

137 FERC ¶ 61,112
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER11-1918-001

ORDER DENYING REHEARING

(Issued November 4, 2011)

1. In this order, the Commission denies Rhode Island Central Genco, LLC's (Genco) request for rehearing of the Commission's December 16, 2010 order (December 16 Order) accepting the filing by ISO New England Inc. (ISO-NE) and New England Power Company d/b/a National Grid (New England Power) (collectively, the Transmission Parties) of their unexecuted large generator interconnection agreement (LGIA) with Genco.¹ As explained below, we reaffirm our finding that the LGIA is just and reasonable and consistent with the terms of the ISO-NE Transmission, Markets and Services Tariff (Tariff) and Commission policy.

I. Background

2. On October 27, 2010, the Transmission Parties filed the unexecuted LGIA to interconnect Genco's new 50 MW landfill-gas fired generating facility in Johnston, Rhode Island (Genco facility) to New England Power's existing transmission system via a new 115 kv generator lead line and a three breaker ring bus switchyard. The Genco facility has an expected in-service date of September 2013.

3. Appendix A of the LGIA identifies the Genco interconnection-related upgrades at issue (Network Upgrades). These Network Upgrades include a new ring bus and transmission line extensions needed to connect the Genco facility to the existing transmission line, upgraded relays for the transmission line, and improvements to neighboring substations.

¹ *ISO New England Inc.*, 133 FERC ¶ 61,229 (2010) (December 16 Order).

4. As discussed in the December 16 Order, Genco challenged the LGIA provisions that allocated the costs of the Network Upgrades solely to Genco.² Genco argued that the Network Upgrades will provide significant benefits to the ISO-NE transmission grid and, therefore, meet the ISO-NE Tariff criteria for allocation to all ISO-NE transmission customers.

5. Genco also objected to the LGIA requirement that Genco provide financial security for the tax gross-up amount associated with payments or property transfers for the Genco facility. Genco asserted that it is unjust and unreasonable to require such financial security, where the interconnection customer (here, Genco) is able to obtain a private letter ruling from the Internal Revenue Service (IRS) that holds that a payment or property transfer to the transmission owner is a non-taxable event.

6. Rejecting Genco's challenges, the Commission accepted the LGIA for filing, effective October 21, 2010. On January 18, 2011, Genco filed its request for rehearing, reasserting its arguments concerning allocation of the Network Upgrade costs and tax gross-up. Genco's rehearing request and the Commission's findings are discussed by issue below.

II. Discussion

A. Procedural Matters

7. On February 2, 2011, Transmission Parties submitted an answer to Genco's request for rehearing, and, on February 15, 2011, Genco submitted an answer to Transmission Parties' answer.

8. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing and Rule 213(b) prohibits answers to answers.³ Accordingly, we reject Transmission Parties' answer to the request for rehearing and Genco's answer.

² LGIA section 11.4.1 requires the costs to be allocated under the ISO-NE Tariff, Schedule 11. Schedule 11, section 5 allocates such costs to the interconnecting generator, unless the upgrades "provide benefits to the system as a whole." LGIA Appendix C provides estimated construction costs, including the tax gross up security amount.

³ 18 C.F.R. §§ 385.213(b), 385.713(d) (2011).

B. Network Upgrade Cost Allocation Issues

1. December 16 Order

9. In the December 16 Order, the Commission found that allocating the costs of the Network Upgrades solely to Genco, rather than to all ISO-NE transmission customers, is just and reasonable for several reasons. The Commission first found that the proposed allocation is consistent with the terms of ISO-NE's Tariff.⁴ The Commission pointed out that the Tariff requires ISO-NE to allocate costs directly to the interconnection customer (in this case, Genco), where such costs would not have been incurred "but for" the interconnection in order to avoid adverse impacts to the transmission system.⁵ As noted in the December 16 Order, an exception exists where ISO-NE determines that the relevant upgrade provides "benefits to the system as a whole," in which case the costs shall be allocated in the same way as Reliability Transmission Upgrades.⁶ To qualify for regional cost allocation under the Tariff, a Reliability Transmission Upgrade must be classified as a Regional Benefit Upgrade, in that it is: (i) rated 115 kV or above; (ii) meets non-voltage pool-transmission facilities (PTF) classification criteria; and (iii) is included in the regional system plan.⁷ The Commission found that, consistent with the Tariff, the Transmission Parties' appropriately focused on the absence of regional benefits, such as correcting for a specific reliability issue, in proposing to allocate the costs of the Network Upgrades solely to Genco.⁸ Further emphasizing that

⁴ December 16 Order, 133 FERC ¶ 61,229 at P 11, 37. *See also Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 691 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats & Regs. ¶ 31,171, *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,146 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

⁵ *See ISO New England, Inc.*, 91 FERC ¶ 61,311, at 62,079 (2000) (approving Schedule 11, section 5 allocation of 100 percent of the costs of interconnection facilities, described as those that would not have been incurred but for the interconnection, to the interconnection customer), *order on rehearing*, 95 FERC ¶ 61,384, at 62,433-34 (2001) (*ISO New England*).

⁶ Under the ISO-NE Tariff, Schedule 12, the cost of Reliability Transmission Upgrades that qualify as Regional Benefit Upgrades is allocated to all ISO-NE transmission customers.

⁷ *See* ISO-NE Tariff, Schedule 12, section B.5.

⁸ December 16 Order, 133 FERC ¶ 61,229 at P 23.

the relevant query under the Tariff is whether the Network Upgrades, not the generating facility, will benefit the system as a whole, the Commission found that neither the Transmission Parties nor Genco identified any such benefits attributable to the Network Upgrades and that any purported benefits cited by Genco were attributable to the generating facility alone.⁹

10. The Commission also disagreed with Genco's argument that various cases warrant a system-wide allocation of costs in this proceeding. Noting that, in the LGIA, ISO-NE proposed to allocate the costs of upgrades necessary to interconnect a new generator (Genco) consistent with Order No. 2003, the Commission distinguished this proceeding from the factual situations involved in cases relied upon by Genco.¹⁰ For example, although Genco argued that *Mansfield* provides controlling precedent requiring rolling in the costs of the Network Upgrades, the December 16 Order set forth a lengthy discussion drawing distinctions between that case and the one at hand.¹¹ The Commission found that, "to the extent that Genco cited precedent involving other regions with different tariff language and that do not seek to allocate upgrade costs to the interconnecting generator, such precedent is not controlling in ISO-NE."¹²

11. The Commission also rejected Genco's argument that ISO-NE acted improperly by relying on its Planning Procedures for purposes of determining whether the Network Upgrades provide benefits to the system as a whole. The Commission found that the procedures provide an appropriate means to make such a determination.¹³ The Commission further rejected Genco's argument that ISO-NE's Planning Procedures permit an improper delegation of the Commission's regulatory responsibilities. The Commission noted that, in Order No. 2003, the Commission established the interconnection study process reflected in the Large Generator Interconnection

⁹ *Id.*

¹⁰ *Id.* P 34-38.

¹¹ *Id.* As summarized in the December 16 Order, *Mansfield* applied five factors in establishing the proper transmission service rate for radial facilities, "unlike the case before us that involves a determination of cost responsibility for the network upgrades necessary to reliability interconnect the generator to the transmission grid." *Id.* P 35, 36 (discussing *Mansfield Municipal Electric Dept. v. New England Power Co.*, 97 FERC ¶ 61,134 (2001), *reh'g denied*, 98 FERC ¶ 61,115 (2002) (*Mansfield*)).

¹² *Id.* P 38.

¹³ *Id.* P 27.

Procedures.¹⁴ The Commission found that nothing about the Planning Procedures or this proceeding interfered with the Commission's ability to meet its statutory obligation to review the LGIA and determine whether the resulting rates are just and reasonable.¹⁵

2. Request for Rehearing

12. On rehearing, Genco takes issue with the Commission's interpretation of the ISO-NE Tariff, the Commission's own policy, and ISO-NE Planning Procedures. First, Genco objects to the Commission's interpretation of the ISO-NE Tariff, asserting that nothing therein either limits what may constitute a "benefit to the system as a whole" or requires a particular type of system benefit, such as a reliability-related benefit, to support rolled-in rate treatment.¹⁶ Moreover, Genco argues that December 16 Order erroneously found that Genco identified system benefits attributable only to the Genco facility rather than the Network Upgrades. Genco asserts that the Network Upgrades provide a myriad of benefits to the system as a whole, including improving reliability by conveying energy and providing a switching function; fostering competition; meeting renewable portfolio standards; reducing congestion and the need for imports; and providing supply diversity, additional renewable energy, and displacement benefits. According to Genco, these benefits justify rolling the Network Upgrade costs into transmission rates.¹⁷

13. Second, Genco reiterates its argument that various Commission precedent, including *Mansfield* and Order No. 2003, require allocating the costs of the Network Upgrades to all ISO-NE transmission customers. To that end, Genco argues that the "but for" test referred to in the Tariff and discussed in the December 16 Order¹⁸ is inconsistent with Order No. 2003 and subsequent orders finding that interconnection-related upgrades benefit the system as a whole regardless of whether they were previously needed.

14. Third, Genco argues that it is inappropriate to rely on the ISO-NE Planning Procedures to determine whether the Network Upgrades result in system benefits, because, according to Genco, only the Tariff governs and it does not require a particular type of system benefit to support rolled-in rate treatment.¹⁹ Genco asserts that the

¹⁴ Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 240.

¹⁵ December 16 Order, 133 FERC ¶ 61,229 at P 28.

¹⁶ Genco Rehearing at 8 (citing Commission orders and court cases).

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 8 (citing Commission orders and court cases).

Planning Procedures “cannot substitute for the tariff as the source for all material terms that have a significant effect on rates.”²⁰ According to Genco, any rule that establishes the basis for allocating Network Upgrade costs, and thereby determines the charges imposed on a generator, must be set forth in ISO-NE’s Tariff, not the Planning Procedures alone.²¹ Genco questions whether ISO-NE ever obtained a determination from the Commission that it is just and reasonable to allocate all of the costs of Network Upgrades, which provide benefits to the system, to an interconnecting generator under the terms of the Planning Procedures.²²

3. Commission Determination

15. We deny rehearing. As an initial matter, we reaffirm our finding that, in allocating the Network Upgrade costs solely to Genco, ISO-NE properly found under its Tariff that the Network Upgrades will not result in benefits to the system as a whole. As detailed in the December 16 Order, in determining how to allocate interconnection costs, ISO-NE first looks to Schedule 11 of the Tariff, which, notably, the Commission previously approved as just and reasonable.²³ Schedule 11 expressly sets forth the “but for” test, requiring a generator owner to pay all of the costs of interconnection upgrades, “including all Direct Interconnection Transmission Costs and any applicable tax gross-up

²⁰ *Id.* at 17.

²¹ Citing *Midwest ISO* as requiring the ISO to file “any changes to the way they allocate the costs of network upgrades associated with generator interconnections.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, at P 68 (2009) (approving ISO commitment to file new cost allocation proposal for “location-constrained resources” and transmission projects driven by the need to integrate large, remote generation resources, including any revisions to the interconnection cost allocation methodology).

²² Genco Rehearing at 19-20.

²³ See *New England Power Pool*, 109 FERC ¶ 61,155, at P 4, 85 (2004) (approving retention of Schedule 11 and Schedule 12 cost allocation provisions in interconnection procedures as variations proposed by an independent entity), *reh’g denied*, 110 FERC ¶ 61,335 (2005) (*NEPOOL I*); *ISO New England*, 95 FERC at 62,433-34 (clarifying that interconnection facilities that provide benefits to the system as a whole may be pool supported if ISO-NE determines that a particular interconnection facility provides benefits to entities other than the interconnecting generator, the costs should be shared according to objective, non-discriminatory standards the same as any expansion or upgrade costs, and declaring expectation that interconnection facilities will ordinarily provide benefits principally to the interconnecting generator, not to the system generally).

amounts, to the extent such costs would not have been incurred but for the interconnection” in order to maintain reliability. It is undisputed that the Network Upgrade costs at issue here would not have been incurred but for Genco’s interconnection request; therefore, this provision would seem dispositive of the issue. However, the parties further acknowledge that this provision must be read in conjunction with the rest of Schedule 11, which carves out an exception to Schedule 11’s cost allocation rule: if ISO-NE determines that the relevant upgrade provides benefits to the system as a whole, then the costs of the upgrade shall be allocated in the same way as a Reliability Transmission Upgrade, which may qualify for region-wide allocation under Schedule 12.²⁴ Thus, as discussed in the December 16 Order, ISO-NE stated that, pursuant to the Schedule 11 exception, it examined whether the Network Upgrades will provide benefits to the system as a whole; it found none.²⁵ We reiterate that ISO-NE’s test for upgrades that “provide benefits to the system as a whole” is a test that requires a demonstration that the upgrades are needed to maintain system reliability and will eliminate in whole or in part the need for upgrades identified by ISO-NE in the Regional System Plan.²⁶

16. Genco asserted, and reasserts here, that its project will provide low-cost, high capacity factor renewable resources to the ISO-NE market, which will in turn reduce environmental externalities and enhance reliability of the grid. However, other than citing these general benefits, Genco offers no specific evidence in support of its assertions. Moreover, in response to the December 16 Order’s finding that such benefits, by their nature, are attributable to the Genco facility, not the Network Upgrades, Genco further posits that the Network Upgrades will provide reliability benefits by continuously conveying energy under normal circumstances and helping to isolate the grid from faults when the circuit breakers are tripped open. Again, however, Genco’s arguments are unconvincing. The benefits Genco cites are general and unsupported, and there is no evidence that the transmission system requires the Network Upgrades in order to

²⁴ The Commission previously approved the New England default transmission cost allocation mechanism to identify upgrades that “benefit the entire pool” and receive regional cost support. *New England Power Pool*, 105 FERC ¶ 61,300, at P 42-43 (2003) (rejecting argument that interconnection cost allocation under Schedule 11 would not be consistent with Regional Benefit Upgrade cost allocation, and declining to order changes), *order on reh’g*, 109 FERC ¶ 61,252 (2004) (*NEPOOL II*).

²⁵ *E.g.*, *United Illuminating Co.*, 107 FERC ¶ 61,003, at P 21-22 & n.16 (2004) (finding that merchant transmission interconnection customer responsible for network upgrade costs which as not providing benefits to the system as a whole under Schedule 11, despite system benefits).

²⁶ December 16 Order, 133 FERC ¶ 61,229 at P 23.

maintain reliability, absent Genco's requested interconnection. Under ISO-NE's Tariff, even Reliability Transmission Upgrades must satisfy more rigorous and specific criteria in order to qualify for regional cost allocation.²⁷

17. As to Genco's argument that the "but for" test set forth in ISO-NE's Tariff, and the LGIA provisions allocating Network Upgrades costs solely to Genco, are unjust and unreasonable and inconsistent with Commission policy, Genco raises no new arguments on rehearing that were not addressed, in detail, in the December 16 Order.²⁸ *Mansfield* and the other cases relied upon by Genco are wholly inapposite for the reasons discussed in the December 16 Order²⁹ and summarized above. While Genco continues to argue that the "but for" test provided for ISO-NE's Tariff is inconsistent with Order No. 2003, we reiterate the discussion in the December 16 Order that the "Commission approved the Large Generator Interconnection Procedures and tariff provisions permitting an ISO or RTO to allocate all interconnection-related upgrade costs to an interconnection generator."³⁰ Moreover, the Commission previously approved as just and reasonable the Tariff provisions at issue here.³¹ For the reasons stated above and in the December 16 Order, we find that ISO-NE properly followed its Commission-approved Tariff in

²⁷ To qualify for regional cost allocation under section B.5 of Schedule 12 of the Tariff, a Reliability Transmission Upgrade must be classified as a Regional Benefit Upgrade, in that it is (i) rated 115 kV or above, (ii) meets non-voltage pool-transmission facilities (PTF) classification criteria, and (iii) is included in the regional system plan.

²⁸ December 16 Order, 133 FERC ¶ 61,229 at P 29-38 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 691 (affirming that an Independent System Operator (ISO) or Regional Transmission Organization (RTO) need not necessarily adhere to the Commission's standard transmission pricing policy, which would otherwise permit transmission owners to roll in interconnection-related network upgrade costs after reimbursing generators for up front payments)).

²⁹ December 16 Order, 133 FERC ¶ 61,229 at P 35-37.

³⁰ See Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 691 (affirming that an ISO or RTO has greater flexibility to propose a customized policy to fit its circumstances and need not necessarily adhere to the Commission's *pro forma* pricing policies, which would otherwise require interconnection customers to be reimbursed for the costs of network upgrades).

³¹ See *NEPOOL I*, 109 FERC ¶ 61,155 at P 7, 84 (citing history of Schedule 11 and accepting ISO-NE cost allocation provisions as independent entity exception to *pro forma* LGIA cost allocation provisions), *reh'g denied*, 110 FERC ¶ 61,335; *ISO New England*, 91 FERC at 62,079 *order on reh'g*; 95 FERC ¶ 61,384.

allocating the costs of the Network Upgrades to Genco. To the extent Genco opposes the Tariff provisions themselves, its arguments are beyond the scope of this proceeding, which is governed by section 205 of the Federal Power Act (FPA).³²

18. With regard to Genco's assertions concerning application of ISO-NE's Planning Procedures, Genco again raises no new arguments on rehearing which were not addressed in the December 16 Order. We nonetheless reiterate our finding, detailed in the December 16 Order, that ISO-NE properly employed its Planning Procedures in implementing its Tariff in this case.³³ The Planning Procedures state that an interconnection-related upgrade can be allocated regionally if it is identified in a System Impact Study as needed for reliability reasons absent the generator interconnection or is similar to, and provides a similar system benefit as, an upgrade in the Regional System Plan.³⁴ We find this approach reasonable and consistent with the ISO-NE Tariff.

19. Moreover, the Commission previously has affirmed the use of operating manuals, like the Planning Procedures, to provide the details for implementing tariff requirements.³⁵ The procedures set forth in such manuals do not necessarily need to be filed,³⁶ and a system operator may rely on its manuals to implement the filed rate and

³² 16 U.S.C. § 824d (2006).

³³ December 16 Order, 133 FERC ¶ 61,229 at P 27-28.

³⁴ ISO-NE Planning Procedure 4-1 at 4-5.

³⁵ *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,183, at P 145 (2008) (declining to require filing of interconnection procedures: "An RTO or ISO appropriately places in its Business Practice Manuals the implementation details that inform stakeholders how the organization conducts business under its tariff.") (*Midwest ISO*).

³⁶ The Commission determines whether a particular operational procedure must be filed, on a case-by-case basis, based on a "rule of reason" – all practices that *significantly* affect rates, terms and conditions fall within the purview of section 205(c) of the FPA, and, therefore, must be included in a tariff filed with the Commission. *See generally Prior Notice and Filing Requirements under Part II of the FPA*, 64 FERC ¶ 61,986, at 61,986-89 (1993) (explaining Commission jurisdiction over all rates and charges that are "for or connected with" and all agreements that "affect or relate to," jurisdictional activities), *order on reh'g*, 65 FERC ¶ 61,081 (1993)).

provide technical details, in light of the multitude of occasions in tariff administration that require the exercise of technical or operational expertise.³⁷

20. While Genco argues that the Planning Procedures at issue here should be reflected in ISO-NE's Tariff as part of the filed rate, we disagree. Genco's argument that the Planning Procedures should not be allowed to supplant the Tariff is based, in part, on the erroneous presumption that the Tariff and Planning Procedures are inconsistent. ISO-NE's filed rate under its Tariff requires that network upgrades provide benefits to the system as a whole in order to qualify for regional cost allocation; consistent with that requirement, the Planning Procedures simply lay out the mechanics for making that determination. Additionally, the Commission employs a "rule of reason" test to determine whether a particular operational procedure must be filed.³⁸ This test requires a case-by-case analysis, comparing what is included in the filed tariff against what is contained in the utility manuals. Neither Order No. 2003, nor the orders accepting ISO-NE's interconnection-related Tariff procedures cited above, required ISO-NE to file its interconnection cost allocation details. Instead, the Commission-approved Tariff procedures require ISO-NE to calculate and disclose interconnection cost projections in advance, which costs may be reviewed via the filing of an unexecuted interconnection agreement, as is the case here. The Commission has reviewed the LGIA, and for the reasons stated in the December 16 Order and expounded upon here, the Commission finds that the provisions allocating the costs of the Network Upgrades to Genco, rather than regionally, are just and reasonable.

³⁷ *New England Power Pool*, 95 FERC ¶ 61,253, at 61,877 (2001) (declining to require NEPOOL to file general technical operating/management procedures under section 205, so long as the procedures are available on the internet); *Southwest Power Pool, Inc.*, 132 FERC ¶ 61,042, at P 57 (2010) (finding RTO's unfiled planning manual an appropriate means to ensure transparency and comparability without causing the Commission to manage the planning process) (*Southwest*); *Dominion Res. Servs. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,025, at P 51 (2009) (relying on PJM manuals for methodology to allocate costs identified in system impact study process); *Midwest ISO*, 124 FERC ¶ 61,183 at P 145.

³⁸ *Southwest*, 132 FERC ¶ 61,042 at P 57 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1649, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

C. Tax Gross-Up

1. December 16 Order

21. In the December 16 Order, the Commission rejected Genco's arguments assailing the LGIA tax gross-up security requirement as unjust and unreasonable.³⁹ The Commission found that the provision is consistent with ISO-NE's Tariff and Order No. 2003, and that, moreover, Genco's arguments constituted a collateral attack on Order No. 2003-A, as well as prior Commission orders accepting the ISO-NE *pro forma* LGIA.⁴⁰ While Genco argued that an interconnection customer should be exempt from providing financial security for the tax gross-up amount where the customer is able to obtain an IRS private letter ruling that a relevant payment or property transfer is a non-taxable event, the Commission rejected that argument as squarely at odds with Order No. 2003-A. As noted in the December 16 Order, Order No. 2003-A expressly rejected a proposal to permit a generator to reduce its security obligation by obtaining a favorable IRS private letter ruling.⁴¹

2. Request for Rehearing

22. On rehearing, Genco largely reiterates its prior arguments against the LGIA tax gross-up provision.⁴² Genco repeats its claim that an IRS private letter ruling indicating that Genco's payment to New England Power is a non-taxable event would completely

³⁹ LGIA section 5.17.3 obligates the interconnection customer to indemnify and hold the transmission owner harmless for any current tax liability.

⁴⁰ December 16 Order, 133 FERC ¶ 61,229 at P 47 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 344); *NEPOOL I*, 109 FERC ¶ 61,155 at P 79-80 (accepting ISO-NE *pro forma* LGIA). *See also* Order No. 2003-B, FERC Stats & Regs. ¶ 31,171 at P 97 ("While the ruling may show that the IRS does not currently consider these payments taxable, the risk remains that the IRS may change its policy or there will be a subsequent taxable event.").

⁴¹ December 16 Order, 133 FERC ¶ 61,229 at P 47 (citing Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 344).

⁴² A tax gross-up is a dollar amount that will indemnify a transmission provider for any current tax liability from payments (which could be treated as income) by an Interconnection Customer for interconnection facilities and network upgrades that ultimately belong to the transmission provider. Order No. 2003-B, FERC Stats & Regs. ¶ 31,171 at P 94 n.36.

eliminate any possibility of relevant tax liability, even if the IRS subsequently changes its regulations.⁴³

23. Genco also repeats its alternative argument that, even if the Commission-approved ISO-NE Tariff requires financial security for a tax gross-up, that provision is unjust and unreasonable as applied to this case. Emphasizing that section 5.17 of ISO-NE's *pro forma* Large Generator Interconnection Agreement provides that a transmission owner "may" require financial security for an interconnection customer's "current" tax liability, Genco argues that requiring financial security is discretionary and that, in any case, Genco has no relevant "current" tax liability. As it did previously, Genco claims that the tax gross-up provision, which, as applied here, requires Genco to provide about \$3 million in financial security, is unjust and unreasonable, particularly because, in Genco's view, the liability is speculative.⁴⁴

3. Commission Determination

24. We deny rehearing. As detailed in the December 16 Order,⁴⁵ Genco's arguments concerning the tax gross-up provision either inappropriately seek to reopen issues squarely addressed and resolved by Order No. 2003-A⁴⁶ or are inconsistent with Commission policy and prior orders accepting the ISO-NE *pro forma* LGIA for filing.⁴⁷

⁴³ 26 C.F.R. § 601.201(1)(6) (2011).

⁴⁴ Genco Rehearing at 21 (citing, e.g., *ISO New England Inc.*, 130 FERC ¶ 61,108, at P 25, 27 (2010) (rejecting as speculative proposal shortening useful life of facilities to 3 years due to anticipated environmental legislation); *ISO New England Inc.*, 128 FERC ¶ 61,266, at P 46 (2009) (same); *Kern River Gas Co.*, 117 FERC ¶ 61,077, at P 86 (2006) (rejecting proposal to reduce billing determinants due to business risks and difficulty remarketing capacity as not "known and measurable" and requiring pipeline to rely on historic data)).

⁴⁵ December 16 Order, 133 FERC ¶ 61,229 at P 46-49.

⁴⁶ Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 344, 357.

⁴⁷ *New England Power Co.*, 120 FERC ¶ 61,005, at P 10 (2007) (rejecting proposal to reduce security based on a private letter ruling, due to risks of IRS policy change or a subsequent taxable event). *Cal. Indep. Sys. Operator Corp.*, 112 FERC ¶ 61,009, at P 201-03 (2005) (accepting Order No. 2003 compliance filings) (*California ISO*); *NEPOOL I*, 109 FERC ¶ 61,155 at P 79-80 (accepting tax gross up provisions because private letter ruling would not reduce the risk to the transmission provider of an

(continued...)

Genco provides no reason to revisit these settled matters in this case. To the extent Genco takes issue with any Commission-approved provision in ISO-NE's Tariff or *pro forma* LGIA, its arguments are beyond the scope of this proceeding, which, as noted above, is governed by section 205 of the FPA.

25. As to Genco's assertion that the Tariff requires financial security for only "current" tax liability (for which Genco claims it has none), we here emphasize discussion in the December 16 Order that contrasted the lack of immediate known liability, indicated by an IRS private letter ruling, with the future risk, for which indemnity may be retained.⁴⁸ Financial risks, by their very nature, are forward-looking, but nonetheless may be faced currently.⁴⁹ The Commission found in Order No. 2003-A that tax gross up risks are substantial enough to require the generator to post security to protect the transmission provider against future contingencies. We find Genco's arguments to the contrary, which are largely based on its own interpretation of IRS regulations or inapplicable precedent, to be unconvincing.

The Commission orders:

Genco's request for rehearing is hereby denied.

By the Commission. Commissioner Spitzer is not participating.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

IRS policy change or a subsequent taxable event and citing Order No. 2003-A); Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 344, *order on reh'g*; Order No. 2003-B, FERC Stats & Regs. ¶ 31,171 at P 97.

⁴⁸ December 16 Order, 133 FERC ¶ 61,229 at P 49.

⁴⁹ LGIA section 5.17.6 indicates that the indemnity is held for current tax including liability determined on the occurrence of a subsequent taxable event, which may occur in the current tax year or up to ten years in the future.