136 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

ISO New England Inc. Docket No. ER11-2427-002

ORDER DENYING REHEARING

(Issued September 29, 2011)

1. By order issued February 17, 2011,[1] the Commission accepted proposed tariff revisions submitted by ISO New England Inc. (ISO-NE) and the New England Power Pool Participants Committee (NEPOOL)[2] which implemented changes to ISO-NE's Peak Energy Rent (PER) mechanism. However, the Commission rejected the Filing Parties' proposal to shorten from 12 to six months the period over which the PER deductions are averaged, and Capacity Suppliers[3] seek rehearing of this determination. The Commission denies rehearing because the Capacity Suppliers do nothing more than reiterate arguments in support of shortening the averaging period to six months that we previously have rejected.

---

[1] *ISO New England Inc.*, 134 FERC ¶ 61,128 (2011) (February 17 Order).

[2] ISO-NE and NEPOOL will be referred to as "the Filing Parties."

[3] Capacity Suppliers include: Casco Bay Energy Company, LLC; Dynegy Power Marketing, Inc.; Dominion Energy Brayton Point, LLC; Dominion Energy Manchester Street, Inc.; Dominion Energy Marketing, Inc.; Dominion Energy New England, Inc.; Dominion Energy Salem Harbor, LLC; Dominion Nuclear Connecticut, Inc.; Dighton Power, LLC; Lake Road Generating Company, L.P.; MASSPOWER, Milford Power Company, LLC; GenOn Energy Management, LLC; GenOn Canal, LLC; GenOn Kendall, LLC; NAEA Energy Massachusetts, LLC; NAEA Newington Energy, LLC; and the New England Power Generators Association, Inc. (NEPGA).

I. Background

A. The PER Mechanism

2. ISO-NE operates a Forward Capacity Market (FCM), under which capacity resources receive payments for providing capacity to ISO-NE. The tariff provisions governing the FCM include a PER mechanism, which, as detailed in the February 17 Order, serves two purposes: (1) to remove the incentive to raise prices in the real-time energy market by offsetting high real-time prices, i.e., prices above the PER Strike Price, with reductions in capacity payments; and (2) to act as a hedge for load against high prices (price spikes) in the energy market.[4]

3. Generation and import resources that have a capacity supply obligation (CSO), which commits them to be available to supply electric energy during shortage events, receive capacity payments in return for that commitment. Those capacity payments are subject to PER adjustments.[5] Specifically, each day ISO-NE calculates a PER Strike Price using hourly integrated real-time Locational Marginal Prices (LMP). For each hour in which the Real-Time LMP exceeds the PER Strike Price, ISO-NE calculates an Hourly PER value. Thus, the Hourly PER value is the difference between the Real-Time LMP and the PER Strike Price, adjusted by a scaling factor and an availability factor.

4. The PER Strike Price is equal to the heat rate of a hypothetical resource called the PER Proxy Unit multiplied by the fuel cost of that same hypothetical resource. As currently set forth in ISO-NE's Transmission, Markets and Services Tariff (Tariff), the heat rate of the PER Proxy Unit is 22,000 Btu/kWh. Prior to the revisions to Market Rule 1 of ISO-NE's Tariff that were accepted in the February 17 Order, the fuel cost was the lower of the price of either: (1) ultra low-sulfur No. 2 oil measured at New York Harbor plus a seven percent markup for transportation; or (2) day-ahead gas measured at the Algonquin City Gate, as determined on a daily basis.

5. For each month, the Hourly PER values for that month are summed to establish the Monthly PER value. ISO-NE then calculates the Average Monthly PER value, defined as the average of the Monthly PER values for the 12 months prior to the Obligation Month. Each capacity resource's monthly capacity payment for that Obligation Month is reduced by the product of the Average Monthly PER and the

---

[4] February 17 Order, 134 FERC ¶ 61,128 at P 3.

[5] Megawatts procured through self-supply are not subject to PER.

resource's CSO. That reduction results in a corresponding credit to load to reflect the reduced capacity price.[6]

6. In the February 17 Order, the Commission accepted the Filing Parties' proposal to use the "higher of" the price of oil or natural gas, rather than the "lower of" those two prices, to determine the PER Proxy Unit (i.e., the marginal unit) from which ISO-NE derives the PER Strike Price. However, as relevant here, the Commission rejected the Filing Parties' proposal to move from a rolling 12-month average to a rolling six-month average to develop the Average Monthly PER Value.

7. As summarized in the February 17 Order, the Filing Parties had stated that, while changing the fuel price to the higher of the price of oil or gas would ensure that the PER Strike Price would increase, parties would not feel the full impact of this change for 12 months absent additional tariff changes.[7] They stated that their proposal to shorten the rolling average from 12 to six months was more "an issue of balancing interests" than a market design issue.[8] The Filing Parties explained that, during stakeholder discussions, generators had proposed to eliminate any rolling average and base the PER deduction on the Monthly PER value for the single month prior to each obligation month; the load serving entities (LSE), on the other hand, had sought continuance of the 12-month rolling average on the basis that they had reasonably relied on the existing Market Rules and it would be unfair to change the Market Rules on short notice in a manner that significantly impacted the economics of their contracts.[9]

8. The Commission rejected the proposal to shorten the rolling average, stating:

> While the Commission agrees with the Filing Parties that consideration of this issue might require a balancing of interests between generators and LSEs, we disagree that a six-month rolling average properly balances those interests. Rather, we find that it is reasonable to consider the fact that LSEs often offer fixed-price contracts to customers, and the PER credits to load are relied upon in pricing the services in

---

[6] *See generally* February 17 Order, 134 FERC ¶ 61,128 at P 3-6; Tariff Sections III.13.7.2.7.1.1, III.13.7.2.7.1.1.1, and III.13.7.2.7.1.1.2.

[7] The Filing Parties proposed to make the change from 12 months to six months effective on February 1, 2011. February 17 Order, 134 FERC ¶ 61,128 at P 27.

[8] Transmittal Letter, Joint Filing at 2 (Transmittal).

[9] February 17 Order, 134 FERC ¶ 61,128 at P 28.

> these often long-term arrangements. . . . While shortening the rolling average period might expedite for generators the effect of the tariff changes that are accepted herein, it does not account for the above-mentioned interests of the LSEs.[10]

9. The Commission also noted that the timing of the proposal was problematic. Because the Filing Parties proposed to put the six-month rolling average into effect beginning February 2011, it would have transferred from load to generators all of the benefits of the PER mechanism for the higher-cost summer months of June and July 2010.[11]

10. The Commission further stated, however, that it was rejecting the proposal without prejudice to a new filing that would "address the same concerns as the revisions proposed here."[12] Finally, the Commission noted that "because we reject the proposal to shorten the rolling average period, we do not need to address the arguments as to whether the proposal violates the Filed Rate Doctrine, or constitutes retroactive ratemaking . . . ."[13]

B. Request for Rehearing

11. On rehearing, Capacity Suppliers argue that the Commission correctly accepted tariff changes to correct the flaws in the PER mechanism, but erroneously rejected the

---

[10] *Id.* P 38-39.

[11] February 17 Order, 134 FERC ¶ 61,128 at P 39 n.53. We provided an example of how this shift in benefits would occur (*id*. P 38):

> [A]ssume that, in the 12 months prior to a particular Obligation Month, for the first six of those 12 months, the Monthly PER Value was $10 per month, and for the second six of those 12 months, the Monthly PER Value was $1 per month. Averaged over 12 months, the Average Monthly PER Value would be $5.50 per month; thus, capacity suppliers would incur a PER deduction of $5.50 for that Obligation Month, and load would receive a credit of the same amount. But if, instead of averaging over 12 months, ISO-NE averages over the second six-month period, when Monthly PER Values are lower, then the Average Monthly PER Value would be $1.

[12] *Id.* P 35.

[13] *Id.* P 40.

shift from a 12-month to a six-month average. Capacity Suppliers assert that this rejection was based on the Commission's erroneous view that LSEs have a reliance interest in the uncollected value of PER credits that accrued under that same, flawed PER mechanism – which, they allege, caused PER credits to be overstated and generator compensation to be understated – by at least $100 million over a seven-month period.[14] They state that there is no evidence that LSEs detrimentally relied on continued use of the 12-month rolling average or on historical monthly PER values. Capacity Suppliers also state that the Commission failed to explain why the six-month average is not a proper "balancing of equities" between the parties.

12. Capacity Suppliers state that the Commission's rejection of the six-month rolling average is not based on substantial evidence or reasoned decisionmaking. They argue that there is no evidence that LSEs indeed relied on past PER credits, where such evidence might include documentation of any long-term, fixed-rate contracts premised on PER credits or quantification of losses that LSEs would have suffered if the Filing Parties' timing provisions had been accepted. Capacity Suppliers also state that LSEs failed to address whether they could have sought relief from their contract obligations through "regulatory out" clauses, or whether they could have mitigated or avoided any negative impacts from the change in the rolling average. Capacity Suppliers further argue that LSEs were on notice that changes to the PER formula were likely to be made in the future, as this was a topic in stakeholder discussions for a year before the December 10, 2010 Participants Committee meeting at which stakeholders voted on the tariff changes. Capacity Suppliers assert that the Commission failed to meaningfully respond to arguments that LSEs have no cognizable reliance on the rates resulting from the flaws in the PER mechanism.

13. Additionally, Capacity Suppliers argue, the Tariff does not bestow on load an entitlement to each of the Monthly PER amounts that are used to develop the Average Monthly PER amount. According to Capacity Suppliers, "[t]he PER deduction is a formula rate that can be changed prospectively, just like any other market rule, notwithstanding the fact that the inputs to the formula are historical Monthly PER values from previous months."[15] Capacity Suppliers argue that the Tariff provides that the heat rate component of the PER Strike Price is to be "periodically reviewed after the first Capacity Commitment Period" to ensure that it is operating as intended and that changes to the PER Strike Price "shall be applied prospectively to the settlement of future Forward Capacity Auctions."[16] Thus, Capacity Suppliers argue, there is no suggestion in

---

[14] Request for Rehearing at 9.

[15] *Id*. at 20 (footnote omitted).

[16] *Id*. at 10, *citing* Tariff at § III.13.7.2.7.1.1.1(b)(iii).

the Tariff that either the PER formula, or any of its components, including backward-looking elements such as the Monthly PER, cannot be changed prospectively.

14. Capacity Suppliers further argue that the Commission's position that a six-month rolling average did not reflect a proper "balancing of interests" between the parties ignores the substantial compromises made by generators to obtain broad stakeholder support of the filing. Capacity Suppliers note that the original December 21, 2010 filing was approved by a nearly 75 percent stakeholder vote and supported by state commissions,[17] and that in August or September 2010, generators were preparing to file a complaint under section 206 of the Federal Power Act (FPA),[18] regarding flaws in the PER mechanism, but preferred to resolve this matter through negotiation, and therefore pursued reforms through the stakeholder process. Capacity Suppliers state that choosing to engage in these stakeholder discussions was itself a concession by generators, and that generators made further concessions from their initial position to win additional stakeholder support. Thus, Capacity Suppliers argue, the February 17 Order in effect punishes generators for seeking to resolve this matter through stakeholder proceedings rather than by filing a complaint, and will discourage market participants from using the stakeholder process to resolve disputes in the future.

15. Capacity Suppliers further assert that, to the extent the Commission rejected the six-month rolling average based on arguments that it would violate the Filed Rate Doctrine or the ban on retroactive ratemaking, its decision was arbitrary and capricious. They state that the rate used to calculate the PER deduction is a formula rate, and that the inputs to the formula are not the rate on file; rather, "'the formula itself is the rate on file, not the particular components of the formula.'"[19] Thus, Capacity Suppliers claim, past Monthly PER values are simply inputs to the filed rate, and do not constitute "deferred billing" or "rates for past service" that are being collected in 1/12 increments over a 12-month period.[20] They further state that the filing was solely a prospective change to that formula rate, which would not change payments that have already been made or the rates for service provided prior to the effective date of the change to the formula. Capacity Suppliers argue that the Tariff did not provide for "any 'memory' of past Monthly PER values that persists after a change to the backward-looking formula," so

---

[17] *Id*. at 14.

[18] 16 U.S.C. § 824e (2006).

[19] *Id*. at 19 n.68, *citing to Pub. Utils. Comm’n of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (*CPUC*), discussing *Ocean State Power II,* 69 FERC ¶ 61,146, at 61,552 (1994).

[20] Request for Rehearing at 19.

that once the formula is changed, all PER calculations must be recalculated using the new formulation.[21]

16. Finally, Capacity Suppliers state that while the Commission acknowledged the need for a balancing of interests, and rejected the change to a six-month rolling average without prejudice to the development of a different proposal, it provided no guidance as to what kind of proposal would be acceptable. Capacity Suppliers therefore argue that, if the Commission does not grant rehearing, it should provide additional guidance, establish an immediate refund effective date, and institute settlement judge procedures to facilitate the development of an alternative proposal.

II. **Discussion**

A. **Procedural Issues**

17. The Indicated Shippers[22] and Retail Energy Supply Association (RESA) each submitted an answer to Capacity Suppliers' rehearing request. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.[23] Accordingly, we will reject the Indicated Shippers' and RESA's answers.

B. **Analysis**

18. The Commission denies Capacity Suppliers' request for rehearing.

19. The Commission continues to find that shortening the rolling average from a 12- to six-month period is unjust and unreasonable, given that LSEs may have relied on the existing PER averaging mechanism in setting prices to their customers on a long-term basis. In particular, as we stated in the February 17 Order, making this change effective in February 2011 would transfer benefits that load could have anticipated from high-PER summer months away from load to generators.[24]

20. Capacity Suppliers assert that LSE representatives – protesters in this case – did not provide specific evidence of detrimental reliance by LSEs on the existing 12-month averaging mechanism, and that the Commission accepted unsubstantiated assertions as to

---

[21] *Id*. at 20.

[22] The Indicated Shippers include Constellation Energy Group, Inc.; Hess Corporation; Macquarie Energy LLC; and BP Energy Company.

[23] 18 C.F.R. § 385.213(a)(2) (2011).

[24] February 17 Order, 134 FERC ¶ 61,128 at P 36-38.

reliance. This argument, however, is based on an erroneous allocation of the burden of proof. Where, as here, a filing is made under section 205 of the FPA,[25] the burden of proof is on the filing party to show that its proposal is just and reasonable; the onus is not on protesters, in this case the LSEs, to show that the proposal is unjust and unreasonable. Thus, the burden of proof in this proceeding was on the Filing Parties to show that the proposed shift from a 12-month to a six-month rolling average was just and reasonable, and, as we found in the February 17 Order, they failed to meet that burden.

21. Rather than providing technical evidentiary support as to why, specifically, a six-month rolling average should be accepted, the Filing Parties merely stated that moving to a six-month rolling average represents a middle ground between competing stakeholder proposals to, on one extreme, retain the 12-month rolling average and, on the other extreme, immediately and completely eliminate any rolling average at all.[26] The Filing Parties' own submission made clear that they were aware that switching to a six-month rolling average could have potential negative impacts on LSEs, due to their long-term contracts. But, instead of evaluating the negative impact on the LSEs and the negative impact on generators, and seeking to determine whether technical or other considerations justified a particular rolling average, the Filing Parties simply pointed to a six-month rolling average, claiming that it strikes a "reasonable balance" between the interested parties.[27]

---

[25] 16 U.S.C. § 824d (2006).

[26] Transmittal at 10 ("[S]ome generator representatives advocated an immediate switch to the higher fuel price and complete elimination of any rolling average [which] would provide much quicker relief [to generators] . . . . This generator-led proposal met strong resistance from [LSEs, who] argued that, while they generally supported the change to the higher fuel price, they had reasonably relied on the current rules in entering into contracts. . . . Between these two positions, though, a third proposal enjoyed broad support . . . to implement the PER Strike Price change . . . for the month of December 2010, to retain the 12-month Average Monthly PER for a short period . . . , and to switch to a 6-month Average Monthly PER beginning with the February 2011 Obligation Month. . . .").

[27] *Id.* Additionally, in its answer to Indicated Suppliers' and RESA's protests, which raised the possibility of such detrimental reliance, NEPOOL did not argue that such detrimental reliance could not have existed; rather, it stated that "[i]t would be unfortunate and ill-advised for the FERC to . . . reduce the future flexibility of RTOs to make timely and warranted improvements to their markets" by not allowing the results of the change to the PER mechanism to flow through to parties earlier than would be the case absent the proposed change from 12 months to 6 months (NEPOOL January 26, 2011 Answer, Section C, at 17).

22. We cannot conclude that the Filing Parties' decision to shorten the rolling average period to six months is just and reasonable, as required by the FPA. As stated in the February 17 Order, we agree that "consideration of this issue might require a balancing of interests between generators and LSEs."[28] However, we continue to find that the Filing Parties failed to show that shortening the rolling average period to six months, in the manner proposed, properly balances those interests.[29] Further, as the February 17 Order noted, load suppliers argue that the PER deductions for the high PER summer months would not be captured under the Filing Parties' proposal.[30] It would not have been unreasonable for LSEs to expect, prior to the December 2010 filing, that the higher PER amounts from the summer months would eventually flow through to them; yet ISO-NE did not in any way address this issue. While the reason that the Filing Parties offered for accepting this proposal – namely, that it represented a compromise between two extreme positions that was acceptable to a significant number of parties, *see* note 26, *supra* – is one of the factors we may consider in evaluating a rate proposal, such agreement cannot supplant the Commission's independent responsibility under section 205 to ensure that rates are just and reasonable.[31]

23. Because we find that shortening the rolling average to six-months is unjust and unreasonable as proposed here, we will not direct further proceedings as requested by Capacity Suppliers.

24. Finally, we note that Capacity Suppliers seek rehearing "[t]o the extent" the Commission found that shortening the rolling average would violate the Filed Rate Doctrine or the ban on retroactive ratemaking.[32] The February 17 Order made no such finding. Instead, the Commission stated that "because we reject the proposal to shorten the rolling average period, we do not need to address the arguments as to whether the

---

[28] February 17 Order, 134 FERC ¶ 61,128 at P 39.

[29] The February 17 Order does not foreclose the possibility of changing the rolling average, provided any proposal to do so is supported as just and reasonable.

[30] *See* February 17 Order, 134 FERC ¶ 61,128 at P 36, *citing* Indicated Suppliers Protest at 23-24 ("load suppliers will lose the uncollected value of the PER deduction for past periods, including the high PER summer months").

[31] *See ISO New England, Inc.*, 132 FERC ¶ 61,122, at P 22, (2010) (stakeholder consensus is "an important factor to be considered in reviewing the just[ness] and reasonableness of a rate design," but "cannot ultimately prove that a rate design is just and reasonable," citations omitted).

[32] Request for Rehearing at 4 ¶ 3.

proposal violates the File Rate Doctrine, or constitutes retroactive ratemaking, or whether the stakeholder process was properly utilized in developing that proposal."[33] For the same reason, we need not address those arguments here.

The Commission orders:

Capacity Suppliers' request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[33] February 17 Order, 134 FERC ¶ 61,128 at P 40.