

128 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER09-1424-000

ORDER ESTABLISHING PAPER HEARING

(Issued August 19, 2009)

1. In this order, the Commission establishes a paper hearing as to the justness and reasonableness of a determination made by ISO New England Inc. (ISO-NE) with regard to certain de-list bids submitted for the upcoming Forward Capacity Auction by Dominion Resources Services, Inc. (Dominion).¹

I. Background

A. Forward Capacity Market (FCM)

2. ISO-NE recently implemented a forward market for capacity, in which capacity resources compete to provide capacity to New England on a three-year-forward basis by participating in an annual Forward Capacity Auction. Providers whose capacity clears the Forward Capacity Auction acquire Capacity Supply Obligations, which they must fulfill three years later. Under the FCM Rules, all existing resources participate in the Forward Capacity Auction, although existing resources may submit de-list bids to opt out of the capacity auction.² ISO-NE held the first two Forward Capacity Auctions in 2008, and the third Forward

¹ In this order, the Commission is addressing only the issues relating to the de-list bids submitted by Dominion's Salem Harbor units. We will address other issues arising from ISO-NE's July 7, 2009 filing subsequently, as appropriate.

² See ISO-NE tariff, section III.13.2.3(c).

Capacity Auction is scheduled for October 5, 2009. Section III.13.8.1(a) of the FCM Rules requires ISO-NE to submit to the Commission a filing no later than 90 days prior to each Forward Capacity Auction. The information required to be filed includes the details of the resources accepted or rejected in the qualification process for participation in the Forward Capacity Auction. For de-list bids rejected by ISO-NE's Market Monitor (Market Monitor),³ the filing must include the market monitor's determination and alternate bid of the resource's net-risk adjusted going forward costs and opportunity costs (Going-Forward Costs).⁴ At that point, a resource may either elect to (a) use the Market Monitor's alternate de-list bid in the auction, or (b) challenge that alternate bid before the Commission prior to the Forward Capacity Auction.⁵ Pursuant to section III.13.8.1(b), any comments or challenges to ISO-NE's determinations must be filed with the Commission no later than 15 days from the date of the filing.

B. The Instant Filing

3. As required by the FCM market rules, on July 7, 2009, and as amended on July 30, 2009, ISO-NE made a filing setting forth, *inter alia*, the list of de-list bids that it rejected from participation in the October 5, 2009 Forward Capacity Auction. ISO-NE states that it rejected the static de-list bids submitted by the four resources at Dominion's Salem Harbor Station because the de-list bids were not consistent with those units' Going-Forward Costs. ISO-NE states that, in part, the Market Monitor rejected the de-list bid of each Salem Harbor unit because the unit sought to depreciate certain capital costs over a shorter period (three years) than the period that the Market Monitor considered appropriate (seven years or, in one case, fifteen years). ISO-NE also adjusted several line items by re-categorizing them from production costs to going forward costs.

4. ISO-NE explains that in addition to the costs that are specific to each Salem Harbor unit at Dominion's Salem Harbor Station, there are costs that are

³ The Market Monitor reviews bids from Existing Generating Capacity Resources that seek to permanently or statically de-list by bidding above 1.25 times the Cost of New Entry (CONE) and 0.8 times CONE, respectively, and new resources that seek to offer below 0.75 times CONE.

⁴ ISO-NE tariff, section III.13.1.2.3.2.1.1.

⁵ The resource may also choose to abandon its attempt to de-list, and participate in the auction as a price taker.

common to all four units,⁶ and each Salem Harbor unit included, in its Going-Forward Costs, all of the common costs of the Salem Harbor Station. ISO-NE states that this practice would be appropriate if only one of the Salem Harbor units receives a Capacity Supply Obligation and the Salem Harbor Station must be operated to support that single resource. If, however, multiple Salem Harbor units receive Capacity Supply Obligations, the resources would over-recover common costs. ISO-NE states that the Market Monitor was faced with the issue of how to appropriately treat the common costs of a station with multiple units, an issue that had not come up in previous auctions and was not addressed in the tariff. Therefore, the Market Monitor developed alternate bids intended to prevent the overpayment of common station costs for most two, three, and four unit combinations for the Salem Harbor Station.⁷ ISO-NE states that to develop the alternate bids, the Market Monitor determined the Going-Forward Costs of various multi-unit combinations based on information provided by Dominion.

5. In addition, ISO-NE calculated de-list bids for each of the Salem Harbor Station's resources (i.e., single unit bids) that include the Station's entire common costs. ISO-NE provides these alternate bids for each Salem Harbor unit, asserting that the Market Monitor considers these bids to accurately reflect that unit's Going-Forward Costs; however, they would only apply if that unit and no other Salem Harbor unit receives a Capacity Supply Obligation.⁸

⁶ ISO-NE states that these are "costs that must be incurred to operate the station but are independent of how many of the station's resources are operating [, including but not limited to] administrative costs, utilities, property and building maintenance, [and] property taxes." Filing at 12 n.41.

⁷ The combination rate price provided for different combinations of units range from \$4.404/kW-month to \$8.097/kW-month. *Id.* at 13.

⁸ For Salem Harbor Unit 1, the Market Monitor reduced the de-list bid from \$20.214/kW-month to \$19.755/kW-month, and for Salem Harbor Unit 2 the Market Monitor reduced the de-list bid from \$20.602/kW-month to \$20.035/kW-month. In addition, for both of these units, because these reduced bids are above the auction starting price of \$9.836/kW-month, ISO-NE stated that the alternate de-list bid for these two units would be \$9.836/kW-month. For Salem Harbor Unit 3, the Market Monitor reduced the de-list bid from \$6.720/kW-month to \$6.558/kW-month, and for Salem Harbor Unit 4 the Market Monitor reduced the de-list bid from \$7.644/kW-month to \$5.937/kW-month. Filing at 14-16.

6. ISO-NE states that these alternate bids will not be used in the Forward Capacity Auction, but would become the basis for capacity payments if more than one Salem Harbor resource is needed for reliability and acquires a Capacity Supply Obligation.

II. Notice of Filing, Motions to Intervene, Comments, Protests, Notices of Intervention and Answers

7. Notice of the filing was published in the *Federal Register*, with interventions and protests due on or before July 22, 2009.⁹ The New England Power Pool Participants Committee (NEPOOL), National Grid USA, Mirant Parties, NRG Companies, Dynegy Power Marketing Inc., Northeast Utilities Service Company, the United Illuminating Company, and Constellation Energy Commodities Group, Inc. filed timely motions to intervene. The Massachusetts Department of Public Utilities and Connecticut Department of Public Utility Control filed notices of intervention.

8. Dominion, the Massachusetts Office of Attorney General (Mass AG), and the Cape Light Compact (Cape Light) filed timely motions to intervene and comments or protests. Indicated Suppliers (PSEG Companies, NRG Companies and Mirant Companies) filed a timely motion for each member to intervene individually, and a limited protest. NSTAR Electric Company (NSTAR) filed a motion to intervene out of time and the Conservation Law Foundation (CLF) filed a motion to intervene out of time and protest.

9. ISO-NE filed an answer to the protests, and Dominion filed an answer specifically to the Mass AG's protest.

III. Discussion

A. Procedural Issues

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and the timely-filed unopposed motions to intervene serve to make the entities filing them parties to this proceeding. We will grant NSTAR's and CLF's motions to intervene out-of-time given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

⁹ 74 Fed. Reg. 36186 (2009).

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by ISO-NE and Dominion because they have provided information that has assisted us in our decision-making process.

B. Analysis

1. Dominion's Protest to the Filing

12. Dominion states that the Market Monitor erroneously determined that the de-list bids Dominion submitted for each of the Salem Harbor's units were inconsistent with the units' respective Going-Forward Costs, and that the proposed changes ISO-NE has made to Dominion's de-list bids will not allow Dominion the opportunity to recover its costs if any of the Salem Harbor Units are prevented from de-listing.

13. Dominion argues that the three year amortization period used in its submitted de-list bids accurately reflects the "useful economic life of the Salem Harbor Units."¹⁰ Dominion asserts that ISO-NE has not provided justification for the use of a seven year amortization period despite the Commission's ruling otherwise,¹¹ and that the "one-size-fits-all" application of amortization periods that the Market Monitor used for the Salem Harbor units is not warranted in this instance. Dominion states that the Commission has previously recognized that the Going-Forward Costs calculation is an approximation of actual future costs,¹²

¹⁰ Dominion protest at 8. Dominion states that the inputs to the determination of the useful economic life of these units include (1) the future physical status of the units; (2) current market conditions; and (3) future challenges impacting the life of the units, including the uncertain nature of future environmental and other regulatory restrictions.

¹¹ *Id.* at 9 fn.8, citing *ISO New England Inc.*, 120 FERC ¶ 61,087, at P 54 (2007) (Market Monitor "must provide support for its determination of the de-list bid as inconsistent with the existing generator's costs").

¹² Dominion protest at 10 fn.12, citing *ISO New England Inc.*, 125 FERC ¶ 61,102 at P 37 (2008) ("the purpose of [the Market Monitor's] review would be to ensure that bids *approximated* an existing resource's [Going-Forward Costs]," emphasis added by Dominion).

and both Dominion's and the Market Monitor's cost determination calculations fall within a range of reasonableness and thus should not have been rejected.

14. With respect to Salem Harbor Unit 4, Dominion argues that the Market Monitor's rejection of that de-list bid is flawed and confiscatory. Dominion states that the de-list bid for Salem Harbor's oil-fired generation unit is consistent with the unit's Going-Forward Costs and the alternate rate proposed by ISO-NE and the Market Monitor fails to take into consideration important assumptions when calculating the alternate bid. First, Dominion disputes the use of seven-year and, in one case, fifteen-year amortization periods for different capital cost items as opposed to Dominion's proposed three-year amortization period. Second, Dominion states that the Market Monitor "erred in zeroing out the Peak Energy Rents adjustment and infra-marginal revenues [the oil generation unit] could expect to receive in the ISO markets in its calculation of [Going-Forward Costs],"¹³ which Dominion states is a result of the Market Monitor's failure to recognize the recent operating history of the unit in the New England market.

15. Dominion also argues that ISO-NE's proposed alternate combination rates to the Salem Harbor units neither ensure that Dominion will recover its Going-Forward Costs nor ensure fairness with respect to market practices and regulatory standards. Dominion argues that the steps taken by ISO-NE and its Market Monitor with regard to the generation resources with multiple generating units are beyond the scope of the tariff, as ISO-NE acknowledges. Dominion states that ISO-NE is proposing to violate its tariff and the filed rate doctrine, in order to accomplish its preferred goal (i.e., the avoidance of overpayment).

16. Dominion further asserts that the combination rates proposed by ISO-NE, if accepted, should be revised to reflect the units' true Going-Forward Costs, as originally submitted. Dominion provides its own proposals as to the combination bids suggested by ISO-NE.¹⁴ Dominion further asserts that ISO-NE has not provided for every possible combination of resources, and that it should be ordered to do so; and that the question of what price will be applied if one or more Salem Harbor units receive Capacity Supply Obligations through the auction, and one or more Salem Harbor units receive Capacity Supply Obligations outside of the auction, should be resolved prior to the auction.

¹³ Dominion protest at 12.

¹⁴ Dominion's proposed rates for the combination rates range from \$4.728/kW-month to \$8.912/kW-month. *Id.* at 22.

17. Finally, Dominion urges the Commission to direct ISO-NE to make a new filing resolving the problem of how to account for costs common to multiple units in time to be applicable for the October 2010 Forward Capacity Auction.

2. **Relevant Portions of Indicated Suppliers' and Mass AG's Protests**¹⁵

18. Indicated Suppliers argue that Dominion correctly calculated its risk that any one of its units might be the "last unit standing," i.e., that only one of its units might be needed for reliability, and that all the common costs of the four units should therefore be recovered through payments for that unit. Indicated Suppliers assert that ISO-NE proposes improperly to create a two-tier pricing regime in which a unit may be forced to accept an after-the-fact price adjustment. Indicated Suppliers argue that ISO-NE should bring such a proposal that changes the market design to the region's stakeholder process and/or make a section 205 filing with the Commission. Additionally, Indicated Suppliers assert that the length of the amortization period should be decided by the resource, rather than the Market Monitor, given the directive in Order No. 719 that "mitigation tariff provisions should be as non-discretionary as possible."¹⁶

19. Mass AG argues that ISO-NE's filing is deficient because it fails to provide adequate information and supporting documentation with respect to the acceptance or rejection of a de-list bid. Mass AG requests that the Commission deny ISO-NE's request for confidential treatment of commercially sensitive information with respect to the notifications sent to resources that were not qualified to participate in the Forward Capacity Auction and the Market Monitor's rejection of de-list bids. Mass AG states that the lack of public documentation has made it difficult to analyze whether the resulting capacity payments result in just and reasonable rates. Mass AG is also concerned with the cost over-recovery that could result from Dominion's de-list bids and the impact that could have on Massachusetts ratepayers and requests that the Commission require an allocation that ensures there is no over-recovery.

¹⁵ See *supra* note 1.

¹⁶ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 at P 379 (2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37716 (July 29, 2009), FERC Stats. & Regs. 31,292 (2009).

3. ISO-NE's Answer to Dominion's Protest

20. ISO-NE states that, although its tariff does not provide a specific directive as to how to treat costs that are common to multiple resources, under its tariff the Market Monitor is required to review de-list bids to determine if those bids are consistent with a resource's Going-Forward Costs, and if the Market Monitor determines that the de-list bid is not consistent with those costs, it is required to develop an alternate de-list bid.¹⁷ It asserts that its development of an alternate bid to prevent the over-recovery of common costs is consistent with the role the Commission has assigned to the Market Monitor, and that, absent the development of such alternate bids, the Salem Harbor units' de-list bids would not be consistent with their Going-Forward Costs. ISO-NE points to the Commission's ruling in an earlier case that specifically required the Market Monitor to determine an appropriate bid level consistent with a resource's Going-Forward Costs.¹⁸

21. ISO-NE further states that the Commission should reject Dominion's suggestion that the Market Monitor develop alternate bids for every possible combination of Salem Harbor units. ISO-NE states that the Market Monitor did not include two combinations that included Salem Harbor Units 1 and 2, because the high priced de-list bids for these units mean that they would be allowed to leave the auction first and any reliability needs would be met by retaining Salem Harbor Units 3 and 4, which have lower de-list bids. However, according to ISO-NE, in the unlikely event that a unit combination that is not set forth in the filing clears in the auction, that unit combination will be addressed in ISO-NE's Forward Capacity Auction Results Filing.

22. ISO-NE explains that the Salem Harbor units will receive their Going-Forward Costs, as approved by the Commission, for units needed for reliability. ISO-NE further states that contrary to Dominion's arguments, the tariff does not dictate that the Market Monitor determine a "reasonable range" of Going-Forward Costs for a unit, but rather, requires the Market Monitor to determine whether a de-list bid is consistent with a unit's Going-Forward Costs.

23. ISO-NE further asserts that its recategorization of certain capital improvement costs was proper, and that its ruling regarding the depreciation

¹⁷ See ISO-NE tariff, sections III.13.1.2.3.2.1. and III.13.1.2.3.2.1.1.

¹⁸ ISO-NE answer at 11, *citing ISO New England Inc.*, 119 FERC ¶ 61,045, at P 120 and 120 FERC ¶ 61,087, at P 37 (2007).

period urged by Dominion is proper. ISO-NE explains that, in terms of the capital improvements identified by Dominion, it is reasonable to expect that those improvements would have an economic life greater than the three years proposed by Dominion. Therefore, ISO-NE states that the Market Monitor appropriately determined that a reasonable time horizon over which to depreciate most of these assets was a seven year period using the straight-line method and fifteen years for one project, the largest capital improvement project. ISO-NE argues that Dominion's business judgment that the resources may retire is not a sufficient basis to justify the use of a three-year amortization period.

24. ISO-NE also states that its determination with regard to the Peak Energy Rent and infra-marginal revenue calculations were reasonable. ISO-NE explains that, for most resources, infra-marginal rents reduce a unit's Going-Forward Costs as they earn revenue above their fuel and variable operating and maintenance costs that offset other going forward costs; however, Dominion's de-list bid for Salem Harbor Unit 4 estimated fuel and variable operating and maintenance costs that exceeded historical revenues, resulting in large negative infra-marginal revenues that increase the Going-Forward Costs. ISO-NE states that the Market Monitor determined that large negative infra-marginal revenues were not plausible. Also, ISO-NE explains that, by Dominion's inclusion of Peak Energy Rent in Going-Forward Costs, Dominion seeks guaranteed recovery of any Peak Energy Rent deduction, which is more favorable treatment than for any other capacity resource, and which is inconsistent with the tariff requirement that units retained for reliability must be subject to the same incentives as are all other capacity resources.

4. Commission Determination

25. ISO-NE rejected the Salem Harbor units' de-list bids due to the allocation of the station's common costs to each unit (the "common costs issue"). ISO-NE also rejected the de-list bids, in part, due to issues relating to each single unit, including the appropriate length of the amortization period and ISO-NE's treatment of the Peak Energy Rent and infra-marginal revenue issues (the "single unit issues"). We find that ISO-NE has failed to provide sufficient cost support for the Market Monitor's alternate bids with regard to both the common costs issue and the single unit issues.

26. Dominion, however, in its protest has similarly failed to support its assertions as to both the common costs issue and the single unit issues. In particular, ISO-NE has stated, without contradiction by Dominion, that if more than one of the Salem Harbor units receives a Capacity Supply Obligation on the

basis of the de-list bids submitted by those units, Dominion would over-recover its common costs, and Dominion has failed to demonstrate why, in that circumstance, such over-recovery would not be unjust and unreasonable.¹⁹ Therefore, pursuant to section 206, we will set for expedited paper hearing the question of what bids should be used for the de-list bids for the four Salem Harbor units in the October 5, 2009 Forward Capacity Auction.

27. Mindful of the needs of ISO-NE and its market participants to have a resolution to this matter on or before September 18, 2009,²⁰ we will require both ISO-NE and Dominion to submit statements to us within 7 calendar days of the date of this order. ISO-NE should explain and provide the cost support and calculations for its allocation of the common costs across the four Salem Harbor units. ISO-NE should also explain and provide the cost support and calculations on which it based its findings regarding the single unit issues, including the appropriate depreciation period to use, and the appropriate use of the Peak Energy Rent and infra-marginal revenue adjustments. ISO-NE should also address its decision to set the alternate de-list bids for Salem Harbor Units 1 and 2 at \$9.836/kW-month, rather than the Market Monitor's estimate of those units'

¹⁹ Dominion argues that ISO-NE has no authority to go beyond the bounds of its tariff and devise an *ad hoc* solution to the problem of how to allocate costs common to multiple units in the context of de-list bids in the Forward Capacity Auction. Whether ISO-NE does or does not have the authority to act here, the Commission does have that authority under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2006). See *Pennsylvania-New Jersey-Maryland Interconnection, et al.*, 92 FERC ¶ 61,282, at 61,955 (2000) ("Section 206 of the FPA confers the Commission with broad remedial authority to require [implementation of a] plan to remedy undue discrimination. . . . Under section 206, the Commission can determine just and reasonable rates and practices when faced with undue discrimination"). The Commission specifically made this point in its order accepting the FCM market rules, noting that if a generator challenges the Market Monitor's alternate de-list bid before the Commission, it "bears the attendant risk that if the Commission upholds the [Market Monitor's] determination *or otherwise concludes that the appropriate bid is below the generator's desired bid*, the generator will be required to participate in the auction at a bid level determined by the Commission to be just and reasonable." *ISO New England Inc.*, 120 FERC ¶ 61,087, at P 57 (2007) (emphasis added).

²⁰ ISO-NE made its filing on July 7, 2009. If the Commission takes no action, on September 18, 2009, the determinations made in the filing take effect.

Going-Forward Costs. Dominion should also submit a statement explaining, with cost support, its arguments as to these issues.

28. Within 14 calendar days of the date of this order, ISO-NE, Dominion and other parties may submit replies to ISO-NE's and Dominion's statements.

29. We also urge the parties to seek to resolve this matter through negotiation, and the Commission's Dispute Resolution Service is at their disposal to assist in arriving at a negotiated resolution.²¹

30. With regard to Mass AG's concern regarding the granting of confidential treatment to cost support information, we note that, in an order approving the FCM market rules, the Commission previously addressed this question and ruled that generators would be permitted to provide cost support information on a confidential basis.²² We note, however, that, after ISO-NE posts the de-list bids, "[p]ersonnel from state commissions will be provided confidential access to full information about posted Static De-list Bids . . . upon request, pursuant to section 3.3 of the ISO-NE Information Policy."²³

31. As to the concerns raised by Indicated Suppliers that any changes to the FCM tariff provisions should be made in a filing with the Commission by ISO-NE, and should be in compliance with Order No. 719, we intend that whatever resolution is arrived at in this order will apply solely to the question of the de-list bids submitted by the Salem Harbor units for the October 2009 Forward Capacity Auction. In order to ensure that this scenario is not repeated, we direct ISO-NE to work with its stakeholders to develop tariff provisions that explicitly address ISO-NE's treatment of similar common cost situations prior to the October 2010

²¹ The Dispute Resolution Service can be reached at 202-502-8702 or 877-FERCADR (337-2237).

²² *ISO New England Inc.*, 120 FERC ¶ 61,087, at P 61 (2007) ("[e]xisting generators are expected to provide to the Market Monitor support for its estimates of its costs in determining its de-list bid; however, that material information is provided confidentially with the expectation that it will not be made public. . . . We will therefore require ISO-NE, when making its informational filing . . . to include only that information on which the Market Monitor relied in making its determination. . . . in a manner that appropriately protects the confidentiality of that information").

²³ *Id.* P 12.

Forward Capacity Auction. We anticipate that new tariff provisions addressing the common costs issue will be filed in time to be implemented for the October 2010 Forward Capacity Auction, whether through a section 205 filing by ISO-NE and its stakeholders or a section 206 filing by ISO-NE.

The Commission orders:

(A) ISO-NE and Dominion are hereby required to file statements on the matters set for hearing, as discussed above, within 7 days of the date of this order.

(B) Parties may reply to the statements filed by ISO-NE and Dominion within 14 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.