

172 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and James P. Danly.

ISO New England Inc.

Docket No. ER20-739-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued September 17, 2020)

1. On January 6, 2020, as amended on March 27, 2020, ISO New England Inc. (ISO-NE) submitted proposed Schedule 17 to its Open Access Transmission Tariff (OATT) that provides a cost recovery mechanism for critical infrastructure protection (CIP) costs incurred by facilities that ISO-NE identifies as critical to the derivation of Interconnection Reliability Operating Limits (IROL).¹ On May 26, 2020, the Commission issued an order accepting ISO-NE's filing, effective March 6, 2020.² In the May 2020 Order, the Commission found that proposed Schedule 17 permits recovery only of IROL-CIP costs incurred on or after the effective date of a Federal Power Act (FPA) section 205³ filing made by an IROL-Critical Facility Owner to recover such costs. On June 25, 2020, the IROL-Critical Facility Owners⁴ filed a request for rehearing.

¹ Capitalized terms not defined herein are used as they are defined in the ISO-NE Transmission, Markets and Services Tariff (ISO-NE Tariff). *See* ISO-NE Tariff, § I.2 Rules of Construction; Definitions, § I.2.2 (117.0.0) (defining IROL as defined in Glossary of Terms in the North American Electric Reliability Corporation (NERC) Reliability Standards); *see also* NERC, Glossary of Terms in NERC Reliability Standards (Jan. 2, 2020), https://www.nerc.com/pa/Stand/Glossary%20of%20Terms/Glossary_of_Terms.pdf.

² *ISO New England Inc.*, 171 FERC ¶ 61,160 (2020) (May 2020 Order).

³ 16 U.S.C. § 824d.

⁴ IROL-Critical Facility Owners are comprised of Cogentrix Energy Power Management, LLC; Cross-Sound Cable Company, LLC; First Light Power, Inc.; NextEra Energy Resources, LLC; NRG Power Marketing LLC; and Vistra Energy Corp. and Dynegy Marketing and Trade, LLC. *See* IROL-Critical Facility Owners Jan. 27, 2020

2. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing request filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the FPA,⁶ however, we are modifying the discussion in the May 20 Order and continue to reach the same the result in this proceeding, as discussed below.⁷

I. Background

3. In Order No. 791, the Commission approved version 5 of NERC CIP Cyber Security Standards, which included a revised methodology for categorizing Bulk Electric System Cyber Assets that incorporated mandatory protections for all high, medium, and low impact Bulk Electric System Cyber Assets (CIP Reliability Standards).⁸ Pursuant to the implementation plan approved in Order No. 791, responsible entities had to achieve compliance by April 1, 2016, for provisions pertaining to medium impact assets.⁹ As relevant here, the CIP Version 5 Standards require responsible entities to identify and categorize each of their Bulk Electric System Cyber Systems according to specific criteria (low, medium, high) set forth in Attachment 1 – Impact Rating Criteria of CIP-002-5.1.

4. In its January 6, 2020 filing in this proceeding, ISO-NE explained that it designates certain generation and transmission facilities as IROL-Critical Facilities pursuant to applicable NERC Reliability Standards and system operating procedures.¹⁰

Motion to Intervene and Comments, Docket No. ER20-739-000.

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁶ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁷ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the May 2020 Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁸ *Version 5 Critical Infrastructure Protection Reliability Standards*, Order No. 791, 145 FERC ¶ 61,160, at PP 41, 87 (2013), *order on clarification and reh’g*, Order No. 791-A, 146 FERC ¶ 61,188 (2014).

⁹ May 2020 Order, 171 FERC ¶ 61,160 at P 2 (citing Order No. 791-A, 146 FERC ¶ 61,188 at PP 10-12).

¹⁰ *Id.* P 4 (citing ISO-NE Filing at 4). As the regional transmission organization

ISO-NE further explained that, once ISO-NE gives them this designation, the IROL-Critical Facilities must comply with the CIP Reliability Standards for the medium impact category. ISO-NE stated that, in most cases, the owners or operators of IROL-Critical Facilities incur significant incremental costs to achieve compliance as compared to other resources or facilities that are only required to meet the requirements of the low impact standards, which had not been recoverable under the OATT.¹¹ ISO-NE stated that it has been identifying transmission facilities since 2013 and generation facilities since 2014 as IROL-Critical Facilities.¹²

5. As proposed by ISO-NE, and accepted in the May 2020 Order, Schedule 17 provides a mechanism for owners of IROL-Critical Facilities to recover costs incurred to comply with CIP Reliability Standards following Commission acceptance of an owner's individual FPA section 205 filing to recover those costs.¹³ As relevant here, section 2.2(A) of Schedule 17 provides that "IROL-CIP Costs, including capital, operation and maintenance, and associated administrative and regulatory costs, are recoverable only to the extent they . . . are incurred by the IROL-Critical Facility Owner *during the period in which the subject facility is designated as an IROL-Critical Facility.*"¹⁴ Schedule 17 does not explicitly state that only prospective costs (i.e., costs occurring from the effective date of the individual FPA section 205 filings going forward) are eligible for recovery.

6. In accepting Schedule 17 as a just and reasonable cost recovery mechanism, the Commission interpreted section 2.2(A) of Schedule 17 as allowing recovery only for

for New England, ISO-NE is responsible for protecting the short-term reliability of the New England Control Area and planning and operating the system pursuant to reliability standards established by the Northeast Power Coordinating Council, Inc. and NERC. *Id.* P 3 (citing ISO-NE Filing at 2-3). ISO-NE is also the NERC Reliability Coordinator for the New England Reliability Coordinator Area/Balancing Authority Area. *Id.*

¹¹ See *id.* P 5 (citing ISO-NE Filing at 6 (citing Testimony of Jonathan B. Lowell at 7)).

¹² *Id.* P 4 (citing ISO-NE Filing at 5 (citing Testimony of Dean L. LaForest at 4-5)).

¹³ ISO-NE Tariff, Schedule 17, § 2.1 (Recovery of CIP Costs) (2.0.0) (requiring owners of IROL-Critical Facilities to "submit a filing to the Commission pursuant to [s]ection 205 of the Federal Power Act requesting approval of IROL-CIP Costs proposed to be recovered").

¹⁴*Id.*, § 2.2(A) (Recovery of CIP Costs) (2.0.0) (emphasis added).

those costs incurred on or after the effective date of the relevant individual FPA section 205 filing.¹⁵

II. Rehearing Request

7. IROL-Critical Facility Owners argue that the Commission failed to address arguments pertaining to the recovery of previously incurred IROL-CIP costs and why, according to IROL-Critical Facility Owners, the filed rate doctrine and rule against retroactive ratemaking should not bar such recovery.¹⁶ IROL-Critical Facility Owners also allege that the Commission's interpretation of section 2.2(A) of Schedule 17 is inconsistent with the plain language of the OATT and is inconsistent with ISO-NE's proposal.¹⁷ IROL-Critical Facility Owners contend that the May 2020 Order produces unlawful rates by impermissibly limiting the cost recovery rights Congress granted pursuant to FPA section 219¹⁸ and "producing a confiscatory rate by depriving IROL-Critical Facility Owners of the opportunity to recover capital deployed in the public interest."¹⁹

8. On July 10, 2020, the New England States Committee on Electricity (NESCOE) filed a motion for leave to answer and limited answer in response to IROL-Critical Facility Owners' request for rehearing. On September 1, 2020, Cogentrix Energy Power Management, LLC (Cogentrix), one of the IROL Critical Facility Owners, filed a "Notice of Intent to Seek Judicial Review" of the May 2020 Order.

III. Discussion

A. Procedural Matters

9. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2020), prohibits an answer to a request for rehearing. Accordingly, we deny NESCOE's motion to answer and reject NESCOE's answer.

¹⁵ May 2020 Order, 171 FERC ¶ 61,160 at P 27.

¹⁶ Rehearing Request at 8.

¹⁷ *Id.* at 14-16.

¹⁸ 16 U.S.C. § 824s.

¹⁹ Rehearing Request at 7, 20-23.

10. While Cogentrix styled its September 1, 2020 pleading as a “notice,” the pleading incorporates arguments raised in IROL-Critical Facility Owners’ rehearing request and is, in substance, an untimely supplement to IROL Critical Facility Owners’ rehearing request. Consistent with Commission precedent, untimely supplements to timely filed requests for rehearing, i.e., supplements filed after the expiration of the statutory 30-day period, are not appropriate.²⁰ We therefore reject Cogentrix’s pleading.

B. Substantive Matters

11. At the outset, as discussed further below, we continue to interpret the language in section 2.2(A) of Schedule 17 as allowing recovery only for those costs incurred on or after the effective date of the relevant individual FPA section 205 filing.²¹ Contrary to IROL-Critical Facility Owners’ arguments on rehearing, we further find that, if section 2.2(A) would have provided for the recovery of IROL-CIP costs incurred prior to the effective date of any relevant, individual FPA section 205 filing, such language would violate the rule against retroactive ratemaking. We also address and find unpersuasive IROL-Critical Facility Owners’ allegations that the Commission’s interpretation of section 2.2(A) of Schedule 17 in the May 2020 Order was unreasonable.

1. The Filed Rate Doctrine and Rule Against Retroactive Ratemaking Preclude Recovery of IROL-Critical Facility Owners’ Previously Incurred Costs

12. The filed rate doctrine and the corollary rule against retroactive ratemaking originate from the FPA’s statutory requirement that public utilities file rate schedules to ensure that customers are only charged rates that have been noticed and properly filed with the Commission.²² Under the rule against retroactive ratemaking, the Commission

²⁰ *Tres Palacios Gas Storage LLC*, 162 FERC ¶ 61,255, at P 8 (2018); *Tex.-N.M. Power Co. v. El Paso Elec. Co.*, 107 FERC ¶ 61,316, at P 22 (2004).

²¹ May 2020 Order, 171 FERC ¶ 61,160 at P 27.

²² *See Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 793 (D.C. Cir. 1990) (*Columbia Gas III*) (“This [filed rate] doctrine, we noted, finds its origins in section 4(c) and 5(a) of the Natural Gas Act [(NGA)] . . . , which require that every natural gas company file rate schedules with the Commission that will then govern the amounts they can bill their customers.” (citations omitted)); *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 517, 577 (1981) (determining that the filed rate doctrine “forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority”); *id.* at 578 (“Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.”).

is prohibited “from imposing a rate increase for [power] already sold”²³ or “adjusting current rates to make up for a utility’s over- or undercollection in prior periods.”²⁴

13. IROL-Critical Facility Owners argue on rehearing, as they did in their comments, that application of the filed rate doctrine and rule against retroactive ratemaking in this case would be inconsistent with FPA section 219.²⁵ They argue that, in enacting the Energy Policy Act of 2005 and establishing FPA section 219, Congress required the Commission to “allow recovery of . . . *all* prudently incurred costs necessary to comply with mandatory reliability standards.”²⁶ IROL-Critical Facility Owners also contend that the May 2020 Order ignores precedent from Order No. 672, which, IROL-Critical Facility Owners argue, establishes a formal policy to allow for the recovery of “all” prudently incurred costs to comply with the reliability standards.²⁷

14. As an initial matter, we disagree with IROL-Critical Facility Owners that our May 2020 Order “categorically prohibit[s] IROL-Critical Facility Owners from seeking to recover certain costs they prudently incurred to comply with the relevant mandatory reliability standards.”²⁸ IROL-Critical Facility Owners have been permitted to participate in the ISO-NE markets and have not asserted that they have been prohibited from recovering their IROL-CIP costs through such participation. That ISO-NE now has filed to provide a new recovery mechanism for these costs does not mean that IROL-Critical Facility Owners were categorically prohibited from recovering those costs through participation in the ISO-NE markets.

15. Even setting aside IROL-Critical Facility Owners’ participation in ISO-NE’s markets, we disagree with IROL-Critical Facility Owners’ assertion that application of the filed rate doctrine and rule against retroactive ratemaking in this case would be

²³ *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992).

²⁴ *Id.* at 71 n.2 (explaining that the rule against retroactive ratemaking is a “logical outgrowth of the filed rate doctrine”) (citation and quotation omitted).

²⁵ Rehearing Request at 8-11, 20-23.

²⁶ *Id.* at 2 (quoting 16 U.S.C. § 824s(b)(4) (emphasis in pleading)).

²⁷ *Id.* at 9-10 (citing *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, at P 259, *order on reh’g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006)).

²⁸ *Id.* at 20.

inconsistent with the language of FPA section 219. FPA section 219 directs the Commission to establish regulations that will “allow recovery of . . . all prudently incurred costs necessary to comply with mandatory [R]eliability [S]tandards issued pursuant to section 215.”²⁹ We find that this provision is appropriately read as directing the Commission through its regulations to allow recovery of “all” such costs when consistent with FPA section 205, pursuant to which individual public utilities propose rates to the Commission and thereby provide notice to potentially affected ratepayers. Importantly, FPA section 219 also states that “[a]ll rates approved under the rules adopted pursuant to [section 219], including any revisions to the rules, are subject to the requirements of sections 205 and 206 that all rates, charges, terms, and conditions be just and reasonable and not unduly discriminatory or preferential.”³⁰ Accordingly, we find that the strictures of FPA section 205, including the prohibition against retroactive rate recovery, apply here. For this reason, we find that the Commission’s application of the rule against retroactive ratemaking here does not, as IROL-Critical Facility Owners allege, “obstruct[] the FPA’s purpose by prohibiting the recovery of prudently incurred costs to comply with reliability standards.”³¹ On the contrary, disregard of the rule against retroactive ratemaking or the filed rate doctrine in this case would obstruct the purpose and application of FPA section 205; that outcome would be inconsistent with FPA section 219. Moreover, we note that Order No. 672 contains no discussion of the filed rate doctrine or the rule against retroactive ratemaking and does not suggest that these principles are inapplicable to section 219.

16. We find similarly unavailing IROL-Critical Facility Owners’ argument that the notice exception to the filed rate doctrine would allow them to recover previously-incurred IROL-CIP costs. IROL-Critical Facility Owners argue that, over the last 15 years, ISO-NE and its various stakeholders received several notices, initially stemming from Congress’s enacting the statutory requirement, that public utilities would be allowed to recover in their wholesale rates all prudently incurred costs necessary to comply with the Commission’s reliability standards.³² IROL-Critical Facility Owners assert that, even if the Commission were to conclude that those earlier milestones were insufficient for purposes of the notice exception, ISO-NE’s filing establishing

²⁹ 16 U.S.C. § 824s(b)(4)(A).

³⁰ *Id.* § 824s(d).

³¹ Rehearing Request at 10.

³² *Id.* at 27.

March 6, 2020, as the effective date for Schedule 17 placed customers on notice that their rates will increase to cover IROL-CIP costs.³³

17. We disagree with this argument made by IROL-Critical Facility Owners Courts have stated that “no violation of the filed rate doctrine occurs when ‘buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.’”³⁴ Such notice “changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.”³⁵ However, as relevant to this case, the D.C. Circuit has found that notice of a potential rate adjustment must be provided through the rate filed with the Commission and that statements that are not filed with the Commission do not provide the legally required notice.³⁶ Even if a statute could provide notice that a rate change is to be applied retroactively, such notice was not provided by the language of FPA section 219. The statutory requirement that the Commission permit IROL-CIP costs to be recovered in rates did not specify the mechanism for such recovery and could not constitute notice that ISO-NE might file in the future for a separate cost recovery mechanism.

18. The IROL-Critical Facility Owners do not reference any filings at the Commission that could constitute notice. ISO-NE’s request for a particular effective date for a proposed tariff provision, in this case March 6, 2020, provided notice only of a potential change to be proposed in potential future filings.³⁷ Furthermore, Schedule 17 is merely a billing mechanism that specifies the types of IROL-CIP Costs that may be recoverable. Therefore, the requested effective date of Schedule 17 does not provide notice of the proposed costs that IROL Critical Facility Owners will seek to recover. That notice will be provided through the effective date of any Commission-accepted individual FPA section 205 filing.

³³ *Id.* at 14, 27.

³⁴ *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018) (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

³⁵ *Columbia Gas III*, 895 F.2d at 797; *Natural Gas Clearinghouse*, 965 F.2d at 1075; see also *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987).

³⁶ *Old Dominion Elec. Coop.*, 892 F.3d at 1231-32.

³⁷ See *id.*

19. IROL-Critical Facility Owners also argue that the filed rate doctrine and rule against retroactive ratemaking would not apply here because ISO-NE's filing represents an initial rate, rather than a rate change.³⁸ However, IROL-Critical Facility Owners offer no support for why the distinction between an initial rate and a changed rate is relevant to this issue. Whether a rate is an initial rate or a changed rate is relevant to determining whether a rate is subject to suspension by the Commission pursuant to FPA section 205(e).³⁹ By contrast, whether a rate is an initial rate or a changed rate is irrelevant here because the above-noted notice requirement of FPA section 205(d)⁴⁰ applies to both initial rates and changed rates.⁴¹ Even if the distinction between an initial rate and a changed rate were relevant here, we find that Schedule 17 is, in fact, a changed rate. The Commission has explained that, in order for a rate to be considered an initial rate rather than a changed rate, it must provide for a new service to a new customer.⁴² Under Commission precedent, the key factor is whether the company is "providing the same service to the same market."⁴³ If a public utility will continue to serve the same market as it previously did and will continue to provide the same service to that market, then the filing is a rate change.⁴⁴ The Commission has found that "[t]aking a broad view as to what constitutes a change in rate clearly serves, by making filings subject to the Commission's suspension and refund authority under section 205(e) of the FPA, to protect customers of electricity from excessive or exploitative rates."⁴⁵ Here, we find that

³⁸ Rehearing Request at 6, 8-9; *see also* IROL-Critical Facility Owners February 11, 2020 Answer at 6-8.

³⁹ 16 U.S.C. § 824d(e). *Middle South Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1986) (the Commission lacks authority to suspend initial rate schedules for sale of electricity).

⁴⁰ 16 U.S.C. § 824d(d).

⁴¹ *See Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988).

⁴² *Sw. Elec. Power Co.*, 39 FERC ¶ 61,099, at 61,293.

⁴³ *Duke Energy Moss Landing, LLC*, 86 FERC ¶ 61,227, at 61,818 (1999) (citing *Duke Energy Moss Landing, LLC*, 83 FERC ¶ 61,318, at 62,306 (1998) (finding that, although applicants seek to make a new service out of the provision of reliability (i.e., must-run reliability service) to the California Independent System Operator Corporation, Pacific Gas and Electric Company has always provided that service and does so now; therefore, the filings constitute rate changes rather than initial rates)).

⁴⁴ *Id.*

⁴⁵ *Sw. Elec. Power*, 39 FERC at 61,293.

ISO-NE's filing of Schedule 17 is a rate change because neither the service provided nor the customers are new. Notably, the transmission customers who would pay for the IROL-CIP costs already take service under the ISO-NE Tariff from the facility owners, who are current participants in the ISO-NE wholesale markets.

20. We also disagree with IROL-Critical Facility Owners' argument that the Commission's determination is "inconsistent with basic ratemaking principles."⁴⁶ According to IROL-Critical Facility Owners, the relevant consideration is not the timing of when a particular cost is incurred, but rather the timing of when the *service* is provided in connection with that cost.⁴⁷ IROL-Critical Facility Owners argue that they are "not seeking to recover costs . . . to provide services that have already been rendered."⁴⁸ However, for the reasons discussed above, we conclude that the service at issue is not new and that the costs to be recovered are in fact for a service that has already been rendered.

21. IROL-Critical Facility Owners also allege that the May 2020 Order "misinterprets the unspecified arguments that it purports to address," claiming that, even NESCOE, the party that argued most strongly against recovery of historically incurred IROL-CIP costs, did not object to the recovery of *all* previously incurred costs.⁴⁹ Specifically, IROL-Critical Facility Owners claim that NESCOE would not object to the recovery of the undepreciated portion of past capital expenditures.⁵⁰ IROL-Critical Facility Owners contend that the Commission "either misinterpreted NESCOE's position" or "failed to comprehend the importance of that concession."⁵¹ Neither is true. IROL-Critical Facility Owners misunderstand the Commission's discussion from the May 2020 Order on this point. The Commission did not "purport to address" NESCOE's comments on the filed rate doctrine or opine on any alleged concession. Instead, the May 2020 Order contains the Commission's determination that the proposed revisions to Schedule 17 would not violate the filed rate doctrine or rule against retroactive ratemaking. In particular, the Commission determined that the language in section 2.2(A) of Schedule 17 is appropriately read in the context of the requirement that IROL-Critical Facility Owners

⁴⁶ Rehearing Request at 16.

⁴⁷ *Id.* at 17.

⁴⁸ *Id.*

⁴⁹ *Id.* at 12.

⁵⁰ *Id.* (citing NESCOE Comments at 10).

⁵¹ *Id.*

submit individual FPA section 205 filings to recover such costs.⁵² As discussed in the May 2020 Order and above, under FPA section 205, rate changes may be prospective only.⁵³ For this reason, and not based on the arguments made by NESCOE, the Commission found that, read in context with the remainder of section 2.2(A), the provision in section 2.2(A) providing for the recovery of costs “during the period in which the subject facility is designated as an IROL-Critical Facility” would allow IROL-Critical Facility Owners to recover only those costs incurred on or after the effective date of the relevant individual FPA section 205 filing.⁵⁴

22. With respect to NESCOE’s initial comments that it would not oppose the recovery of the undepreciated portion of past capital expenditures, we note that IROL-Critical Facility Owners may seek recovery of the undepreciated costs of any such past capital expenditures to comply with the IROL-CIP requirements. This may include a return of and on such previously-incurred costs, as well as any appropriate prospective costs, in their FPA section 205 filings submitted to the Commission pursuant to Schedule 17.⁵⁵

23. Finally, IROL-Critical Facility Owners argue that the Commission’s decision to limit IROL-Critical Facility Owners’ cost recovery to prospective costs produces a confiscatory rate by “depriving IROL-Critical Facility Owners of the opportunity to recover capital deployed for the public interest.”⁵⁶ We disagree. Under standard ratemaking principles, it is well-established that, while regulated companies must have a reasonable opportunity to recover their costs, they enjoy no guarantee that they will necessarily do so.⁵⁷ As IROL-Critical Facility Owners indicate, rates must be sufficient

⁵² May 2020 Order, 171 FERC ¶ 61,160 at P 27.

⁵³ *Id.*

⁵⁴ *See id.*

⁵⁵ Schedule 17 states that it “provides for the recovery of an IROL-Critical Facility Owner’s incremental capital, operation and maintenance, and associated administrative and regulatory costs paid to comply with the NERC CIP Reliability Standards corresponding to the medium impact category” subject to Commission approval “to the extent cost recovery for the IROL-CIP Costs is not provided for under another provision of the Tariff or a contractual arrangement to which the IROL-Critical Facility Owner is a party.”

⁵⁶ Rehearing Request at 7.

⁵⁷ *Holyoke Water Power Co.*, 37 FERC ¶ 61,223, 61,562, at 61,562 (1986) (“Rates are *designed* to recover costs prospectively, not to *guarantee* cost recovery retroactively.”); *ISO New England Inc.*, 130 FERC ¶ 61,108, at P 24 (2010) (“resources

to yield a reasonable return on the value of property⁵⁸ and the impact of the government rate-setting action must not interfere with the utility's opportunity to earn a reasonable return.⁵⁹

24. Here, as noted, IROL-Critical Facility Owners participated in the ISO-NE markets. They have made no showing that, if they were unable to recover historic IROL-CIP costs in those markets, such failure in any way interferes with their opportunity to earn a reasonable return in the future. Furthermore, even if they were unable to recover their costs in the past, IROL-Critical Facility Owners cite no precedent suggesting that application of the filed rate doctrine and rule against retroactive ratemaking can be avoided in these circumstances.

2. The Commission Reasonably Interpreted Schedule 17 to Encompass Only Forward-Looking Cost Recovery

25. In the May 2020 Order, the Commission found that section 2.2(A) of Schedule 17 does not violate the filed rate doctrine or rule against retroactive ratemaking based on its interpretation that the provision allows for recovery of only those costs incurred on or after the effective date of the relevant individual FPA section 205 filing.⁶⁰ IROL-Critical Facility Owners allege that the Commission's interpretation of Schedule 17 "transforms it into a fundamentally different rate design than ISO-NE proposed, thereby running afoul

are provided only an opportunity to recover their costs, not a guarantee that they will recover those costs.").

⁵⁸ See *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923) ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.").

⁵⁹ See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) ("[W]hether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return.").

⁶⁰ May 2020 Order, 171 FERC ¶ 61,160 at P 27.

of *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (*NRG*).⁶¹ We disagree.

26. When the language of a tariff is unambiguous, the “plain language of the tariff controls.”⁶² However, Schedule 17 does not address whether facility owners may seek to recover costs incurred prior to the effective date of the relevant individual FPA section 205 filing. Indeed, in response to Commission staff’s deficiency letter asking whether ISO-NE intended for the proposed tariff to allow for the recovery of historical costs, ISO-NE took no position, stating that “[s]ection 2.2(A)(i) of the proposed Schedule 17 does not address the recovery of IROL-CIP Costs incurred prior to the requested effective date of March 6, 2020.”⁶³ Given ISO-NE’s acknowledgment of this ambiguity, we conclude that the Commission reasonably interpreted section 2.2(A) in the context of the requirement that IROL-Critical Facility Owners submit individual FPA section 205 filings to recover IROL-CIP costs and the requirement under section 205 that cost recovery be prospective only.⁶⁴ Because this interpretation is not inconsistent with ISO-NE’s intent, we disagree that the May 2020 Order accepted a “fundamentally different rate design,” as that phrase is used in *NRG*.

The Commission orders:

In response to IROL-Critical Facility Owners’ request for rehearing, the May 2020 Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶¹ Rehearing Request at 19-20; *see also id.* at 19 (“the Commission [should], therefore, grant rehearing to make clear that, as ISO-NE intended, Schedule 17 establishes a backward-looking cost recovery mechanism”).

⁶² *Cal. Indep. Sys. Operator Corp.*, 140 FERC ¶ 61,168, at P 7 (2012) (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998); *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003)).

⁶³ ISO-NE March 27, 2020 Response to Deficiency Letter.

⁶⁴ May 2020 Order, 171 FERC ¶ 61,160 at P 27.