

108 FERC ¶ 61,306  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

New England Power Pool

Docket No. ER04-335-003

ORDER DENYING REHEARING

(Issued September 22, 2004)

**Introduction**

1. In this order, we deny a request for rehearing of an order issued on May 28, 2004 (May 28 Order).<sup>1</sup> This order benefits customers by clarifying the Commission's policy regarding New England Power Pool (NEPOOL) Gap Requests for Proposals (Gap RFPs).

**Background**

2. In Docket No. ER04-335-000, NEPOOL filed proposed changes to NEPOOL Market Rule 1- NEPOOL Standard Market Design. The proposed changes to Market Rule 1 would apply whenever ISO New England, Inc. (ISO-NE) determines the need for RFPs to address near-term reliability concerns while long-term solutions are being implemented. The proposed changes would allow ISO-NE to issue Gap RFPs and enter into contracts awarded pursuant to the Gap RFP program. That program is intended to address near-term reliability concerns while long-term solutions are being implemented.<sup>2</sup>

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<sup>1</sup> New England Power Pool, 107 FERC ¶ 61,208 (2004).

<sup>2</sup> In Docket No. ER03-563-030, ISO-NE filed a proposed long-term locational installed capacity (LICAP) mechanism for New England and committed to continue to work toward a long-term regional resource adequacy mechanism. The Commission deferred implementation of ISO-NE's proposed LICAP plan until January 1, 2006, and set the proposal for hearing. *See* Devon Power LLC, *et al.*, 107 FERC ¶ 61,240 (2004), *reh'g pending (Devon)*.

3. The Commission conditionally accepted NEPOOL's proposed changes for filing by order issued on February 27, 2004 (February 27 Order).<sup>3</sup> The Commission conditioned its acceptance on a requirement that ISO-NE obtain Commission approval to issue a Gap RFP at least 60 days prior to the date it intends to issue the RFP. The Commission further required that the successful bidder (*e.g.*, a generator) file for approval of the rates to be charged under the supply arrangement to the extent that such contracts are for jurisdictional services.

4. PSEG Energy Resources & Trade LLC's (PSEG), although it originally supported the filing, filed a request for rehearing of the February 27 Order. In pertinent part, it argued that bidders with market-based rate authority, such as PSEG, should be allowed to enter into Gap RFP contracts without receiving prior Commission approval of the rates. PSEG contended that, because the Commission has already determined that a seller with market-based rate authority does not possess the ability to exercise market power, the rates determined through a properly designed, competitive RFP process should be deemed just and reasonable.

5. The May 28 Order found that PSEG's arguments were not properly before the Commission, because PSEG could have raised them when NEPOOL made the original filing, but failed to do so.<sup>4</sup> The May 28 Order further determined that, even if PSEG's arguments were properly before the Commission, they were unpersuasive. It stated:

The Commission has held that long-term power sales agreements entered into pursuant to previously granted market-based rate tariffs are not traditional [Federal Power Act] section 205 filings but are submitted for information purposes only. That is, the filing of such agreements does not serve as a vehicle to challenge the justness and reasonableness of either the agreements themselves or the underlying market-based rate authority. However, the Gap RFP program is a new and unique program. The contracts resulting from future Gap RFPs would not serve as a vehicle to revisit previously granted market-based rate authority, but they would instead provide a vehicle to review matters such as whether the selection of the winning bidder/seller in the Gap RFP was in accordance with the authorized RFP process or whether the resulting contract is consistent with the Gap RFP. Therefore, our review of any

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<sup>3</sup> New England Power Pool, 106 FERC ¶ 61,190 (2004).

<sup>4</sup> May 28 Order, 107 FERC ¶ 61,208 at P 10.

jurisdictional contracts resulting from any future Gap RFPs, as well as of the Gap RFPs themselves, under section 205 of the FPA, will ensure that any rates, terms and conditions are reasonable.<sup>[5]</sup>

6. Separately, the May 28 Order granted NEPOOL's and ISO-NE's request for clarification. The May 28 Order held that, while contracts for power sales from generating facilities would have to be filed for Commission approval, "[c]onsistent with our practice of not requiring individual contracts under load response programs to be filed, we . . . will not require winning bidders for conservation and load management to file such contracts."<sup>6</sup>

7. PSEG filed a timely request for rehearing of the May 28 Order. PSEG objects to the May 28 Order's determination that, while contracts for power sales from generating facilities have to be filed, contracts for conservation and load management need not be filed. PSEG objects to the Commission imposing different filing requirements based on the types of resources used to provide the Gap RFP services.

8. PSEG contends that, from a jurisdictional standpoint, contracts with generators and contracts with conservation and load management resources are indistinguishable. PSEG objects to what it views as a determination that contracts for the provision of capacity through conservation and load management services are not within the Commission's jurisdiction. Further, PSEG contends that the Commission, in *PJM Interconnection*, determined that load response programs were jurisdictional services.

9. PSEG also disputes the May 28 Order's reliance, in treating generators differently, on the Commission's practice of not requiring individual contracts under "load response programs" such as those used in PJM to be filed.<sup>7</sup> It asserts that, in contrast, the Gap RFP program was not approved as a "load response program." Rather, it is a program to obtain "capacity" from various types of resources needed for reliability purposes

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<sup>5</sup> *Id.* at P 12 (footnote omitted); *accord id.* at P 11. The May 28 Order also noted that the role of ISO-NE in the procurement of power is a topic more generally raised in the LICAP proceeding.

<sup>6</sup> *Id.* at P 13, *citing* PJM Interconnection, L.L.C., 99 FERC ¶ 61,139 (2002) (*PJM Interconnection*).

<sup>7</sup> PSEG argues that PJM's load response program is not comparable to the ISO-NE Gap RFP program.

(including, but not limited to, conservation and load response providers). According to PSEG, at least one contract was awarded to a traditional capacity resource (*i.e.*, a generating facility).

10. PSEG argues that the filed rate doctrine, under which a public utility may not charge rates other than those on file with the Commission, applies with equal force to contracts for capacity sales from generating units as to contracts for capacity sales from conservation and load response resources. PSEG also contends that it is discriminatory to have different filing requirements for generator contracts than for conservation and load response contracts, when the resources are supplying essentially the same services. Further, PSEG argues that exempting conservation and load response contracts from filing creates a regulatory gap, because neither the Commission nor a state commission will provide oversight of the services provided by conservation and load response resources under the Gap RFP program.

### **Discussion**

11. We will deny PSEG's request for rehearing. PSEG, notwithstanding its nominal claim that conservation and load response contracts should be filed, seeks a Commission determination that generator contracts (including PSEG's) should not have to be filed. We disagree. As we explained in our earlier orders, contracts for sales from generators under the Gap RFP program must be filed.<sup>8</sup> We see no reason to change this determination.

12. Turning to contracts for conservation and load response resources, contrary to PSEG's reading of the May 28 Order, that order did not find that Gap RFP services provided from conservation and load response resources were not jurisdictional. Our determination that conservation and load response contracts need not be filed merely meant that the Commission, applying its traditional rule of reason, determined that they did not need to be filed.<sup>9</sup> In fact, the May 28 Order cited *PJM Interconnection*, in which load response programs were found to be jurisdictional. Plainly implicit from the

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<sup>8</sup> May 28 Order, 107 FERC ¶ 61,208 at P 12; February 27 Order, 106 FERC ¶ 61,190 at P 8.

<sup>9</sup> See, e.g., *Public Service Co. of Colorado*, 67 FERC ¶ 61,371 at 62,267 (1994) (*PSColorado*) (Commission may have jurisdiction over particular contract or practice, but nevertheless may exercise its discretion to allow utilities to forego filing such contracts or practices).

May 28 Order's citation to *PJM Interconnection* - and now made explicit here - is that services provided from conservation and load response resources pursuant to ISO-NE's Commission-authorized Gap RFP program are jurisdictional.

13. However, finding that such contracts are jurisdictional does not end the matter. The May 28 Order's exemption of individual winning bidders' conservation and load response Gap RFP contracts from a filing requirement was an appropriate exercise of our discretion, especially given our practice to date.<sup>10</sup> Conservation and load response Gap RFP contracts are different from generator Gap RFP contracts. They involve not just a sale of power for resale, but the sale of power purchased by an end user that it would otherwise use itself; in effect, the end user immediately putting back in the market power just taken from that market for the end user's consumption.<sup>11</sup> Moreover, individual conservation and load response Gap RFP contracts in the sub-regions covered by the Gap RFPs, while implicating our jurisdiction, are likely to involve smaller numbers of megawatts than individual generator contracts, warranting our not requiring that such contracts be individually filed and reviewed.<sup>12</sup> Further, the Commission did not require that they be filed in *PJM Interconnection* and, consistent with that practice, does not do so here. In contrast, PSEG seeks a determination that would be inconsistent with Commission practice.

14. Finally, the exemption of individual winning bidders' conservation and load response contracts from section 205's filing requirements does not violate the filed rate doctrine. NEPOOL's Market Rule 1, which provides for the Gap RFP program, is on file, and, as directed in our earlier orders, the individual proposed RFPs must be filed by ISO-NE. The Commission's exercise of its jurisdiction over the Gap RFP program at the ISO level provides oversight sufficient to ensure that the rates, terms and conditions under the Gap RFP program are just and reasonable.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *See PJM Interconnection*, 99 FERC ¶ 61,179 at 61,573.

<sup>12</sup> *See, e.g., Pacific Gas and Electric Co.*, 80 FERC ¶ 61,128 at 61,423 (1997) (declining to require the filing of certain documents); *accord Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 46 (2002) (the Commission has considerable discretion as to both the content and timing of filing requirements), *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074 (2002), *reconsideration denied*, Order No. 2001-B, 100 FERC ¶ 61,342 (2002), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004).

<sup>13</sup> *See supra* note 9.

The Commission orders:

PSEG's request for rehearing of the May 28 Order is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.