

103 FERC ¶ 61,302
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Wisvest-Connecticut, LLC

Docket No. EL03-11-001

v.

ISO New England, Inc.

ORDER ON MARKET RULES REVISIONS

(Issued June 6, 2003)

1. In this order, the Commission modifies and accepts the compliance submittal, filed by the New England Power Pool Participants Committee (NEPOOL) and ISO New England Inc. (ISO-NE), that responds to the Commission's order issued in this proceeding on December 26, 2002.¹ This order benefits customers because it treats equitably the NEPOOL market participants who must report to ISO-NE, in timely fashion, that they have met their monthly installed capacity (ICAP) requirements.

Background

2. The December Order addressed an October 11, 2002 complaint, filed by Wisvest-Connecticut, LLC (Wisvest), against ISO-NE, concerning assessment of deficiency charges for late notification of monthly ICAP responsibility. Wisvest had missed the monthly deadline to notify ISO-NE to transfer an amount of ICAP from Wisvest's account to the account of the Load Serving Entity (LSE) that had purchased it. Wisvest had the contractual responsibility to notify ISO-NE of the transfer and was liable for the deficiency charge assessed against the under-reported LSE.

3. Wisvest argued to the Commission that ISO-NE was too rigid in its application of the NEPOOL rules against accepting untimely ICAP submissions and had misinterpreted

¹Wisvest-Connecticut, LLC v. ISO New England, Inc. 101 FERC ¶ 61,372 (2002) (December Order).

earlier Commission orders.² Additionally, Wisvest argued that ISO-NE had not accommodated the facts of this situation: Wisvest's mistake was inadvertent; the contract between Wisvest and the LSE pre-dated the notification deadline; and ISO-NE was aware, by the monthly deadline, of the total amount of ICAP available to it from Wisvest's and the LSE's accounts because Wisvest exceeded its required level by more than the LSE's underreported amount.³

4. In its answer, ISO-NE defended the deficiency charges as consistent with applicable NEPOOL Market Rules and Procedures (MRPs) and the Cure Period Orders. ISO-NE said that if the Commission supported Wisvest's position, then unambiguous, narrowly defined parameters were needed to prevent future gaming and to protect the ICAP markets' integrity.⁴

5. The Commission recognized that ISO-NE had strictly enforced the applicable ICAP market rules. However, the Commission also recognized that these rules did not specifically deal with Wisvest's situation. Emphasizing that the ICAP in question was both available and callable to ISO-NE, that system reliability was unimpaired, that the contract for transfer of the ICAP was in place before the supply month, and that there did not appear to be any attempt to manipulate or take advantage of market rules for other purposes or any attempt to re-sell the ICAP, the Commission granted Wisvest's requests for crediting of the LSE's account and refund of any deficiency charges paid. The Commission also directed ISO-NE and NEPOOL to add provisions to the MRPs that address and clearly define the circumstances and the consequences of a market participant's failure to notify or a market participant's late notification of an existing contract for ICAP in cases in which pool reliability is not jeopardized.⁵

²Wisvest referred to the Commission's orders prohibiting a "cure period" after the monthly supply period during which participants could eliminate any ICAP deficiencies and avoid deficiency assessments. See *ISO New England Inc.*, 96 FERC ¶ 61,234 (2001), order on reh'g, 97 FERC ¶ 61,212 (2001), order on reh'g, 98 FERC ¶ 61,103 (2002) (collectively, Cure Period Orders).

³December Order at P 4-11.

⁴*Id.* at P 14-15.

⁵*Id.* at P 24-27.

Proposed Revisions

6. On February 24, 2003, NEPOOL and ISO-NE submitted proposed changes to the MRPs (February submittal), and stated that 82 percent of the Sector Voting Shares had voted in favor. The proposed changes would revise MRP 11 by adding text to Section 11.2.3, and by adding a new Section 11.2.4 and a new Appendix 11-E.⁶

7. As revised, Section 11.2.3, "Satisfaction of Forward Settlement Obligation," would refer to MRP 4 for further details on the submission deadline for various types of ICAP contracts.

8. New Section 11.2.4, "Consequences of Failure to Submit ICAP Contracts by the Deadline for Submission," would state that, under normal circumstances, ISO-NE will not recognize bilateral contracts submitted after the trading deadline of MRP 4, and that such bilateral contracts will not be used to determine the surplus or deficiency of a Participant's market position nor the charges or credits resulting from that position. It continues that exceptions to this rule are noted in proposed Appendix 11-E, "Exceptional Circumstances for the Late Submittal of Bilateral Transactions Associated with the ICAP Market."

9. Proposed Appendix 11-E gives three situations that qualify for exceptional circumstances consideration when the mistakes did not affect transmission system reliability and corrective adjustments do not harm other participants. One qualifying situation is inadvertent failure to submit the contract in timely fashion. The two additional qualifying situations are inadvertent failure to submit, in timely fashion, the proper contract quantity or the correct contract counter-party (participant). Acknowledging that these two additional situations are not, strictly speaking, within the scope of the Commission's directive, ISO-NE and NEPOOL state that they nevertheless included them at the behest of the majority of the Participants Committee members, who view them as consistent with the intent and spirit of the Commission's order.

10. NEPOOL participants have three months in which to request billing adjustments under MRP 18. Nevertheless, proposed Appendix 11-E would provide (one time only) relief retroactive to August 2000.

⁶The proposed changes to Market Rule 11 would affect only ICAP transactions made prior to replacement of the NEPOOL rules by Market Rule 1, under New England's Standard Market Design (NE-SMD). See New England Power Pool and ISO New England, Inc., 100 FERC ¶ 61,287, order on reh'g, 101 FERC ¶ 61,344 (2002). ISO-NE states that it is drafting, for NEPOOL consideration, similar revisions that will achieve the same objectives under NE-SMD. February submittal at pp. 4-5.

Notice and Responses

11. Notice of NEPOOL's and ISO-NE's compliance filing was published in the Federal Register, 68 Fed. Reg. 10,220 (2003), with comments, protests and interventions due on or before March 26, 2003. Comments supporting the proposed changes were filed by Northeast Utilities Service Company (NUSCO), an intervenor in the complaint proceeding. Motions to intervene were filed by Calpine Eastern Corporation and Calpine Energy Services, LP, jointly, and by NSTAR Electric & Gas Corporation (NSTAR), and American National Power, Inc. (ANP), with the latter two including comments supporting the proposed revisions. A motion to intervene and to protest the proposed changes was filed by Constellation Power Source, Inc. (Constellation). On April 10, 2003, NEPOOL filed a response to Constellation's protest.

12. Constellation protests the two additional adjustment situations proposed by ISO-NE and NEPOOL, i.e., permitting market participants to correct incorrect MW amounts or incorrect counter parties to ICAP contracts. Constellation urges that these situations go beyond the intent of the December Order. Constellation points out that, in resolving the Wisvest question, the Commission found it necessary to determine whether ISO-NE knew that the capacity at issue was available as ICAP and callable during the relevant month. Constellation says that if market participants submit erroneous information concerning counter parties or MW amounts, particularly under-reporting the MW, ISO-NE could have been unaware of capacity that may have been available as ICAP or callable as such. Thus, the condition that pool reliability not be jeopardized would not be met.

13. Constellation protests also that the retroactive relief proposed in Appendix 11-E would be disruptive if presumably final settlements were subject to resettlement where the time had passed to adjust preliminary settlements and there was no notice of such cause for adjustment. Constellation relates that the original text of proposed revisions that ISO-NE presented to NEPOOL called for retroactive relief only to April 2002. Constellation supports this approach. It says that the preliminary or initial customer bills for ICAP for these months were issued on October 9 and November 8 and 18, 2002, and that the filing of Wisvest's complaint, in October, gave the marketplace the first notice that assessment of ICAP deficiencies was under question.

14. Constellation asks the Commission to reject proposed Appendix 11-E and to require ISO-NE to submit a revised appendix, applicable only to those months for which the three-month period to challenge preliminary bills has not expired and where the inadvertent mistake was solely failure to notify or late notification of an ICAP contract. Constellation says also that it would support Commission approval of a retroactive remedy that covered only the customer bills initially issued in October 2002 if the relief were

limited to market participants who, like Wisvest, timely pursued their billing disputes within the applicable three-month period.

15. NEPOOL's April 10, 2003 response addresses Constellation's concern over jeopardy of pool reliability should mistakes in ICAP quantity qualify for remedy. NEPOOL points out that the ISO will be (and was) aware of available ICAP resources in all circumstances covered by its proposal because the ISO is aware of the underlying capacity resources. NEPOOL states that the proposed correction does not apply to external ICAP transactions, which could result in two control areas relying on the same transactions, but only to internal transactions. Also because transactions are internal, NEPOOL urges that it is inequitable to distinguish between misreported amounts and misreported counter-parties. NEPOOL supports the retroactivity of its proposed relief to August 2000, when NEPOOL re-instituted its deficiency charges, by pointing out that the December Order did not expressly limit the time period, and that failure to approve such retroactivity could result in further complaint about ISO-NE's application of market rules.

Discussion

Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2003), prohibits an answer to a protest unless otherwise permitted by the decisional authority. We find that allowing NEPOOL's response gives a more complete record upon which to base our decision and therefore will accept it.

NEPOOL Rules Revision

Eligible Situations

17. We find that the two additional situations that ISO-NE and NEPOOL have included in their proposed revisions, inadvertent notification of incorrect contract quantity or incorrect contract counter-party, are sufficiently close to inadvertent failure to notify in a timely fashion, that they are within the spirit of the December Order. We emphasize that all three situations occur under the narrowly defined circumstances that the inadvertent error not did jeopardize NEPOOL reliability and that ISO-NE knew that the quantity of ICAP in question was in fact available for use during the period at issue. We believe that NEPOOL has answered Constellation's concern over jeopardy of pool reliability in cases in which ISO-NE is notified of incorrect ICAP quantity or counter-party. Therefore,

regarding Appendix 11-E's recital of the situations that are eligible for consideration under exceptional circumstances, we accept the proposed revisions.

Retroactive Relief

18. The Commission did not discuss retroactive relief in the December Order but spoke, prospectively, of directing ISO-NE and NEPOOL "to add provisions to the MRPs that specifically address and clearly define the circumstances and the consequences of a participant's failure to notify or a participant's late notification of an existing contract for ICAP in cases such as this where pool reliability is not jeopardized."⁷

19. In considering requests for retroactive effect of a new rule, the Commission follows the test established by the courts: (1) whether the rule is actually a departure from clear prior policy; (2) whether retroactive application will be more likely to hinder than to further the operation of a new rule; and (3) whether retroactive application would produce substantial inequitable results, with particular reference to whether parties relied on the old standard.⁸

20. We will evaluate NEPOOL's request for retroactive relief to 2000 against this test. We will not disturb the finality of past ICAP market transactions by opening the books where months have finally settled. (We note that Wisvest raised its concerns to ISO-NE before the months had settled.) We will allow retroactive relief for those months where the three-month deadline for participants to request adjustments to their ICAP bills had not expired at the time of the December Order. We will not require such participants to have previously requested billing adjustments or filed notice of billing disputes, as Constellation has requested.

21. ISO-NE and NEPOOL are directed to modify proposed Appendix 11-E, Section 1, "Criteria applicable to the months of August 2000 through September 2002," to apply only to those months for which settlement was not finalized and the three-month window for participants to request adjustments to their ICAP bills had not yet closed by the date of the December Order, ie. December 26, 2002.

22. With reference to ISO-NE's and NEPOOL's statement that, at the time of the February submittal, they were drafting similar proposed revisions to the NEPOOL Manuals

⁷December Order at P 27.

⁸See San Diego Gas & Electric Company v. Seller of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange, 100 FERC ¶ 61,235 at P 3 & cases cited at n.4 (2002).

to achieve the same objectives under NE-SMD,⁹ we recognize that the redesigned ICAP market under NE-SMD is quite different from that to which the proposed modifications to MRP 11 apply. The new market may necessitate a different approach from the one accepted here. We therefore direct NEPOOL to add provisions to the NEPOOL Manuals that make the transition between Market Rule 11 and Market Rule 1 seamless, so that the market rule changes accepted here are in effect without any lapses in coverage to participants.

The Commission orders:

(A) The Commission hereby conditionally accepts for filing the proposed revisions to the NEPOOL Market Rules and Procedures, modified as discussed in the body of this order.

(B) ISO-NE and NEPOOL are hereby ordered to make a compliance filing, within 30 days of the date of this order, revising their proposed revisions to the NEPOOL Market Rules and Procedures, as discussed in the body of this order.

(C) ISO-NE and NEPOOL are hereby ordered to revise the NEPOOL Manuals to reflect the revisions approved in this order, prospectively from the implementation date of the Installed Capacity market under Market Rule 1.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁹See n.6, *supra*.