

141 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc. and New England Power Pool Docket No. ER12-1651-001

ORDER DENYING REHEARING

(Issued November 29, 2012)

1. On October 4, 2012, the Eastern Massachusetts Consumer-Owned Systems (EMCOS)¹ submitted a request for rehearing of the Commission's September 4, 2012 order,² which accepted ISO New England Inc.'s (ISO-NE) compliance filing designating ISO-NE as a central counterparty for transactions that clear through the day-ahead and real-time markets, as well as for regional network service transactions and certain bilateral transactions that clear through the ISO-NE settlement system. For the reasons discussed below, we deny rehearing.

I. Background

A. Order No. 741

2. In Order No. 741, the Commission adopted reforms to strengthen the credit policies used in organized wholesale electric power markets.³ Citing its statutory responsibility to ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential,⁴ the Commission directed each regional transmission organization (RTO)

¹ EMCOS consists of Braintree Electric Light Department, Hingham Municipal Lighting Plant, Reading Municipal Light Department and Taunton Municipal Lighting Plant.

² *ISO New England, Inc. and New England Power Pool*, 140 FERC ¶ 61,177 (2012) (September 2012 Order).

³ *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, FERC Stats. & Regs. ¶ 31,317 (2010), *order on reh'g*, Order No. 741-A, FERC Stats. & Regs. ¶ 31,320 (2011), *reh'g denied*, Order No. 741-B, 135 FERC ¶ 61,242 (2011).

⁴ 16 U.S.C. §§ 824d, 824e (2006).

and independent system operator (ISO) to submit tariff revisions reflecting numerous reforms, including, most relevant here, how each RTO or ISO would address the risk that it may not be allowed to use netting and set-offs if a market participant enters bankruptcy.⁵ The Commission required each RTO and ISO to submit tariff revisions reflecting one of the following options: (1) establish a central counterparty; (2) require market participants to provide a security interest in their transactions in order to establish collateral requirements based on net exposure; (3) propose another alternative, which provides the same degree of protection as options 1 and 2; or (4) establish credit requirements for market participants based on their gross obligations.⁶

B. April 2012 Compliance Filing

3. On April 30, 2012, ISO-NE and the New England Power Pool (NEPOOL) Participants Committee (together, Filing Parties) submitted revisions to the ISO-NE Transmission, Markets and Services Tariff (Tariff) to comply with Order Nos. 741 and 741-A (April 2012 Compliance Filing). The Filing Parties proposed to designate ISO-NE as the central counterparty⁷ for transactions that clear through the day-ahead and real-time markets, as well as for regional network service transactions and certain bilateral transactions that clear through the ISO-NE settlement system.

C. September 2012 Order

4. In the September 2012 Order, the Commission accepted the April 2012 Compliance Filing, finding that it satisfied the directives in Order Nos. 741 and 741-A.⁸ The Commission found that the establishment of ISO-NE as central counterparty addressed ambiguity regarding the identity of contracting parties in ISO-NE transactions by clarifying that there is a single, specified central counterparty to market participants. The Commission stated that establishment of ISO-NE as central counterparty permits it to assert in a market participant bankruptcy that ISO-NE is involved in all transactions for

⁵ Order No. 741, FERC Stats. & Regs. ¶ 31,317 at P 117.

⁶ *Id.*

⁷ ISO-NE defines central counterparty as: “Counterparty means the status in which the ISO acts as the contracting party, in its name and own right and now as an agent, to an agreement or transaction with a Customer (including assignments involving Customer) involving sale to the ISO, and/or purchase from the ISO, of Regional Transmission Service and market and other products and services, and other transactions and assignments involving Customers, all as described in the Tariff.” ISO-NE, Transmission, Markets and Services Tariff, § I.2.2 (34.0.0).

⁸ September 2012 Order, 140 FERC ¶ 61,177 at PP 1, 30.

which a setoff is effected, satisfying one of the criteria for the “mutuality” needed for such a setoff in the bankruptcy.⁹

5. As relevant here, the Commission also rejected EMCOS’ request that ISO-NE should include Tariff language addressing unforeseen impacts on the tax-exempt status of income or debt of publicly-owned entities.¹⁰ The Commission recognized that tax-exempt status is an important issue to some stakeholders and stated that, to the extent ISO-NE’s proposal affects their tax-exempt status, ISO-NE, working with its stakeholders, may address this issue in a filing that demonstrates that their proposal would provide the market the same degree of protection as the central counterparty requirement.¹¹

II. Request for Rehearing

6. EMCOS asserts that the Commission erred in the September 2012 Order by not requiring ISO-NE to add Tariff language ensuring that the central counterparty provisions would not adversely affect publicly-owned utilities’ tax-exempt status.¹² EMCOS asserts that the September 2012 Order is inconsistent with Commission orders addressing California Independent System Operator Corporation’s (CAISO) and Midwest Independent Transmission System Operator, Inc.’s (MISO) Order No. 741 compliance filings.¹³ EMCOS posits that, in those orders, the Commission accepted or required proposed language similar to what EMCOS sought here.

7. In its request for rehearing, EMCOS asserts that the Commission should, at a minimum, direct ISO-NE to modify its Tariff to provide that:

⁹ *Id.* P 30.

¹⁰ *Id.* PP 20, 33. EMCOS proposed the following provision: “If a Publicly Owned Entity reasonably determines that [ISO-NE’s] status as counterparty ... would . . . jeopardize or compromise the tax-exempt status of its income or any bonds used to finance the Publicly Owned Entity’s facilities, it shall [notify ISO-NE, and ISO-NE and] the affected Publicly Owned Entity will initiate efforts to develop revised or replacement arrangements that will enable the affected Publicly Owned Entity to maintain the tax-exempt status of its affected income and debt.” *Id.* P 20.

¹¹ *Id.* P 33.

¹² EMCOS Request for Rehearing at 2.

¹³ *California Indep. Sys. Operator Corp.*, 140 FERC ¶ 61,169, at P 35 (2012) (*CAISO Order*); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,116, at PP 12, 20 (2012) (*MISO Order*).

- a. ISO-NE's status as the central counterparty is not intended to affect the tax-exempt status of transmission facilities or entitlements subject to its control (Alternative 1); or
- b. ISO-NE shall not be the counterparty to financial schedule and generator self-supply transactions by consumer-owned market participants (Alternative 2).¹⁴

EMCOS asserts that Alternative 1 is consistent with the *CAISO Order* and Alternative 2 is consistent with the *MISO Order*.¹⁵

8. On October 19, 2012, ISO-NE filed an answer to EMCOS' request for rehearing.

III. Discussion

A. Procedural Matters

9. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.¹⁶ Accordingly, we will reject ISO-NE's answer to EMCOS' rehearing request.

B. Substantive Matters

10. We will deny EMCOS' request for rehearing of the September 2012 Order. EMCOS' rehearing request is based on the argument that the September 2012 Order is inconsistent with the *CAISO* and *MISO Orders*. We disagree.

11. EMCOS' assertion that the Commission required CAISO to submit tariff language similar to what EMCOS seeks here is based on a mischaracterization of the nature of that proceeding and of the filing. Indeed, in both the *CAISO Order* and here, the Commission rejected intervenors' argument that the relevant RTO/ISO should be *required* to include tariff provisions protecting the tax-exempt status of market participants. Instead, the Commission stated in both orders that, to the extent the ISO's proposal affects the tax-exempt status of some stakeholders, "[the ISO,] working with its stakeholders, may address that issue in a filing that demonstrates that their [new] proposal would provide

¹⁴ EMCOS Request for Rehearing at 4-5.

¹⁵ *Id.* 3-5.

¹⁶ 18 C.F.R. § 385.713(d)(1) (2012).

the market the same degree of protection as the counterparty requirement”;¹⁷ i.e., in both cases, we allowed the relevant RTO/ISO to make a future filing to address the issue, but we did not ourselves require such a filing. Thus, the September 2012 Order and the *CAISO Order* are consistent in the relevant respect.

12. EMCOS is correct that, in the *CAISO Order*, the Commission directed CAISO to submit a compliance filing including tariff revisions providing that CAISO’s status as the central counterparty is not intended to affect the tax-exempt status of transmission facilities or entitlements subject to its control.¹⁸ However, CAISO, the applicant in that case, had itself proposed to submit the relevant tariff language; the required compliance filing merely effectuated the Commission’s acceptance of CAISO’s commitment.¹⁹ Unlike CAISO, ISO-NE, the applicant here, did not propose to revise its Tariff in a similar manner, and requiring such a proposal would exceed the scope of this compliance proceeding, where the only issue is whether ISO-NE’s proposal satisfied the directives in Order Nos. 741 and 741-A.²⁰ EMCOS does not assert that ISO-NE has failed to comply with Order Nos. 741 and 741-A; rather, EMCOS seeks to revise ISO-NE’s Tariff in a manner not required by that rule and not otherwise proposed by ISO-NE, the applicant, in this case.²¹ As stated in the September 2012 Order,²² a proposal addressing the tax-

¹⁷ See September 2012 Order, 140 FERC ¶ 61,177 at P 33; *CAISO Order*, 140 FERC ¶ 61,169 at P 31 (denying intervenor’s request to add a savings clause to CAISO’s tariff whereby the tariff would be immediately modified to include appropriate exceptions if market participants receive notice of adverse actions related to their tax-exempt status).

¹⁸ *CAISO Order*, 140 FERC ¶ 61,169 at P 35.

¹⁹ *Id.* (“[W]e accept the language CAISO proposed [and] direct CAISO to fulfill its commitment to revise [the relevant tariff section].”).

²⁰ See, e.g., *New York Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,042, at P 26 (2009); *Southwest Power Pool, Inc.*, 129 FERC ¶ 61,145, at P 8 (2009); *Calpine Oneta Power, L.P.*, 121 FERC ¶ 61,189, at P 14 (2007) (“As the Commission has repeatedly explained, it will not consider arguments raised in a compliance proceeding that do not respond to the narrow issue of the filing company’s compliance with the explicit directives of the Commission in the underlying order.”).

²¹ Further, similar to the CAISO proceeding, there is no record evidence in this proceeding to support the argument that ISO-NE’s status as the central counterparty will, in fact, adversely affect the tax-exempt status of consumer- or publicly-owned stakeholders. See *CAISO Order*, 140 FERC ¶ 61,169 at PP 30-31.

²² September 2012 Order, 140 FERC ¶ 61,177 at P 33.

exempt status of stakeholders should first be vetted through the ISO-NE stakeholder process and then appropriately submitted as a new filing pursuant to section 205 of the Federal Power Act (FPA).²³

13. For reasons similar to the discussion above regarding the *CAISO Order*, we also reject EMCOS' assertion that the September 2012 Order is inconsistent with the *MISO Order*. Order Nos. 741 and 741-A did not require uniformity with respect to how each RTO or ISO would address the risk that it may not be allowed to use netting and set-offs if a market participant enters bankruptcy. MISO and ISO-NE each proposed different central counterparty proposals, and the Commission found that each applicant had sufficiently demonstrated that its proposal complied with Order Nos. 741 and 741-A in a manner appropriate for its market.

14. In MISO's central counterparty proposal, MISO distinguished between transactions where MISO would be the central counterparty and transactions where it would not be the central counterparty.²⁴ Specifically, MISO proposed to become the central counterparty on a limited basis in only market-related transactions of MISO market participants.²⁵ It did not propose to become the central counterparty for financial schedule and generator self-supply transactions. MISO explained that it did not propose to be the central counterparty for financial schedule transactions because MISO market participants are already themselves the counterparties to the financial schedule transactions.²⁶ As for generator self-supply transactions, MISO stated that these transactions do not have a counterparty for the sale of energy since relevant MISO market participants are supplying themselves.²⁷ In contrast, ISO-NE proposed to become the central counterparty for virtually all transactions in its markets, and, with limited exceptions, to be inserted in the chain of title for Regional Transmission Service transactions, transactions in the day-ahead and real-time energy markets, transactions for ancillary services, transactions in the Forward Capacity Market, market transactions for Financial Transmission Rights, and Internal Bilateral Transactions.²⁸

²³ 16 U.S.C. § 824d (2006).

²⁴ *MISO Order*, 140 FERC ¶ 61,116 at P 12.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ September 2012 Order, 140 FERC ¶ 61,177 at P 8.

15. To the extent EMCOS believes that a proposal similar to MISO's (by which ISO-NE would not be the counterparty to financial schedule and generator self-supply transactions) would better safeguard the tax-exempt status of ISO-NE's consumer- or publicly-owned stakeholders, EMCOS may seek to vet that proposal through ISO-NE's stakeholder process and then have ISO-NE make that filing. As noted above, though, EMCOS does not allege that ISO-NE's central counterparty proposal fails to comply with the Commission's directives in Order Nos. 741 and 741-A, and having found ISO-NE to be in compliance with those orders, we need not address the merits of an alternate proposal.²⁹

16. Based upon the foregoing, we will deny rehearing.

The Commission orders:

EMCOS' request for rehearing of the September 2012 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ See *id.* P 30; see, e.g., *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (finding that under the FPA, as long as the Commission finds a methodology to be just and reasonable, that methodology "need not be the only reasonable methodology, or even the most accurate one"); cf. *City of Bethany v. FERC*, 727 F.2d 1131, 1136, 234 U.S. App. D.C. 32 (D.C. Cir. 1984) (when determining whether a proposed rate was just and reasonable, the Commission properly did not consider "whether a proposed rate schedule is more or less reasonable than alternative rate designs"); *Southwest Power Pool, Inc.*, 131 FERC ¶ 61,252, at P 124 & n.154 (2010); *California Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,282, at P 31 (2009); *Louisville Gas and Electric Co.*, 114 FERC ¶ 61,282, at P 29 (2006) ("the just and reasonable standard under the FPA is not so rigid as to limit rates to a 'best rate' or 'most efficient rate' standard. Rather, a range of alternative approaches often may be just and reasonable.").