grounds. They argue that the Commission should resolve the issues raised in the complaint expeditiously so that the state commissions in New England that are considering the funding mechanism for the Access Northeast Project can complete their regulatory duties.²¹ Complainants assert that changes to the tariff are needed now, and none of the "contingent" events in this case warrant a finding that the concrete harm threatened here is so speculative as to support dismissal.²²

C. Responses to Complaint

10. CLF, NHCA, Talen, and NEPGA filed comments generally in support of the complaint, voicing concerns regarding price suppression and market distortion. NEPOOL requests that, if the Commission concludes the facts in the complaint justify modifications to the Tariff, the Commission should not direct specific rule changes, but should direct ISO-NE and NEPOOL to consider proposed alterations to the markets through the stakeholder processes.²³ ISO-NE, National Grid, Eversource, Algonquin, and Connecticut PURA and OCC urge the Commission to deny the complaint. ISO-NE argues that Complainants ask the Commission to take steps that would fundamentally change the respective roles of ISO-NE, the Commission, and organized wholesale

¹⁸ Connecticut PURA and OCC July 28, 2016 Answer at 2-4.

¹⁹ Algonquin July 5, 2016 Answer at 1.

²⁰ *Id.* at 2.

²¹ Eversource and National Grid July 1, 2016 Answer at 2.

²² Complainants June 30, 2016 Answer at 2, 8.

²³ NEPOOL July 28, 2016 Comments at 2.

markets themselves.²⁴ Algonquin, Eversource, and National Grid contend that the EDCs' proposal is a rational response to addressing the insufficiency of natural gas pipeline infrastructure in the region.²⁵ Eversource and National Grid assert that the New England states are acting appropriately, within their jurisdiction, to address an infrastructure deficiency that threatens reliability and is causing retail consumers to pay billions in excess charges for electricity.²⁶ Algonquin requests the Commission find that NextEra, PSEG, and any other similarly situated generators are collaterally estopped from filing similar complaints or pleadings.²⁷

11. NHCA and EDF raise allegations of anticompetitive practices that violate the Commission's regulations on affiliate restrictions and the Commission's standards of conduct.²⁸ They assert that, under the proposed plan, marketing affiliates of Eversource and National Grid will be procuring transportation on a pipeline that is 60 percent owned by Eversource and National Grid. They contend that such transactions violate the Commission's prohibition against marketing affiliate involvement in transmission

²⁴ ISO-NE July 28, 2016 Answer at 1-2.

²⁵ Algonquin July 28, 2016 Answer at 10-11, 23; Eversource July 28, 2016 Protest at 4; National Grid July 28, 2016 Protest at 1-3.

²⁶ Eversource July 28, 2016 Protest at 3; National Grid July 28, 2016 Protest at 24-27.

²⁷ Algonquin July 28, 2016 Answer at 2.

²⁸ EDF August 12, 2016 Answer at 3-7 (citing *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, 53 Fed. Reg. 22139, 22141 (1988); *Standards of Conduct for Transmission Providers*, Order No. 717, 73 Fed. Reg. 63796 (2008); *Standards of Conduct*, 18 C.F.R. Part 358 (2016)); NHCA July 26, 2016 Comments at 3-4 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 914-18, *clarified*, 121 FERC ¶ 61,260 (2007) (Order Clarifying Final Rule), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008)).

operations,²⁹ and the Commission's standards of conduct designed to prevent discrimination or undue preference in the sale or purchase of transmission service.³⁰

D. Complainants' Answer

12. Complainants argue that, contrary to protestors' claims, the ISO-NE market has not failed to produce a needed pipeline. They assert that the market has responded to increased prices resulting from infrastructure constraints and that pipeline expansions that are consistent with fundamentals of supply and demand are currently being built in New England.³¹ Complainants suggest that, when the admitted intent of buyer action is to push down wholesale energy prices, and when it is being carried out through the planning and out-of-market subsidization of a pipeline expansion that has no independent economic justification at the behest of those who will benefit financially from its construction, the Commission's attention and action is required to make sure that rates in wholesale markets remain just, reasonable and not unduly discriminatory.³² Complainants request that the Commission not defer substantive action until the completion of the section 7 certificate proceeding.³³

IV. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2016), the Commission will grant the late-filed motion to intervene of FirstLight Hydro Generating Company, given its interest in the proceeding, the early stage of the proceeding and the absence of undue prejudice or delay.

²⁹ EDF August 12, 2016 Answer at 2.

³⁰ *Id.* at 7.

³¹ Complainants August 12, 2016 Answer at 12-13.

³² *Id.* at 11.

³³ *Id.* at 48.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We will accept Complainants, EDF, and Algonquin's answers in this case because they provided information that assisted us in our decision-making process. We will deny Complainants' motion to lodge, as it does not provide information that has assisted us in our decision-making process.³⁴ Because we deny Complainants' motion to lodge, we also reject Algonquin's answer.

B. Commission Determination

15. We find that the Complaint is not ripe for consideration. The circumstances giving rise to the Complaint are in a state of flux and the Commission does not have before it the concrete facts necessary to determine whether the tariff will be unjust and unreasonable. Several critical project elements of the individual states' electric reliability programs are undetermined at this time. Notably, the Massachusetts SJC decision essentially prohibits Massachusetts DPU from approving cost recovery for the precedent agreements absent a legislative remedy, which is unlikely to occur this year. Subsequently, on August 22, 2016, Eversource and National Grid EDCs withdrew their petitions for Massachusetts DPU approval of long-term contracts related to the Access Northeast Project.³⁵ Concurrent with the instant order, the Commission is issuing an order in Docket No. RP16-618 rejecting an aspect of Algonquin's proposal to establish a blanket exemption from bidding for capacity releases by EDCs contracting under a state-regulated electric reliability program (or their agents or asset managers) to natural gas-fired electric generators serving ISO-NE. Therefore, at this time the EDCs can neither recover costs from ratepayers nor release capacity on the Access Northeast Project under the proposed capacity release exemption. Additionally, the size and scope of the Access Northeast Project is as yet unknown; Algonquin's project is currently in the Commission's pre-filing process, and Algonquin expects to make its section 7 certificate application in the fourth quarter of 2016.³⁶ For the reasons set forth above, protestors' concerns about the nature of the Eversource and National Grid EDCs' affiliate transactions are similarly speculative.

³⁴ See, e.g., *ISO New England Inc.*, 147 FERC ¶ 61,027 at P 13 (2014).

³⁵ *Mass. Elec. Co.*, Motion to Withdraw Petitions, Docket No. 16-05 (Mass. D.P.U. filed Aug. 22, 2016); *NSTAR Elec. Co.*, Motion to Withdraw Petitions, Docket No. 15-181 (Mass. D.P.U. filed Aug. 22, 2016).

³⁶ See Docket No. PF16-1-000.

16. Under section 206 of the FPA, a complainant has the “burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential.”³⁷ We agree with ISO-NE that Complainants have not made this showing here. Complainants’ allegations are speculative and the complaint lacks sufficient evidence of harm. We find that the Complaint fails to meet the requirements of section 206(a) of the FPA because it fails to demonstrate that any provisions of ISO-NE’s existing tariff are unjust and unreasonable at the present time. Accordingly, we find that the Complaint is not ripe, and we therefore dismiss it without prejudice.³⁸

The Commission orders:

The Complaint is hereby dismissed, without prejudice, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁷ 16 U.S.C. § 824e(b) (2012).

³⁸ See, e.g., *Mich. Elec. Transmission Co., LLC*, 156 FERC ¶ 61,012 (2016) (dismissing a complaint, without prejudice, as unripe).

Appendix: List of Pleadings

Timely Motions to Intervene

Algonquin Gas Transmission, LLC (Algonquin)

American Public Power Association

Calpine Corporation

Central Maine Power Company and the United Illuminating Company

Connecticut Department of Energy and Environmental Protection

Connecticut Office of Consumer Counsel

Connecticut Public Utilities Regulatory Authority

Conservation Law Foundation (CLF)

Consolidated Edison Energy, Inc.

Direct Energy

Emera Energy Services, Inc.

Dominion Resources Services, Inc.

Electric Power Supply Association

ENGIE Gas & LNG LLC

Environmental Defense Fund (EDF)

Exelon Corporation

Eversource Energy Service Company (Eversource)³⁹

ISO-NE

³⁹ Eversource filed a motion to intervene for itself and another acting as agent for its public utility subsidiary, The Connecticut Light and Power Company.

Maine Public Utilities Commission

New England States Committee on Electricity

Massachusetts Department of Public Utilities

Massachusetts Electric Company, Nantucket Electric Company, and Narragansett Electric Company (National Grid) (jointly).

National Rural Electric Cooperative Association

New England Local Distribution Companies

New England Power Generators Association, Inc. (NEPGA)

New England Power Pool Participants Committee (NEPOOL)

New England States Committee on Electricity

New Hampshire Consumer Advocate (NHCA)

NRG Power Marketing LLC and GenOn Energy Management, LLC

Repsol Energy North America Corporation

Rhone Island Division of Public Utilities and Carriers

Talen Companies (Talen)

Tennessee Gas Pipeline Company, L.L.C.

Late Filed Motions to Intervene

FirstLight Hydro Generating Company

Motion to Dismiss

ISO-NE

Pleadings in Response to Motion to Dismiss

Algonquin

Complainants

Connecticut Public Utilities Regulatory Authority and Connecticut Office of Consumer Counsel (jointly, Connecticut PURA and OCC)

Eversource

ISO-NE

Request for Extension

Algonquin

Answers

Algonquin

Connecticut PURA and OCC

Eversource

ISO-NE

Protests

Connecticut PURA and OCC

Eversource

National Grid USA⁴⁰

Comments

CLF

EDF

NEPOOL

New England Power Generators Association, Inc.

New Hampshire Office of Consumer Advocate

⁴⁰ National Grid filed its protest on behalf of itself and its New England utility operating subsidiaries.

Talen

Answers to Answers

Complainants

EDF

Algonquin

Motion to Lodge

Complainants

Answer to Motion to Lodge

Algonquin