

165 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

ISO New England Inc. and
New England Power Pool
Participants Committee

Docket No. ER19-169-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued December 20, 2018)

1. On October 23, 2018, pursuant to section 205 of the Federal Power Act (FPA), ISO New England Inc. (ISO-NE) and the New England Power Pool Participants Committee (NEPOOL) (together, the Filing Parties) jointly filed proposed revisions to ISO-NE's Transmission, Markets, and Services Tariff (Tariff). The proposed Tariff changes remove provisions requiring ISO-NE to submit a demand bid into the third annual reconfiguration auction on a capacity resource's behalf when ISO-NE expects that the resource will not achieve commercial operation before the relevant capacity commitment period, and instead allow ISO-NE to levy a monthly Failure to Cover Charge Rate on resources that do not demonstrate the ability to meet their full capacity supply obligation (CSO) during the capacity commitment period. As discussed below, we accept the filing, to become effective December 24, 2018, as requested.

I. Background

2. As part of its Forward Capacity Market, ISO-NE conducts an annual Forward Capacity Auction (FCA) in which resources compete to obtain a CSO to provide capacity for a one-year capacity commitment period that begins roughly three years after the FCA concludes.

3. ISO-NE establishes milestones for new resources awarded a CSO in the FCA to ensure they will be available in time for the corresponding capacity commitment period.¹

¹ ISO-NE Tariff, § III.13.1.1 (56.0.0).

Specifically, a new resource must provide ISO-NE with a critical path schedule that specifies when it will achieve major development milestones (e.g. permits, equipment delivery, site construction, commercial operation), and the resource must demonstrate that it will achieve commercial operation before the relevant capacity commitment period.²

4. Resources that fail to achieve commercial operation on time are expected to “cover” their CSO by purchasing replacement capacity through one of the annual reconfiguration auctions held during the three-year period prior to the relevant capacity commitment period or through a bilateral trade.³ Under the current Tariff, if a resource does not fully cover its CSO before the third annual reconfiguration auction (which occurs three months before the capacity commitment period begins), and ISO-NE expects that it will not be able to satisfy its CSO, ISO-NE will submit a mandatory demand bid into the third annual reconfiguration auction on the resource’s behalf for all months of the capacity commitment period.⁴ The bid is entered at the FCA Starting Price,⁵ which is equal to the higher of the estimated cost of new entry (CONE) and 1.6 multiplied by net CONE (i.e., 1.6 multiplied by CONE minus estimated revenues outside the capacity market).⁶ The FCA Starting Price for the upcoming 13th FCA is \$13.05/kW-month.⁷

5. If ISO-NE expects that a new resource will achieve commercial operation by the capacity commitment period (and thus does not enter a mandatory annual reconfiguration auction demand bid on the resource’s behalf), but the resource fails to meet its CSO during the capacity commitment period, the resource faces the risk of paying penalty

² *Id.*, § III.13.3 (15.0.0).

³ *Id.*, § III.13.3.4 (15.0.0).

⁴ *Id.*

⁵ The FCA Starting Price is the maximum price allowable in ISO-NE’s System-Wide Capacity Demand Curve. *See id.* § III.13.2.2.1 (49.0.0).

⁶ *Id.* § III.13.2.4 (49.0.0).

⁷ Transmittal Letter at 5.

charges referred to as a Capacity Performance Payment Rate.⁸ However, these charges only apply during defined capacity scarcity conditions,⁹ which may not occur.¹⁰

II. ISO-NE Filing

6. ISO-NE states that the key objectives of its proposed Tariff revisions are to shift the responsibility to determine whether to cover a CSO from ISO-NE to the resource owner, and provide reasonable financial incentives for resource owners to cover their CSOs when they do not expect to fulfill them.¹¹ Specifically, the filing (1) removes ISO-NE's obligation to enter a mandatory demand bid in the third annual reconfiguration auction on a delayed resource's behalf; (2) removes language giving ISO-NE the right to terminate the CSO of a new resource that fails to take actions to cover its CSO for a portion of the capacity commitment period (ISO-NE will still be able to terminate the resource for other reasons);¹² (3) defines a standard method to measure a resource's monthly unproven CSO; and (4) establishes a Failure to Cover Charge Rate that penalizes resources in proportion to their monthly unproven CSO during the capacity commitment period.¹³

7. ISO-NE explains in its testimony that, under the proposed revisions, a resource's monthly unproven CSO quantity is calculated as the difference between its monthly CSO quantity and its Maximum Demonstrated Output,¹⁴ which is equal to its maximum metered output over a period beginning six years prior to the start of the applicable capacity commitment period and ending with the most recently completed calendar month in the capacity commitment period, including all prior months in the capacity

⁸ The rate escalates from \$2,000/MWh for the period June 1, 2018 – May 31, 2021, to \$3,500/MWh for the period June 1, 2021 – May 31, 2024, to \$5,455/MWh for June 1, 2024 and thereafter. *See* ISO-NE Tariff, § III.13.7.2.5 (56.0.0).

⁹ *Id.* § III.13.7.2.1 (56.0.0) (defining capacity scarcity condition).

¹⁰ ISO-NE Filing, Attachment (Testimony of Ryan McCarthy) at 19 (McCarthy Test.).

¹¹ *Id.* at 12-13.

¹² *See* § III.13.3.4A of the proposed Tariff revisions.

¹³ Transmittal Letter at 6.

¹⁴ For definition, *see* § III.13.3.4(b) of the proposed Tariff revisions.

commitment period.¹⁵ ISO-NE states that the Failure to Cover Charge Rate¹⁶ in \$/kW-month is calculated in advance of the capacity commitment period and held constant for the duration of the period; it is calculated by executing a second clearing of the third annual reconfiguration auction a “charge rate run” with the total unproven CSO quantity across all resources, as of the completion of the third annual reconfiguration auction, entered as a demand bid at the FCA Starting Price.¹⁷ The proposed total charge imposed on a resource with an uncovered CSO during a month of the capacity commitment period would be its monthly unproven CSO quantity in MW multiplied by the Failure to Cover Charge Rate in \$/kW-month for the capacity commitment period.¹⁸ To avoid these failure to cover charges, a resource would have to either demonstrate its full CSO, or cover the portion of its CSO it cannot demonstrate.¹⁹

8. The Filing Parties state that the proposed revisions improve the existing market rules in two main ways, particularly with respect to the treatment of new, non-commercial capacity resources. First, the revised rules eliminate ISO-NE’s role in assessing whether a resource will be ready to satisfy its CSO. Instead, the resource owner itself retains the authority to exercise its judgment as to whether a resource will be ready to satisfy its CSO, and whether and at what price to seek to cover the CSO. Second, the revised rules eliminate the risk associated with having ISO-NE submit a mandatory demand bid in an annual reconfiguration auction that can result in a resource’s CSO being transferred at a high price for the entire capacity commitment period. Instead, resource owners themselves determine whether, at what price, and for how long to seek to cover for a non-performing resource on a monthly or annual basis.²⁰

¹⁵ McCarthy Test. at 23-24.

¹⁶ For definition, *see* § III.13.3.4(b) of the proposed Tariff revisions.

¹⁷ Note that for capacity commitment periods beginning prior to June 1, 2022, the Failure to Cover Charge Rate is simply set equal to the higher of the FCA clearing price and any annual reconfiguration auction clearing price for that capacity commitment period. The third annual configuration auction is not re-executed. *See* McCarthy Test. at 33.

¹⁸ *See* § III.13.3.4 of the proposed Tariff revisions.

¹⁹ McCarthy Test. at 23-24.

²⁰ Transmittal Letter at 5.

9. The Filing Parties request a December 24, 2018 effective date for the proposed tariff revisions.²¹ With this effective date, the proposed Failure to Cover Charge Rate would apply to existing resources²² that fail to demonstrate the ability to fully meet their CSO and to any new resources with CSOs beginning with the June 1, 2019 capacity commitment period.

III. Notice of Filing and Responsive Pleadings

10. Notice of the filing was published in the *Federal Register*, 83 Fed. Reg. 54,733 (2018), with interventions and protests due on or before November 13, 2018. Energy New England, LLC, Consolidated Edison Energy, Inc., PSEG Companies (PSEG)²³, Dominion Energy Services, Inc., National Grid, Eversource Energy Service Company, and Northeast Massachusetts Consumer-Owned Systems (NEMACOS) filed timely motions to intervene.²⁴ On November 13, 2018 and November 14, 2018, respectively, PSEG filed a comment, and NEMACOS filed a protest. On November 28, 2018, ISO-NE and NEPOOL filed answers to PSEG's and NEMACOS' pleadings.

A. PSEG Comments

11. PSEG supports the filing but asks the Commission to accept it with “staggered effective dates” (i.e., a transition period to incorporate a three-month grace period beginning in June 2019, June 2020, and June 2021 for resources awarded CSOs in the FCAs associated with those capacity commitment periods).²⁵ PSEG argues that allowing the filing to take effect December 24, 2018, as ISO-NE requests, will unjustly and unreasonably impose new and unexpected risks and costs on resources that obtained

²¹ *Id.* at 1.

²² McCarthy Test. at 24-26.

²³ PSEG Companies consists of PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Power Connecticut LLC. The PSEG Companies are each wholly owned, direct and indirect subsidiaries of Public Service Enterprise Group Incorporated.

²⁴ NEMACOS comprises the following load serving entities: Belmont Municipal Light Department, Concord Municipal Light Plant, Town of Danvers Electric Division, Georgetown Municipal Light Department, Groveland Electric Light Department, Merrimac Municipal Light Department, Middleton Electric Light Department, Reading Municipal Light Department, Rowley Municipal Lighting Plant, and Wellesley Municipal Light Plant.

²⁵ PSEG Comments at 8-9.

CSOs under the existing rules. PSEG states that its proposed transition period will allow resources that have already cleared prior auctions to maintain their expected risk profiles and not be negatively impacted by the proposed Tariff revisions. PSEG further argues that immediately applying the new rules will violate the filed rate doctrine by modifying fixed rates set by the FCAs for June 2019, June 2020, and June 2021, and retroactively revising the rules and altering the final rates determined in those auctions.

12. PSEG states that its Bridgeport Harbor 5 project, which has an expected commercial operation date of June 1, 2019, is the largest resource affected by the proposed rule.²⁶ PSEG contends that, if it determines after April 24, 2019 that there will be a delay in the commercial operation date, it will have no opportunity to mitigate the risk because the monthly reconfiguration auction deadline will have passed, which will eliminate the opportunity to cover the CSO.²⁷ PSEG argues that, if the revised rules are implemented under ISO-NE's proposed schedule, they will not provide a way for PSEG, or similarly situated new entrants, either to price or mitigate such unexpected risk during this time period.²⁸ PSEG states that, with a scheduled commercial operation date of June 1, 2019, Bridgeport Harbor 5 does not have the capability to alter its construction schedule should unknown issues arise during the final commissioning of this project, asserting that this risk was analyzed and priced under the current CSO cover provisions. PSEG argues that, by implementing these Tariff revisions while resources with CSOs are under construction, ISO-NE is changing the risk profile of these projects without providing for any flexibility to manage these new, unexpected risks.²⁹

13. PSEG also contends that modifying the proposed effective date would constitute a minor modification under *NRG*.³⁰

²⁶ *Id.* at 2.

²⁷ *Id.* at 8-9.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 10-11 (citing *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (*NRG*) (noting that although “minor deviations” from a proposal are permissible, Section 205 does not allow the Commission to suggest modifications that result in an “entirely different rate design” than the utility's original proposal or the utility's prior rate scheme).

B. NEMACOS Protest

14. NEMACOS is concerned that load-serving entities may be paying arbitrage margins to suppliers that obtain a higher clearing price in the FCA and cover their CSO in the reconfiguration auctions at a lower price. NEMACOS argues that this concern arises when suppliers receive a CSO in the FCA and seek to cover their CSOs by bidding into the annual or monthly reconfiguration auctions when the clearing price in those auctions is lower than the FCA clearing price, particularly when the auctions clear under different market constraints.³¹

C. ISO-NE Answer to PSEG and NEMACOS Pleadings

15. ISO-NE asks the Commission to reject both PSEG's comment and its request to delay the effective date.³² ISO-NE explains that the altered risks that PSEG refers to relate to a gap in the current Tariff that allows a resource that is delayed between the third annual reconfiguration auction and the capacity commitment period to collect its full capacity market revenues, subject only to penalties for non-performance during scarcity conditions.³³ ISO-NE states that one of the very purposes of the filing is to fill this gap. ISO-NE adds that the filing does not unreasonably alter the risk profile of resources because these resources should expect to perform or, in the alternative, cover their CSO and not rely on the specific timing associated with the above-mentioned gap to avoid having to cover their CSO at all.³⁴ ISO-NE states PSEG incorrectly argues that the Failure to Cover Charge Rate constitutes retroactive ratemaking, noting that the rate applies only prospectively, and that the Commission has previously accepted Tariff revisions that were implemented after the FCA but prior to the applicable capacity commitment period.³⁵ ISO-NE also argues that the filing includes a sufficient, one-month grace period for resources because the Failure to Cover Charge Rate is only levied if a resource does not demonstrate its full CSO by the end of the month.³⁶

³¹ NEMACOS Protest at 5-9.

³² ISO-NE Answer at 4.

³³ *Id.*

³⁴ *Id.* at 4-7.

³⁵ *Id.* at 5-6 (citing *ISO New England Inc.*, 134 FERC ¶ 61,128, at P 24 (2011); *ISO New England Inc.*, 145 FERC ¶ 61,095, at PP 28-30 (2013)).

³⁶ *Id.* at 9.

16. ISO-NE contends that NEMACOS' protest raises issues outside the scope of this proceeding. ISO-NE asserts that the filing does not establish, expand, or otherwise change the opportunity for resources to purchase and sell CSOs after an FCA.³⁷ ISO-NE states that, even if these issues were not outside the scope, the price difference between the FCA and subsequent reconfiguration auctions is determined by the prevailing market conditions, which the Commission has repeatedly recognized as the proper basis for capacity obligation trading prices.³⁸

D. NEPOOL Answer to PSEG and NEMACOS Pleadings

17. NEPOOL states that PSEG's alternative effective date proposal was considered and rejected by NEPOOL stakeholders.³⁹ NEPOOL also responds that, regardless of stakeholders' opinion of the PSEG alternative, the Commission must consider the filing based on its own merits and does not need to consider alternatives when determining whether the filing is just and reasonable.⁴⁰

18. NEPOOL states that NEMACOS uses this proceeding to complain about other related but unchanged market rules.⁴¹

IV. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept ISO-NE's answer and NEPOOL's answer because they have provided information that assisted us in our decision-making process.

³⁷ *Id.* at 10.

³⁸ *Id.* at 12.

³⁹ NEPOOL Answer at 7.

⁴⁰ *Id.* at 7 (citing *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, at P 29 (2006)).

⁴¹ *Id.* at 5.

B. Substantive Matters

21. As discussed below, we accept as just and reasonable ISO-NE's proposed Tariff revisions, to become effective December 24, 2018, as requested.

22. We agree with ISO-NE that the Failure to Cover Charge Rate mechanism establishes a just and reasonable penalty rate for capacity resources that do not cover their CSO in advance of a capacity commitment period and fail to demonstrate the ability to fulfill all or part of their CSO.⁴² If a resource owner anticipates that the resource will not be available for the entirety of the capacity commitment period, it will be economically preferable for that resource owner to place a demand bid into the third annual reconfiguration auction to cover its CSO rather than pay the Failure to Cover Charge Rate. The Failure to Cover Charge Rate is determined by entering the total anticipated, uncovered CSO quantity of all resources into a second run of the third annual reconfiguration auction at the FCA Starting Price, which is the maximum price in the ISO-NE System-Wide Capacity Demand Curve.⁴³ If a resource bids to cover its CSO in the third annual reconfiguration auction, its bid will be at or below the FCA Starting Price. Thus, the resulting annual reconfiguration auction clearing price the resource pays to cover its CSO will always be less than or equal to the Failure to Cover Charge Rate. This aspect of the Failure to Cover Charge Rate mechanism ensures that resources that expect to be at least one year late are incentivized to cover their CSO rather than simply pay the Failure to Cover Charge Rate charges.

23. An advantage of the Failure to Cover Charge Rate mechanism is that it gives new resources with uncertain commercial operation dates the flexibility to voluntarily cover their CSOs during a particular month of the capacity commitment period without administrative intervention from ISO-NE, while still imposing an economically-sound cost for not fulfilling their CSO.⁴⁴ In addition, the monthly granularity of the proposed Failure to Cover Charge Rate gives resources flexibility as to when and how they cover their CSOs.⁴⁵ Because the resource owner ultimately has the best information about a resource's in-service date, we find that it is reasonable to afford resource owners this level of flexibility. At the same time, we recognize that it is important to provide a market signal for resource owners to cover or fulfill their CSOs and preserve the integrity of the ISO-NE capacity market and regional reliability. We find that the proposed

⁴² McCarthy Test. at 12-13.

⁴³ *Id.* at 30-31.

⁴⁴ *Id.* at 12-13.

⁴⁵ Transmittal Letter at 5.

Failure to Cover Charge Rate achieves this balance. Because the Failure to Cover Charge Rate is developed based on a hypothetical run or “charge rate run” of the third annual reconfiguration auction, the rate will tend to be higher when capacity is scarce and lower when capacity is plentiful, aligning incentives between ISO-NE and resource owners.⁴⁶

24. We disagree with PSEG that the proposed effective date violates the filed rate doctrine and rule against retroactive ratemaking. The Failure to Cover Charge Rate would become effective December 24, 2018, just over 60 days past the filing date, and would apply only prospectively to resources that fail to satisfy their CSO during a delivery year. Further, the revisions address the terms and conditions of performance (or, here, non-performance),⁴⁷ and the Commission has previously found that the terms and conditions of performance and other obligations that are a part of forward capacity markets may be revised, even after a forward auction for a future delivery year is completed, if the changes are made prospectively.⁴⁸

25. PSEG argues that the proposed revisions change the anticipated risk profile of Bridgeport Harbor 5 without providing any flexibility to manage it. However, PSEG fails to quantify or detail the extent to which the risk profile for Bridgeport Harbor 5 is altered or otherwise to support its argument that any such change is unjust and unreasonable. Indeed, PSEG argues that the existing Tariff provisions requiring ISO-NE to place a mandatory demand bid in the third annual reconfiguration auction on delayed

⁴⁶ McCarthy Test. at 33-35.

⁴⁷ The existing Tariff states that a new resource that faces construction delays “must take actions to cover the entire CSO for the portion of the capacity commitment period for which the project will not have achieved all its critical path schedule milestones.” ISO-NE Tariff, § III.13.3.4 (15.0.0). The proposed Failure to Cover Charge Rate directly pertains to the terms and conditions of this obligation.

⁴⁸ See *ISO New England Inc.*, 145 FERC ¶ 61,095, at PP 28, 31 (2013) (finding ISO-NE’s proposed effective date for what constitutes a shortage event complies with the rule against retroactive ratemaking and would not upset the expectations of market participants because the changes “apply only prospectively and after notice,” and that the proposed revision expanding the definition of a shortage event was more consistent with the original intent of the Forward Capacity Market and better reflected the meaning intended from the outset). See also *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,059, at P 18 (2014) (finding that PJM’s waiver of \$1,000 offer cap did not violate the filed rate doctrine because the revision affected only periods after the notice was filed); *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103 (2014) (allowing PJM to revise the rules under which a demand response resource could be required to reduce its load when PJM initiates emergency procedures for future delivery years).

resources' behalf are unjust and unreasonable,⁴⁹ and PSEG supports replacing the existing framework with the more flexible Failure to Cover Charge Rate mechanism, albeit with a delayed effective date.⁵⁰ Weighing the benefits of the proposal, as discussed above and which PSEG itself recognizes, against the alleged harm from immediate implementation, we find the filing is just and reasonable.⁵¹

26. In addition, we note that PSEG's arguments regarding the potential disruption to market expectations rely on an attenuated theory of how today's order affects those expectations. The changes proposed here affect the treatment of resources that fail to timely fulfill their capacity commitments after they have already cleared an FCA. As a result, the only circumstance in which the proposed revisions would subject a resource owner to additional risk is when the resource has not covered its CSO and cannot fulfill its CSO.

27. Regarding NEMACOS' concern regarding arbitrage margins between the FCA and subsequent reconfiguration auctions, we find the Tariff provisions that NEMACOS addresses in its protest are not at issue in this proceeding. Accordingly, we will not reach this issue here because it is outside the scope of this proceeding. However, we note that, under both the current Tariff and the proposed revisions, a resource that obtains a CSO in the FCA would have an opportunity to cover its CSO in a subsequent reconfiguration auction and potentially garner an arbitrage margin. Because the Failure to Cover Charge Rate is designed to always be greater than or equal to the third annual reconfiguration auction clearing price, the proposed revisions will offer no additional arbitrage incentives beyond those already available to resources under the current Tariff.

⁴⁹ PSEG Comments at 3-4.

⁵⁰ *Id.* at 3-4.

⁵¹ Further, the Commission lacks the authority to implement PSEG's suggested change to the effective date, regardless of *NRG*. The Commission may not delay the effective date of a rate proposal beyond the statutory notice period under FPA section 205(d) unless the Commission invokes its suspension-and-hearing authority under FPA section 205(e) to extend the effective date up to five months. *See Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 341 (D.C. Cir. 1974) (citing *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958) (notice provision provides not only minimum notice period for customers and Commission but also maximum waiting period for utility)); *Cities of Anaheim v. FERC*, 723 F.2d 656, 657-58 (9th Cir. 1984).

The Commission orders:

The Filing Parties' proposed Tariff revisions are hereby accepted, to become effective December 24, 2018, as requested, as discussed in the body of this order.

By the Commission. Commissioner McIntyre is not voting on this order.
Commissioner McNamee is voting present.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.