

123 FERC ¶ 61,132  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Cargill Power Markets, LLC

Docket No. EL08-29-000

v.

ISO New England Inc.  
Central Maine Power Company  
New England Power Company  
NSTAR Electric Company and  
The United Illuminating Company

ORDER DENYING COMPLAINT

(Issued May 7, 2008)

1. In this order, the Commission denies Cargill Power Markets, LLC's (Cargill) December 28, 2007 complaint against Central Maine Power Company (Central Maine), New England Power Company (NEP), NSTAR Electric Company (NSTAR Electric) and The United Illuminating Company (UI) (collectively, the Companies), and ISO New England Inc. (ISO-NE), filed pursuant to section 206 of the Federal Power Act,<sup>1</sup> alleging that they improperly processed certain transmission service requests received November 1, 2007 for transmission service on the Phase I/II HVDC-TF.

**I. Background**

2. On February 16, 2007, the Commission issued Order No. 890,<sup>2</sup> which required, among other things, that transmission providers establish simultaneous submission windows to apply to transmission service requests that can be submitted no earlier than a

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<sup>1</sup> 16 U.S.C. § 824e (2000 & Supp. V 2005).

<sup>2</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12266 (March 15, 2007), FERC Statutes and Regulations ¶ 31,241, at P 1419 (2007), *on rehearing*, Order No. 890-A, 73 Fed. Reg. 2984 (January 16, 2008) FERC Statutes and Regulations ¶ 31,261 (2007).

specified deadline.<sup>3</sup> In such circumstances, a number of transmission requests may be submitted at the same time.<sup>4</sup> Order No. 890 required transmission providers with such a business practice or tariff provision to modify their tariffs to include its proposed specified period of time for simultaneous submissions.<sup>5</sup> Further, Order No. 890 required that transmission service requests submitted within the specified window not be publicly available until the window has closed in order to prevent competitors from requesting the same service simply to disrupt the transmission service procurement process.<sup>6</sup>

3. The Phase I/II HVDC-TF are transmission facilities that interconnect the transmission system in New England to Hydro-Québec TransÉnergie in Canada (hereafter the HQ Interconnection). Schedule 20A of the ISO-NE Tariff governs the rates, terms and conditions pursuant to which nine transmission providers in New England who are Interconnection Rights Holders (IRH) in the HQ Interconnection, including the Companies, offer firm and non-firm point-to-point transmission service over the HQ Interconnection (the Schedule 20A Service Providers or SSPs). The SSPs make those rights available on an open access basis to transmission customers.

4. Schedule 20A of the ISO-NE Tariff provides that the submission priority for either long-term or short-term firm transmission service over the HQ Interconnection shall be determined on a first-come, first-served basis by the date and time of the service submission. Schedule 20A further provides that requests for yearly or monthly service shall be submitted no earlier than sixty days before service is to commence. On November 1, 2007, Cargill,<sup>7</sup> as well as HQUS Energy Services, Brookfield Power, and Ontario Power Generation Inc., submitted transmission service requests over the HQ Interconnection to commence on January 1, 2008.

5. The amount of transmission service requested on November 1, 2007, exceeded the capacity of the HQ Interconnection, and the SSPs thus allocated the transmission capacity according to the procedures set forth in their business practices. The SSPs' business practices follow Order No. 890,<sup>8</sup> providing that all requests for transmission service over

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<sup>3</sup> *Id.* P 1419.

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.* P 1421.

<sup>7</sup> The “no earlier than 60 days” deadline in Schedule 20A for service commencing on January 1, 2008 was November 2, 2007.

<sup>8</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P1421.

the HQ Interconnection received within a five minute window will be deemed to have been submitted simultaneously, and should sufficient capacity be unavailable to satisfy all of the requests, requests for the same level of service will be allocated pro rata. As such, of the total of 597 MW of capacity Cargill requested, it was awarded only 176 MW for varying durations of long-term service.

6. On October 11, 2007, ISO-NE and its transmission-owning members submitted tariff changes to comply with the directives of Order No. 890.<sup>9</sup> However, the proposed revisions to Schedule 20A of the ISO-NE Tariff did not include the “simultaneous submission window” provisions adopted in Order No. 890.<sup>10</sup>

### **The Parties**

7. The Petitioner, Cargill, is a power marketer with a market-based rate wholesale power sales tariff on file with the Commission. On August 29, 2002, the Commission issued an order authorizing Alliant Energy Corporation to sell its membership interests in Cargill-Alliant, LLC to Cargill, Inc. Cargill thus is no longer affiliated with Alliant Energy Corporation or its affiliates. Cargill does not own any generating or transmission facilities and, as such, is a non-transmission owning member of ISO-NE, eligible to receive transmission service under the ISO Tariff. Cargill conducts a significant amount of its power marketing business in New England markets.

8. The Respondents are ISO-NE and Companies. ISO-NE is the private, non-profit entity that serves as the Regional Transmission Organization (RTO) for New England. ISO-NE operates the New England transmission system and administers the New England electricity markets pursuant to the ISO-NE Tariff and the operating agreements with New England transmission owners.

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<sup>9</sup> ISO-NE and its transmission-owning members submitted their Order No. 890 compliance filing in Docket No. ER08-054-000. That order will be issued concurrently with this order.

<sup>10</sup> On January 17, 2008, in Docket No. ER08-054-001, the SSPs submitted amendments to the ISO-NE Order No. 890 compliance filing to incorporate a five-minute simultaneous submission window for firm and monthly non-firm transmission requests, with a pro rata allocation mechanism to be used if sufficient capacity is unavailable to meet all such requests. The SSPs requested an effective date of October 11, 2007. The Commission acts on ISO-NE and its transmission-owning member’s Order No. 890 compliance filing in Docket No. ER08-054-000, and the amendments thereto, in an accompanying order.

## II. Complaint

9. The complaint presents the issue of who takes precedence in the HQ Interconnection transmission queue, where there seemingly is a conflict between the ISO-NE Tariff, on the one hand, and the SSPs' business practices, on the other. Cargill argues that, under the "first-come, first-served" rule set forth in Schedule 20A of the ISO-NE Tariff, it should have received 264 MWs of its transmission service request of 597 MWs, rather than have been allocated a pro rata share (176 MW) pursuant to the "simultaneous submissions" rule in the SSPs' business practices.<sup>11</sup> Citing to the filed rate doctrine,<sup>12</sup> Cargill argues that because Schedule 20A's "first-come, first-served rule" has not been changed via an appropriate Order No. 890 compliance filing, the party who first submitted its transmission service request (Cargill) has precedence in the transmission queue.<sup>13</sup> Cargill further alleges that Order No. 890 expressly prohibits the use of the simultaneous submissions window rule from being implemented through business practices for those transmission services that include a deadline for service requests, and that such provisions can only be applied prospectively to future transmission submission queues.<sup>14</sup>

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<sup>11</sup> Cargill at 9-10.

<sup>12</sup> In brief, the filed rate doctrine establishes that all rates subject to the Commission's jurisdiction must be on file with the Commission, and public utilities must sell their services at, and otherwise abide by, the applicable filed rate. *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *NEPCO Mun. Rat. Comm. v. FERC*, 668 F.2d 1327, 1343-44 (D.C. Cir. 1981).

<sup>13</sup> Cargill at 8, 10-12.

<sup>14</sup> Cargill cites Order No. 890 at P 1419. Cargill also suggests that some SSPs did not follow the procedures to allocate transmission capacity set forth in their business practices. Cargill refers to a capacity allocation by UI, in which no capacity was initially allocated to Cargill although Cargill submitted a pre-confirmed firm transmission service request for 65 MW. Cargill states that UI's business practices provide that if pre-confirmed firm transmission service requests exceed the firm available transmission capacity (ATC), then transmission capacity will be allocated pro rata based on each party's share of total requests. Cargill suggests that UI used a "duration of the service request" rule to determine precedence, although this method is not set forth in the business practices. Cargill at 15.

10. In the alternative, Cargill argues that, if Order No. 890's simultaneous submissions window rule for transmission services with "no earlier than" deadlines<sup>15</sup> is followed, then the resulting transmission queue should be reordered because the bidding was not masked as Order No. 890 requires. Cargill alleges that unmasked bidding improperly allowed participants to view their competitors' requests and still have time to withdraw and submit new bids to gain advantage in the allocation process.<sup>16</sup> Cargill argues that, not only did ISO-NE's Order No. 890 compliance filing not contain provisions for a simultaneous submissions window, but the Companies' business practices, which did outline such a procedure, nonetheless did not require masking in accordance with Order No. 890.<sup>17</sup>

11. Finally, Cargill argues that the Companies' business practices cannot override the ISO-NE Tariff and that, in any event, these same business practices specify that the ISO-NE Tariff controls in a conflict between the two.<sup>18</sup> Therefore, Cargill argues that resettlement of the transmission queue is warranted because the Companies violated both Schedule 20A (by using a simultaneous submissions window when Schedule 20A specifies "first-come, first-served") and Order No. 890 (by not masking bidding during that window).

### **III. Notice of Filings and Responsive Pleadings**

12. Notice of Cargill's filing was published in the *Federal Register*, 73 Fed. Reg. 1331 (2008), with interventions and protests due on or before January 17, 2008. PJM Interconnection, Northeast Utilities Services Company, and Brookfield Energy Marketing, Inc. filed timely motions to intervene. HQ Energy Services (U.S.), Inc. (HQUS) filed a timely motion to intervene and an answer to Cargill's filing. ISO-NE and the Companies both filed answers to Cargill's complaint. On February 1, 2008, ISO-NE filed an answer to HQUS's pleading to clarify the facts surrounding a clock error that is not at issue in this proceeding. Finally, Cargill filed a motion for leave to answer and answer to the Companies and HQUS on February 1, 2008.

13. HQUS argues that Schedule 20A is modified both by Order No. 890 at P 1419, and by the Companies' business practices, which implemented the simultaneous

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<sup>15</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1419.

<sup>16</sup> Cargill at 13.

<sup>17</sup> *Id.* at 8, 10, 13.

<sup>18</sup> *Id.* at 14-15, citing *Tenaska Power Services Co. v. Midwest ISO*, 102 FERC ¶61,095 (2003).

submissions window.<sup>19</sup> HQUS argues there is no express prohibition in Order No. 890 forbidding using a business practice document to implement Order No. 890's simultaneous submissions window requirement. HQUS also argues that Cargill is inconsistent in both claiming that the simultaneous submissions window in Order No. 890 does not apply and that the bids must be masked during the window according to Order No. 890.<sup>20</sup>

14. HQUS further argues against resettlement of the transmission queue on the grounds that resettlement would create the result that Order No. 890 found contrary to public policy: an allocation of scarce transmission capacity based on one computer being faster than another.<sup>21</sup> Instead, HQUS argues that should the Commission find the Companies' Order No. 890 implementation methodology inadequate, it should recognize the Companies' intent to implement Order No. 890 by waiving whatever portions of the Schedule 20A deemed to be violated by the bidding process, affirm the current allocation as consistent with Order No. 890, and order the Companies to make another compliance filing. Finally, HQUS notes that, if Cargill's request for relief were granted, it would lose significant transmission capacity that it has already been awarded, the existence of which it relied on when it signed several long-term transmission service agreements.<sup>22</sup>

15. The Companies argue that, not only have they complied with the requirements of Order No. 890, but also with the filed rate doctrine, in processing the November transmission service requests. They maintain that the filed rate in effect was Schedule 20A as modified by Order No. 890, effective as of October 11, 2007 which is when the Companies were required to make their Order No. 890 compliance filing.<sup>23</sup> The Companies concede that the bidding should have been masked, but they state that this was impossible due to software limitations. The Companies further argue the ISO-NE Tariff itself specifies that any procedures set forth in their business practices are part of the Companies' filed rates.<sup>24</sup> Finally, the Companies argue that their business practices

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<sup>19</sup> HQUS at 7-10.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.* at 10, citing to Order No. 890, P 1419.

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

<sup>23</sup> The Companies at 1-2, 8-11.

<sup>24</sup> *Id.* at 10.

state that the ISO-NE Tariff governs except with respect to those business practices that implement Order No. 890, so Cargill's assertion that the Tariff governs in case of a conflict is not correct.<sup>25</sup>

16. The Companies argue that the business practices should govern allocation of capacity because they are consistent with and implement Order No. 890, and because the Companies implemented the "first-come, first-served" principles of Schedule 20A in accordance with Order No. 890 and their posted business practices. They also maintain that customers have relied on the window procedures.<sup>26</sup> Finally, the Companies note that Cargill offers no evidence of harm from this failure to mask simultaneous reservations as they were being submitted.<sup>27</sup>

17. ISO-NE requests only that any relief the Commission orders be granted on a prospective basis since the transactions based on the November transmission queue will have already commenced.

18. On February 1, 2008, Cargill filed an answer to the Companies' comments. According to Cargill, a showing of financial harm is not a prerequisite to filing a complaint.<sup>28</sup> Cargill claims that it is legitimately aggrieved by the general uncertainty surrounding the SSPs' queue administration.<sup>29</sup> Cargill asserts that permitting an SSP to submit a compliance filing to be effective retroactively provides no incentive for SSPs to adhere to their filed tariffs or comply with Commission orders in the future.<sup>30</sup> Cargill further claims that the Commission has held that parties should not be allowed to retain transmission capacity that they should not have received in the first place.<sup>31</sup>

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<sup>25</sup> *Id.* at 10-11.

<sup>26</sup> *Id.* at 7-8, 11-13.

<sup>27</sup> *Id.* at 15.

<sup>28</sup> Cargill Answer at 3-4, citing 18 C.F.R. §385.206 (1997).

<sup>29</sup> *Id.* at 3, citing *Tenaska Power Services Co. v. Midwest Independent Transmission System Operator, Inc. and Cargill Power Markets LLC v. Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,230 at P 53, *reh'g denied* 107 FERC ¶ 61,308 (2004).

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 6.

#### IV. Discussion

##### A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept ISO-NE and Cargill's answers because they have provided information that assisted us in our decision-making process.

##### B. Commission Determination

21. In Order No. 890, the Commission required transmission providers who set a "no earlier than" deadline for transmission service requests to treat all requests received within a specified period of time as having been received simultaneously.<sup>32</sup> At the time Cargill submitted the transmission service request at issue, the Companies' business practices, but not Schedule 20A, contained this requirement. The Companies maintain that, consistent with their business practices and Order No. 890, they treated all transmission service requests for transmission capacity over the HQ Interconnection received between midnight and five minutes thereafter on November 2, 2007, for service to commence on January 1, 2008, as having been submitted simultaneously, leading to Cargill receiving only 176 MW out of its total requests of 597 MW. Cargill alleges that, because Schedule 20A does not contain language consistent with Order No. 890 and the Companies had not yet made a compliance filing to incorporate the appropriate language into Schedule 20A, the transmission queue should be reallocated on a first-come first-served basis consistent with Schedule 20A.

22. We find Cargill's argument unpersuasive. The Commission required all transmission providers within an ISO or RTO footprint to submit a compliance filing under FPA section 206 containing the revised terms and conditions of the *pro forma* Open Access Transmission Tariff (OATT) within 210 days after Order No. 890's publication in the *Federal Register*, i.e. October 11, 2007.<sup>33</sup> Effective October 11, 2007, ISO and RTO transmission providers therefore were required to abide by the provisions set forth in Order No. 890, and the Commission intended for their compliance filings to

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<sup>32</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1419.

<sup>33</sup> *Id.* P 157.

be made effective as of that date, as was the case in Order No. 888.<sup>34</sup> While it is true that the ISO-NE initially failed to incorporate the simultaneous submissions window provisions into the ISO-NE Tariff,<sup>35</sup> the Companies corrected that omission in a later amendment on January 17, 2008 and properly requested an effective date of October 11, 2007, consistent with their initial compliance filing.<sup>36</sup> The Commission is accepting these compliance filings in an accompanying order<sup>37</sup> and, thus, the tariff provisions in effect as of the date of Cargill's request correctly reflect the requirements of Order No. 890 with regard to the use of simultaneous submission windows. We therefore disagree with Cargill that ISO-NE was required to process its transmission service request on a first-come, first-served basis.

23. We agree, however, that the Companies must overcome the software limitations that prevent masking of simultaneously-submitted transmission service requests. Order No. 890 requires that bids submitted within the specified time window be masked until the window has closed.<sup>38</sup> In the accompanying order conditionally accepting the SSPs' Order No. 890 compliance filing, we accept the simultaneous submission window, though directing the SSPs to submit tariff sheets to implement masking of simultaneously submitted bids within 90 days of the date of that order.<sup>39</sup>

24. Finally, in support of our conclusions, Cargill has not demonstrated that it has suffered economic harm from the reduced allocation of transmission capacity or disclosure of its service request. In comparison, granting Cargill's complaint could lead to reductions in allocated capacity for other transmission customers that have already begun to use that service. Cargill's general assertions of harm from uncertainty surrounding the SSPs' queue administration is not sufficient to overcome the actual harm

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<sup>34</sup> *Id.* P 157, 158. Transmission providers were permitted to retain tariff provisions that did not conform to the revised *pro forma* OATT only if they specifically demonstrated that the existing tariff provisions are consistent with or superior to those set forth in Order No. 890.

<sup>35</sup> *Id.* P 1419.

<sup>36</sup> *See* Docket No. ER08-54-001.

<sup>37</sup> *See ISO New England Inc.*, 123 FERC ¶ 61,133 (2008) (Compliance Order).

<sup>38</sup> *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1421.

<sup>39</sup> *See* Compliance Order, 123 FERC ¶ 61,133 at P 59.

that would befall third parties that have relied on the allocations of capacity they were awarded. We therefore decline to disturb the November allocations and deny Cargill's complaint.

The Commission orders:

Cargill's complaint is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.