

164 FERC ¶ 61,196
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER14-1409-000

ORDER DISMISSING AMENDED PROTEST

(Issued September 20, 2018)

1. The Commission hereby dismisses as untimely the amended protest filed by the Utility Workers Union of America Local 464 (UWUA) in the above-referenced proceeding.

I. Background

2. On February 28, 2014, ISO-NE submitted the results of its eighth Forward Capacity Auction (FCA 8) to the Commission for acceptance under section 205 of the Federal Power Act (FPA).¹

3. On April 14, 2014, Utility Workers of America Local 464 and Robert Clark (collectively, UWUA) filed a timely motion to intervene and protest. On June 11, 2014, UWUA filed an answer to other comments. In those pleadings, UWUA alleged that the FCA 8 clearing price was the result of market manipulation because Energy Capital Partners (ECP), the owner of the Brayton Point plant, deliberately withheld Brayton Point from FCA 8 with the intent of raising the price that would be paid to ECP's other resources.²

4. In response to questions from Commission staff, ISO-NE amended its filing on July 17, 2014.

5. On September 16, 2014, the Secretary of the Commission issued a notice stating that, in the absence of Commission action on or before September 15, 2014, pursuant to

¹ 16 U.S.C. § 824d (2012).

² UWUA Motion to Intervene and Protest at 1-2 (filed April 14, 2014).

section 205 of the FPA, ISO-NE's filing, as amended, had become effective by operation of law.³

6. Multiple parties sought rehearing of the September 16, 2014 notice. In response, on October 24, 2014, the Secretary issued a notice stating that rehearing did not lie in the absence of "an order issued by the Commission,"⁴ and noting that the rehearing petitions were dismissed on that basis.

7. On October 25, 2016, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) addressed an appeal of these notices. The court stated that the Commission, which at that time had four members, had "deadlocked about whether to approve the rates or set them for hearing," and that the FPA provided that "[a]ctions of the Commission shall be determined by a majority vote of the members present."⁵ The court found that "FERC's deadlock does not constitute agency action, and the Notices describing the effects of the deadlock are not reviewable orders under the FPA."⁶

II. Amended Protest

8. On February 10, 2015, UWUA filed an amended protest. UWUA asserted that, as a fifth Commissioner had since joined the Commission, it would be possible to break the two-two deadlock. Therefore, UWUA urged the Commission to rule on the merits of the objections originally argued in UWUA's earlier protest and answer.

³ Notice of Filing Taking Effect by Operation of Law, *ISO New England, Inc.*, Docket No. ER14-1409-000 (September 16, 2014).

⁴ Notice of Dismissal of Pleadings, *ISO New England, Inc.*, Docket No. ER14-1409-000 at 2 (October 24, 2014) ("Under section 313(a) of the FPA, '[a]ny person . . . aggrieved by an order issued by the Commission in a proceeding under [the FPA]. . . may apply for a rehearing within thirty days after the issuance of such order.' The Secretary's September 16, 2014 notice acknowledging that those filings had become effective pursuant to section 205 of the FPA in the absence of Commission action on those filings on or before September 15, 2014, was not 'an order issued by the Commission.' Rehearing therefore does not lie; the Commission did not issue an order in this proceeding, and the referenced pleadings are therefore dismissed").

⁵ *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168-69 (D.C. Cir. 2016) (*Public Citizen*) (citing FPA Section 313(b), 16 U.S.C. § 8251(b)).

⁶ *Public Citizen*, 839 F.3d at 1172 (footnoted omitted).

III. Discussion

9. The Commission dismisses UWUA's amended protest as untimely for two reasons. First, pursuant to the notice of filing issued in this proceeding, 79 Fed. Reg. 14,026 (2014), protests were required to be filed on or before April 14, 2014. The amended protest at issue here was not filed until February 10, 2015. Second, at the time UWUA filed the amended protest, this proceeding was no longer pending at the Commission. As confirmed by the D.C. Circuit, the FCA 8 results had become effective by operation of law and the subsequent requests for rehearing had been dismissed.

10. We note that UWUA raised similar challenges in the later proceedings in which ISO-NE submitted, respectively, the results of the ninth and tenth Forward Capacity Auctions. In orders in those proceedings, the Commission addressed UWUA's argument that the capacity prices resulting from those auctions were the result of ECP's withholding of Brayton Point, stating, "during a non-public investigation into the bidding behavior in FCA 8, [Commission Office of Enforcement] staff conducted a limited review of Brayton Point's bidding behavior and found credible justifications for the owners' retirement decision and elected not to widen its investigation to include Brayton Point."⁷

11. We further note that due to an overall shortage of existing capacity, administrative pricing rules were triggered, providing existing resources the lower of the auction clearing price or an administrative price in all zones but one.⁸ Additionally, following FCA 8, the Commission initiated an investigation under section 206 of the FPA⁹ into ISO-NE's treatment of import capacity resources.¹⁰ That proceeding resulted in

⁷ *ISO New England Inc.*, 151 FERC ¶ 61,226, at P 22 n.35 (2015) (citing *ISO New England Inc.*, 148 FERC ¶ 61,201, at P 11 (2014)), *reh'g denied*, 153 FERC ¶ 61,378 (2015); *see also ISO New England Inc.*, 155 FERC ¶ 61,273, at P 26, *reh'g denied*, 157 FERC ¶ 61,060 (2016). The D.C. Circuit similarly upheld these Commission orders. *Utility Workers Union of America Local 464 v. FERC*, 896 F.3d 573 (D.C. Cir. 2018).

⁸ *See ISO New England Inc.*, 146 FERC ¶ 61,038 (2014), *reh'g denied*, 150 FERC ¶ 61,066 (2015). *See also Public Citizen*, 839 F.3d at 1168 (noting that the administrative pricing rules were triggered in FCA 8).

⁹ 16 U.S.C. § 824e.

¹⁰ *See ISO New England Inc.*, 148 FERC ¶ 61,201.

enhanced review and mitigation of capacity bids from such resources in order to limit the exercise of market power.¹¹

The Commission orders:

The Commission hereby dismisses UWUA's amended protest as untimely, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹¹ See *ISO New England Inc.*, 149 FERC ¶ 61,227 (2014); *reh'g denied*, 153 FERC ¶ 61,096 (2015).