



STATEMENT

Partial Dissent of Chairman Neil Chatterjee on ISO New England Inc.

Date: December 3, 2018

Docket Nos.: ER18-2364-000,
EL18-182-000

Today's order approves ISO New England Inc.'s (ISO-NE) proposed tariff revisions that provide an interim process for implementing cost-of-service agreements to address demonstrated fuel security concerns. As discussed in the Commission's July 2, 2018 Order,¹ ISO-NE's Operational Fuel Security Analysis established that ISO-NE's existing market-design framework is unable to ensure adequate fuel security for the region. I strongly supported that order's directive that ISO-NE develop a short-term cost-of-service agreement to retain resources needed for fuel security while also working towards long-term market-based approaches to better address those concerns. I am pleased that today's order approves an interim out-of-market process designed to mitigate regional fuel security concerns and I support many of the determinations in today's order as just and reasonable ways to approach various aspects of the interim process.

However, I do find two elements of the proposed tariff revisions to be unjust and unreasonable, and believe the majority's decision to accept them is unsupported by the record. First, I believe the price treatment provision - which would require ISO-NE to enter resources retained for fuel security purposes into the Forward Capacity Auction (FCA) as price takers - undermines the fundamental premise for implementing a process to support fuel security. Second, I find that the sunset provision improperly presumes that whatever market-based approach ISO-NE designs will resolve the region's fuel security concerns as soon as it is implemented.

The proposed price taker provision is unjust and unreasonable under the Federal Power Act because it exacerbates the very problem it purports to solve. As noted above, in the July 2 Order, the Commission found that ISO-NE's tariff fails to address specific regional fuel security concerns identified in the record.² In particular, the current Forward Capacity Market (FCM) construct does not value fuel security.³ In attempting to avoid over-procurement of capacity, however, ISO-NE's price taker proposal is likely to compound the very fuel security problem it sought to address. Indeed, ISO-NE *acknowledges* that its price taker proposal will result in lower FCA prices and fails to appropriately compensate resources that provide both resource adequacy and fuel security.⁴ These lower FCA prices will encourage marginal units - specifically those that otherwise would have received adequate capacity revenue if fuel security resources were not entered into the FCA as price takers - to retire. If these same units also are fuel-secure resources, then this price suppression could lead to a further decline in fuel security. The result could be a vicious cycle of additional out-of-market interventions for these retiring resources, further price suppression, and even more

¹ *ISO New England Inc.*, 164 FERC ¶ 61,003, at P 47 (2018) (July 2 Order).

² *Id.* P 49.

³ *Id.* P 53-54.

⁴ ISO-NE Transmittal at 4, 17.



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retirements, which, in turn, will only further diminish the region's fuel security.⁵ If the majority's concern is minimizing proliferation of fuel security agreements, then, considering these potential consequences, I find that accurately reflecting these resources' value in the market is a better way to alleviate any such concern in the long term.

Further, I find unpersuasive the majority's reliance on the fact that the Commission historically has allowed reliability must-run (RMR) units to be offered as price takers. RMR resources are distinguishable from resources retained for fuel security. They are necessary to address local reliability needs while other reliability solutions such as transmission upgrades are determined and implemented. Conversely, resources retained for fuel security are intended to address regional fuel security issues that may be more difficult to solve. Today's order acknowledges these differences, noting that, "unlike reliability must-run resources, the need for a fuel-secure resource is unlikely to be met by local or pool transmission upgrades."⁶ In addition, the order states that, "[a]s ISO-NE has previously explained, multiple factors, including infrastructure limitations and the lack of transmission development to accommodate large projects, have contributed to current regional fuel security concerns. While some of these individual factors may seem local in nature, the lack of fuel security nevertheless impacts the reliability of the entire region."⁷

The Commission addressed the differences between fuel security and RMR resources in the July 2 Order, explaining that fuel security resources do not need to be treated the same way in the FCM as reliability resources because there are material differences between cost-of-service agreements for local reliability needs and regional fuel security concerns. The Commission went on to explain that it may be reasonable for ISO-NE to either (1) offer fuel security resources into the FCM at a non-zero price that is still subject to mitigation by the IMM or (2) retain fuel security resources outside of the FCM construct.⁸

I believe the majority glosses over these differences, and ISO-NE disregards them, focusing primarily on the risk of over-procurement of capacity. While I recognize ISO-NE's concern that entering retained resources into the market at a non-zero price creates a risk of over-procurement, this case necessarily requires us to choose between, on the one hand, the risk of over-procurement and, on the other hand, the risk of exacerbating the fuel security problem by accelerating resource retirements. On balance, I find it more acceptable to risk over-procurement than to risk intensifying the significant fuel security concerns that these tariff revisions are intended to address. Consistent with the market principles discussed above and the evidence in the record, I would have preferred requiring ISO-NE to use the IMM's proxy bid price for fuel-secure resources. I believe that doing so would have ensured competitive pricing in the market.

Further, I note that the Commission previously rejected proposed PJM capacity market rules that would have allowed price-locked resources to offer as price takers because it would result in price suppression.⁹ Earlier this year, the

⁵ Although marginal fuel-secure resources are the likeliest to retire as a result of the price suppression that the majority is requiring, they are not the only ones that will be harmed by the price taker provision. Prices will be suppressed for all resources in the FCM.

⁶ *ISO New England Inc.*, 165 FERC ¶ 61,202 at P 54 (2018).

⁷ *Id.* P 55.

⁸ July 2 Order at P 56-57.

⁹ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 (2009); *PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,104 (2009); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 (2009).



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Court of Appeals for the D.C. Circuit remanded to the Commission its subsequent decision allowing price-locked resources in ISO-NE to offer into the FCM as price takers, finding that the Commission failed to “square its decision [accepting ISO-NE’s proposal] with past precedent.”¹⁰ The D.C. Circuit’s opinion excoriates the Commission for failing to adequately explain why its rationale in *PJM* does not apply to the scheme it accepted in ISO-NE.¹¹ Here, the majority does not even attempt to address the price suppressive effects of the price taker provision, relying instead on precedent regarding treatment of RMR agreements. But, as outlined above, these arguments are inapposite.

In addition, the proposed sunset provision should be rejected as unjust and unreasonable because it could allow the ISO-NE tariff to revert to a state without fuel security provisions, which the order simultaneously finds to be unjust and unreasonable. While I do not doubt ISO-NE’s resolve to develop an appropriate solution, history tells us that developing such programs frequently takes longer than anticipated and may require several iterations of filings before the Commission - and litigation in the courts - to achieve the desired results.¹² Moreover, as we noted in the July 2 Order, ISO-NE’s tariff is but one variable in addressing the region’s fuel security challenge - “even if the ISO-NE market sends a price signal indicating that investment is needed, the states have the authority to control whether, and which, infrastructure gets built in response to that price signal.”¹³ And even assuming *arguendo* that the Commission were to accept ISO-NE’s first attempt at a market-based proposal, the majority’s decision presumes that the problem will be solved *immediately* upon filing, as if the necessary investments and infrastructure developments happen instantaneously. Consequently, I would have rejected or, at a minimum, extended the term of the sunset provision.

¹⁰ *New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018).

¹¹ *Id.* 210-213.

¹² For example, ISO-NE’s development and implementation of sloped demand curves for capacity zones took several years. On January 24, 2014, the Commission ordered ISO-NE to file tariff revisions providing for a sloped demand curve by April 1, 2014 so it could be implemented prior to FCA 9 (see *ISO New England Inc.*, 146 FERC ¶ 61,038 (2014); *ISO New England Inc.*, 150 FERC ¶ 61,066, at P 7 (2015)). On April 1, 2014, ISO-NE filed a new system-wide demand curve, but asked the Commission for additional time to develop new demand curves for the separate capacity zones, committing to have those zonal demand curves in place for FCA 10, which request the Commission granted on May 30, 2014 (*ISO New England Inc.*, 147 FERC ¶ 61,173, at P 41 (2014)). Additional delays, requests for extensions and Commission directives ensued before the demand curves were eventually implemented for FCA 11 (see *ISO New England Inc.*, 153 FERC ¶ 61,338 (2015); *ISO New England Inc.*, 155 FERC ¶ 61,319 (2016)).

Indeed, some programs can take years to implement even as planned. For example, there was an approximately four-year gap between the time the Commission issued its May 2014 order directing ISO-NE to submit a modified version of its proposed “Pay-for-Performance” program (PFP) and full implementation of PFP on June 1, 2018. See *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,172 (2014), *petition for review dismissed*, *New England Power Generators Association, Inc. v. FERC*, 879 F.3d 1192 (D.C. Cir. 2018). During that interim period, ISO-NE implemented a series of out-of-market, temporary programs to help ensure reliability over the winter months. See *ISO New England Inc. and New England Power Pool Participants Committee*, 152 FERC ¶ 61,190 (2015), *reh’g denied*, 154 FERC 61,133 (2016); *ISO New England Inc. and New England Power Pool Participants Committee*, 148 FERC ¶ 61,179 (2014), *clarification granted*, 150 FERC ¶ 61,029 (2015), *reh’g granted*, 151 FERC ¶ 61,052 (2015); *ISO New England Inc. and New England Power Pool Participants Committee*, 144 FERC ¶ 61,204 (2013), *reh’g denied*, 147 FERC ¶ 61,026 (2014).

¹³ July 2 Order at P 54.



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In addition, the majority's decision to accept the price taker provision and the proposed sunset provision is not supported by the record.¹⁴ With respect to the price taker provision, as explained above, the evidence indicates that the price taker provision could *exacerbate* the problem the Commission is trying to solve. Even if one assumes that additional retirements of fuel secure resources are speculative at present, the price taker provision is likely to worsen the *very cause* of that problem - by weakening the price signal that already fails to value fuel security. Similarly, the sunset provision would cause the ISO-NE tariff to revert to a state without fuel security measures - a state that the order simultaneously concludes is unjust and unreasonable. The majority offers no explanation as to why such an outcome is just and reasonable, particularly in light of the non-trivial likelihood that the development of a permanent, market-based solution could take some time to implement.

For these reasons, I respectfully dissent in part.

¹⁴ See, e.g., *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Emera Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017); *S. Cal. Edison Co. v. FERC*, 717 F.3d 717, 181 (D.C. Cir. 2013).