

164 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Entergy Nuclear Power Marketing, L.L.C.

Docket No. IN18-5-000

ORDER APPROVING STIPULATION AND CONSENT AGREEMENT

(Issued July 25, 2018)

1. The Commission approves the attached Stipulation and Consent Agreement (Agreement) between the Office of Enforcement (Enforcement) and Entergy Nuclear Power Marketing, L.L.C. (ENPM). This order is in the public interest because the Agreement resolves on fair and equitable terms Enforcement's investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2018), into whether ENPM violated 18 C.F.R. §§ 35.41(a) and (b) and ISO New England Inc.'s (ISO-NE) Tariff, Market Rule 1 § III.13.6.1.1.1 ("Energy Market Offer Requirements") and § III.1.10.1A(d) ("Day Ahead Energy Market Scheduling") when ENPM: 1) failed to timely act in response to a natural gas pipeline notice restricting interruptible fuel transportation service, leading ENPM to have insufficient fuel to meet dispatch instructions at one gas-fired power plant, and 2) failed to timely update its open supply offer or otherwise notify ISO-NE of its potential inability to meet dispatch instructions after the notice was issued. ENPM agrees to pay a civil penalty of \$115,000 and to pay disgorgement of \$47,084, plus interest.

I. Facts

2. ENPM is a business unit of Entergy Corporation. Its primary responsibility is the operation of several of Entergy Corporation's facilities across the United States, including the Rhode Island State Energy Center (RISE) – a 575 MW two-unit combined-cycle natural gas generation facility. ENPM is a "Seller," and thus subject to 18 C.F.R. § 35.41 because it has authority to sell electricity at market-based rates.¹

¹ ENPM was granted market-based rate authority in *Entergy Nuclear Power Marketing, LLC*, Letter Order in Docket Nos. ER06-653-000 and ER06-653-001 (April 19, 2006).

3. Acting as the ISO-NE lead market participant for the RISE facility, ENPM offered RISE as a capacity resource in ISO-NE's Winter 2013-2014 capacity auction and was selected as a 575 MW capacity resource by ISO-NE. As a capacity resource, ENPM received monthly capacity payments, including \$1,459,610 from ISO-NE for December 2013. In exchange, RISE was required to each day offer the full 575 MW it had bid into the ISO-NE capacity auction in ISO-NE's Day-Ahead market and to provide the associated electricity offered if RISE was dispatched.

4. On the morning of December 26, 2013, ENPM submitted an offer for RISE in ISO-NE's Day-Ahead market to provide electricity on December 27, 2013. Enforcement determined in its investigation that ENPM directed its fuel management agent to rely on fuel drawn from ENPM's Operational Balancing Account (OBA) maintained with the pipeline interconnected with RISE, and failed to amend or alter its plan following the publication of a notice from said pipeline limiting the use of the OBA. As a result, ENPM failed to secure fuel sufficient to meet its dispatch obligation.

5. Enforcement's investigation further determined that despite becoming aware of RISE's likely inability to operate at approximately 9:30 PM on December 26, 2013, ENPM waited until 5:31 AM on December 27, 2013 to contact ISO-NE about the issue.

II. Stipulation and Consent Agreement

6. Enforcement and ENPM have resolved Enforcement's investigation by means of the attached Agreement.

7. As set forth in the Agreement, ENPM stipulates to the facts but does not admit violations of 18 C.F.R. §§ 35.41(a) and (b) and ISO-NE's Tariff, Market Rule 1 § III.13.6.1.1.1 ("Energy Market Offer Requirements") and § III.1.10.1A(d) ("Day Ahead Energy Market Scheduling").

8. ENPM agrees to pay a civil penalty of \$115,000 and to pay disgorgement of \$47,084, plus interest.

III. Determination of the Appropriate Sanctions and Remedies

9. Pursuant to Section 316A of the FPA, the Commission may assess a civil penalty of up to \$1,000,000 for each day that a violation continues.² In determining the

² 16 U.S.C. § 825o-1 (2012). The current inflation-adjusted civil penalties of the Commission are \$1,238,271 per day. 18 C.F.R. § 385.1602(d) (2018).

appropriate remedy for ENPM's violations, Enforcement considered the factors described in the Revised Policy Statement on Penalty Guidelines.³

10. Enforcement determined that ENPM's violations were the result of a failure to exercise sufficient diligence to ensure that RISE was able to meet its dispatch obligations. Other factors considered in reaching the proposed penalty included: the lack of any intent to commit the violations; steps ENPM has taken to ensure that repeat violations will not occur; the absence of significant market harm caused by the violations; ENPM's full cooperation with the investigation; and ENPM's resolution of this investigation without a hearing.

11. The Commission concludes that the Agreement is a fair and equitable resolution of the matters concerned and is in the public interest, as it reflects the nature and seriousness of ENPM's conduct. The Commission finds that the civil penalty contained in the Agreement is warranted and consistent with the Revised Policy Statement on Penalty Guidelines.⁴

The Commission orders:

The attached Stipulation and Consent Agreement is hereby approved without modification.

By the Commission.

(S E A L)

Kimberly D. Bose
Secretary.

³ *Enforcement of Statutes, Orders, Rules, and Regulations*, Revised Policy Statement on Penalty Guidelines, 132 FERC ¶ 61,216 (2010).

⁴ *Id.*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Entergy Nuclear Power Marketing, LLC

Docket No. IN18-5-000

STIPULATION AND CONSENT AGREEMENT

I. Introduction

1. The Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) and Entergy Nuclear Power Marketing, LLC (ENPM), enter into this Stipulation and Consent Agreement (Agreement) to resolve a non-public preliminary investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2018) (Investigation). The Investigation examined whether ENPM violated 18 C.F.R. §§ 35.41(a) and (b) and ISO New England Inc.'s (ISO-NE) Tariff, Market Rule 1 § III.13.6.1.1.1 and § III.1.10.1A(d) by: 1) failing to timely act in response to a natural gas pipeline notice restricting interruptible fuel transportation service, leading ENPM to have insufficient fuel to meet dispatch instructions at one gas-fired power plant, and 2) failing to timely update its open supply offer or otherwise notify ISO-NE of its potential inability to meet dispatch instructions after the notice was issued.

2. ENPM stipulates to the facts in Section II, but neither admits nor denies the alleged violations. In order to fully resolve this matter, ENPM agrees to: (a) disgorge \$47,084 to ISO-NE, plus interest, and (b) pay a civil penalty of \$115,000 to the United States Treasury.

II. Stipulated Facts

Enforcement and ENPM hereby stipulate and agree to the following facts:

a. Subject

3. ENPM is a business unit of Entergy Corporation and was the lead market participant for the Rhode Island State Energy Center (RISE) – a 575 MW two-unit combined-cycle natural gas generation facility owned by ENPM's affiliate, Entergy Rhode Island State Energy, L.P. It is a wholesale power marketer that serves as the market participant for affiliated power generators in organized capacity and energy markets and also provides certain support services to affiliated generators, including the procurement of fuel and transportation services. ENPM is a "Seller" under 18 C.F.R. § 35.41 because it has authority from the Commission to sell electricity at market-based

rates.¹ In December 2013, Entergy Corporation had approximately 13,000 employees.

B. Facts Underlying Alleged Wrongdoing

4. Acting as the ISO-NE lead market participant for the RISE facility during December 2013, ENPM offered RISE as a capacity resource in ISO-NE's Winter 2013-2014 capacity auction and it was selected as a 575 MW capacity resource. As a capacity resource, ENPM received a capacity payment of \$1,459,610 from ISO-NE for December 2013. Consistent with its capacity award, RISE was obligated each day to offer all of the energy associated with the RISE facility's capacity of 575 MW in ISO-NE's Day-Ahead energy market and to provide that energy if ISO-NE dispatched RISE.

5. During December 2013, ENPM provided market participant and fuel and transportation procurement services for RISE. ENPM contracted with a purchasing and management agent to assist it in procuring fuel and fuel transportation services for RISE. Transportation for fuel used by RISE is provided by Tennessee Gas Pipeline Company, L.L.C. (Tennessee). At that time, ENPM had a contract for firm transportation service with Tennessee for up to 45,000 Dth per day. Each day gas was transported, ENPM would take more or less gas than scheduled with Tennessee, the net balance of which would be attributed to ENPM's Operational Balancing Account (OBA). At the end of each month, the OBA balance would be reduced to zero through a cash-out mechanism. From December 1 through December 25, 2013, ENPM had accumulated a positive OBA balance of over 80,000 Dth. This was RISE's largest OBA balance ever. RISE would end the month with its highest OBA surplus ever, which was nearly 15,000 Dth more than its next highest month-ending OBA surplus.

6. On December 18, 2013, Tennessee issued a "Critical" notice to shippers lifting a prior operational flow order, but it anticipated potential disruptions to future service provided on the pipeline. Thus, the notice stated that it was "imperative that customers continue to match physical flow with scheduled volumes" This notice was provided both to ENPM and its fuel management agent.

7. On the morning of December 26, 2013, ENPM offered RISE into ISO-NE's Day-Ahead energy market to provide energy on December 27, 2013. At approximately 1:00 PM on December 26, RISE received a commitment for approximately 9,900 MWh. ENPM determined that RISE would require a total of 71,540 Dth of gas to meet its commitment. ENPM directed its fuel management agent to schedule firm transportation on Tennessee for some of this needed fuel and to rely upon unscheduled gas taken under ENPM's OBA for the remainder. ENPM planned to use approximately 36,540 Dth of

¹ ENPM was granted market-based rate authority in *Entergy Nuclear Power Marketing, LLC*, Letter Order in Docket Nos. ER06-653-000 and ER06-653-001 (April 19, 2006).

OBA balancing gas to meet RISE's commitment for December 27.

8. At 2:15 PM on December 26, while ENPM was still considering its fuel procurement strategy for December 27, Tennessee issued a notice. This notice provided for "Restrictions for 12-27-13" effective at 9:00 that evening for December 27, 2013. Among other restrictions, the notice stated, "Downstream of STA 261 – Restricted through 100% of Payback. . . ." The notice concluded, "If you have any questions, please contact your Scheduler." ENPM and its fuel management agent contemporaneously received the notice by email and the notice was publicly available on the pipeline's website. STA 261 is a compressor station in Agawam, Massachusetts, and RISE is downstream of STA 261. Neither ENPM nor its procurement agent contacted Tennessee to discuss the notice and ENPM did not alter its fuel procurement strategy in response to this notice.

9. At approximately 9:30 PM on December 26, Tennessee called the RISE control room. On the call, Tennessee warned ENPM regarding potential gas unavailability for the next day.

10. Although gas delivery pressures were low, at 2:45 AM on December 27, ENPM began to operate RISE. RISE not only took gas volumes it had scheduled from Tennessee, but attempted to pull additional gas volumes from the pipeline. ENPM was able to operate RISE for about an hour at levels consistent with its offer and ramp rate. However, pipeline pressure to RISE continued to drop and would continue to do so over the ensuing two hours.

11. During this time, ENPM did not contact ISO-NE. However, at 5:05 AM on December 27, ENPM contacted Tennessee and confirmed that additional gas supplies could not be provided and that RISE would be restricted to scheduled volumes. At 5:31 AM, RISE informed ISO-NE, for the first time, that the plant was incapable of fulfilling its day-ahead obligation. Operators stated that RISE could operate at a reduced 310 MW level. ISO-NE dispatchers agreed to allow RISE to operate at the reduced level during the remainder of the December 27 operating day. ISO-NE dispatched other generators in response to ENPM's failure to meet its capacity supply obligation.

12. Enforcement subsequently opened a preliminary, non-public investigation into ENPM's alleged violations.

III. Violations

A. Tariff and 18 C.F.R. § 35.41(a) Violations

13. Section 35.41(a) provides, in relevant part, that "[w]here a Seller participates in a Commission-approved organized market, Seller must operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in

a manner that complies with the Commission-approved rules and regulations of the applicable market.”

14. ENPM was bound by ISO-NE’s Tariff, Market Rule 1 § III.13.6.1.1.1 and § III.1.10.1A(d), which the Commission interpreted in 2013 in *New England Power Generators Ass’n, Inc. v. ISO New England, Inc.* as creating a “strict performance obligation” that can only be excused due to the physical unavailability of the generator.² On rehearing, the Commission clarified this obligation by stating that “the Tariff does not require capacity resources to guarantee that fuel will be available; rather, it requires them to purchase the fuel and transportation necessary to satisfy a Capacity Supply Obligation if the fuel and transportation are available. This finding neither alters the performance obligations the Tariff imposes on capacity resources nor expands the limited circumstances under which the Tariff may excuse non-performance.”³

15. Under the Tariff, ENPM had a strict performance obligation. ENPM was on notice by December 18, 2013 that pipeline transportation might not be available in the coming weeks and that it was “imperative that customers [on Tennessee] continue to match physical flow with scheduled volumes.” Nevertheless, ENPM elected a fuel procurement strategy that relied upon unscheduled OBA gas drawn from Tennessee in addition to scheduled volumes.⁴ In fact, the OBA volumes upon which ENPM was relying were substantially in excess of the average amounts ENPM typically utilized. In these circumstances, ENPM should have been particularly watchful for changes to Tennessee’s system that would make such reliance impractical.

16. Tennessee’s December 26 notice provided that unscheduled gas, including OBA gas, would be unavailable at RISE’s location.⁵ ENPM knew or should have known that it had to adjust its fuel procurement strategy following the pipeline’s December 26 notice.

²*New England Power Generators Ass’n, Inc. v. ISO New England, Inc.*, 144 FERC ¶ 61,157 at P 47 (2013).

³*New England Power Generators Ass’n, Inc. v. ISO New England, Inc.*, 145 FERC ¶ 61,206 at P 20 (2013).

⁴ An OBA is not intended to be used as a source of supply and large OBA balances are discouraged by monthly cash-out requirements at rates that are generally viewed as unfavorable compared to the market price for natural gas. *Tennessee Gas Pipeline Co.*, 56 FERC ¶ 61463, 62626 (1991) (finding justified pipeline’s OBA cash-out provision designed to “prevent customers from using the OBA as a source of supply”).

⁵ The notice’s reference to “downstream of STA 261,” refers to a compressor station from which RISE is located downstream. And, the notice’s reference to “payback” gas includes gas sought to be obtained via an OBA.

While ENPM was not obligated to purchase or utilize firm transportation service, it was required to take all reasonable steps to ensure that RISE would be able to operate when dispatched.

17. ENPM did not use reasonable diligence, however.⁶ There was nothing exceptional about the amount of fuel required to fulfill the dispatch instruction, or any other factor that necessitated use of the OBA. Yet, ENPM failed to exercise sufficient diligence to ensure that its fuel procurement strategy was viable following the pipeline's notices. "[A]n unwillingness to procure fuel at the prevailing price" does not qualify as physical unavailability sufficient to excuse a resource's non-performance.⁷ Tennessee had the ability to supply additional fuel to RISE had ENPM timely scheduled such transportation. Had ENPM exercised reasonable diligence in response to the pipeline's December 26 notice, it could have scheduled and nominated gas sufficient to fulfill its day-ahead commitment.

18. Enforcement concludes that ENPM's resulting failure to perform is a violation of ISO-NE's Tariff, Market Rule 1 § III.13.6.1.1.1 and § III.1.10.1A(d) and, thus, a violation of 18 C.F.R. § 35.41(a).

B. 18 C.F.R. § 35.41(b) Violation

19. Section 35.41(b) provides, in relevant part, that "[a] Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences."

20. ENPM violated 18 C.F.R. § 35.41(b) by failing to timely inform ISO-NE that RISE was likely unable to operate and thus would be incapable of meeting its Day-Ahead obligations. ENPM should have been aware as early as 2:15 PM on December 26 (when it received the pipeline's notice) that RISE would be unable to rely on OBA gas. In any event, ENPM was actually aware of the same by the time of the December 26 9:30 PM call with Tennessee. This likely inability to operate was confirmed again by ENPM operators when they noticed that pressure levels were low at 2:45 AM on December 27. Yet, ISO-NE dispatchers were not contacted by ENPM about the facility's changed circumstances until 5:31 AM on December 27.

⁶ In fact, ENPM's decision to draw large unscheduled volumes of natural gas from Tennessee may have contributed to Tennessee's operational problems on December 27 by further reducing gas pressures on the pipeline.

⁷ 144 FERC ¶ 61,157 at P 58.

21. Once ENPM learned that RISE would likely be incapable of actually producing the amount of energy stated in its supply offer, that open supply offer became inaccurate. At the very least, ENPM was aware for several hours that, barring an improbable reversal of events, RISE could not produce the amount of energy stated in its supply offer. Because ENPM knew by 9:30 PM on December 26 (at the latest) that transportation was unlikely to be available the following day, ENPM should have taken steps at that time to notify ISO-NE of RISE's likely inability to operate. Further, having failed to contact ISO-NE earlier about the likely erroneous supply offer, ENPM should have contacted ISO-NE at 2:45 AM on December 27 regarding RISE's likely inability to operate as operators continued to observe low pressure on the pipeline to RISE.

22. ISO-NE dispatches generation based upon anticipated load and generators that fail to provide correct, timely supply information to ISO-NE can cause reliability problems. ENPM's failure to notify ISO-NE did not cause reliability problems in this instance.

23. Taken as a whole, ENPM's failure to timely contact ISO-NE is not excusable here because ENPM did not act with the due diligence required by 18 C.F.R. § 35.41(b).

IV. Additional Factors

24. Enforcement determined that ENPM's violation resulted in a quantifiable market harm equivalent to a proportionate amount of ENPM's monthly capacity payment, namely \$47,084.

25. Enforcement determined that ENPM's violations were not intentional, fraudulent, or manipulative, but were instead the result of a failure to exercise adequate diligence in reviewing the pipeline's notice and contacting ISO-NE.

26. ENPM fully cooperated in Enforcement's Investigation, and Enforcement found ENPM's compliance program adequate.

V. Remedies and Sanctions

27. In conjunction with settling any and all civil and administrative disputes arising out of, related to, or connected with Enforcement's Investigation, ENPM agrees with the facts as stipulated in Section II of this Agreement, but neither admits nor denies the violations described in Section III of this Agreement. ENPM and Enforcement agree to the following:

A. Disgorgement and Civil Penalty

28. ENPM agrees to pay disgorgement of \$47,084 plus interest calculated pursuant to section 35.19a of the Commission's regulations to ISO-NE, and a civil penalty of \$115,000 to the United States Treasury, within ten days of the Effective Date of this

Agreement.

VI. Terms

29. The Effective Date of this Agreement (Effective Date) shall be the earliest date on which the Commission has issued an order approving this Agreement without material modification or conditions. When effective, this Agreement shall resolve the matters specifically addressed herein as to ENPM and any affiliated entity, its agents, officers, directors, and employees, both past and present, and any successor in interest to ENPM.

30. Commission approval of the Agreement without material modification shall release ENPM and any successor or affiliate, and forever bar the Commission from holding ENPM and any successor or affiliate, and their respective agents, officers, directors, and employees, past and present, liable for any and all administrative or civil claims, arising out of the conduct addressed and stipulated to in this Agreement.

31. ENPM's failure to (a) timely make the disgorgement and civil penalty payments set forth in Section V above, or (b) comply with the other provisions of this Agreement, shall be deemed a violation of a final order of the Commission issued pursuant to the Federal Power Act, 16 U.S.C. § 792, *et seq.* and may subject ENPM and any successor companies to additional action under the enforcement and penalty provisions of the Federal Power Act.

32. If ENPM fails to make the disgorgement and civil penalty payments set forth in Section V above by the deadlines set forth in this Agreement, interest shall begin to accrue pursuant to the Commission's regulations at 18 C.F.R. § 35.19(a)(2)(iii)(A) (2018) from the date each payment is due, in addition to any other enforcement action and penalty that the Commission or a court may take or impose.

33. The Agreement binds ENPM and its agents, successors, and assignees. The Agreement does not create any additional or independent obligations on ENPM, or any affiliated entity, its agents, officers, directors, or employees, other than the obligations identified in the Agreement.

34. The signatories to this Agreement agree that they enter into the Agreement voluntarily and that, other than the recitations set forth herein, no tender, offer, or promise of any kind by any member, employee, officer, director, agent, or representative of Enforcement or ENPM has been made to induce the signatories or any other party to enter into the Agreement.

35. Notwithstanding anything to the contrary herein, unless the Commission issues an order approving this Agreement in its entirety and without material modification, the Agreement (including, without limitation, the disgorgement, civil penalty, and any and all stipulations and representations) shall be null and void and of no effect whatsoever, and

neither Enforcement nor ENPM shall be bound by any provision or term of this Agreement, unless otherwise agreed to in writing by Enforcement and ENPM.

36. In connection with the civil penalty provided for herein, ENPM agrees that the Commission's order approving this Agreement without material modification shall be a final and unappealable order assessing a civil penalty under section 316A(b) of the Federal Power Act, 16 U.S.C. § 825o-1(b). ENPM waives findings of fact and conclusions of law, rehearing of any Commission order approving this Agreement without material modification, and judicial review by any court of any Commission order approving this Agreement without material modification.

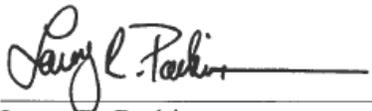
37. The Agreement may be modified only if in writing and signed by Enforcement and ENPM. No modification will be effective unless approved by the Commission.

38. The undersigned warrants that he or she is an authorized representative of ENPM, is authorized to bind ENPM, and accepts the Agreement on ENPM's behalf.

39. The undersigned representative of ENPM affirms that he or she has read the Agreement, that all of the matters set forth in the Agreement are true and correct to the best of his or her knowledge, information and belief, and that he or she understands that the Agreement is entered into by Enforcement in express reliance on those representations.

40. This Agreement is executed in duplicate, each of which so executed shall be deemed to be an original.

ACCEPTED AND AGREED TO:



Larry R. Parkinson
Director, Office of Enforcement
Federal Energy Regulatory Commission

Date: *May 16, 2018*



Barrett E. Green
President and Chief Financial Officer
Entergy Nuclear Power Marketing, LLC

Date: *May 9, 2018*