UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New England States Committee on Electricity	)	Docket No. EL13-34-_ _ _
v.	)	
ISO New England Inc.	)	

REQUEST FOR REHEARING OF THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l* (2006), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2012), the New England States Committee on Electricity ("NESCOE") respectfully requests rehearing of the Commission's February 12, 2013 Order issued in the above-captioned proceeding ("Order").[1] For the reasons detailed below, the Commission should: (i) correct the legal deficiencies in the Order, (ii) find that ISO New England Inc.'s ("ISO-NE") buyer-side mitigation provisions are unjust and unreasonable, and (iii) take appropriate action to strike an achievable balance between ensuring efficient wholesale markets and accommodating policy objectives codified in state laws.

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[1] *New England States Committee on Electricity v. ISO New England Inc.*, 142 FERC ¶ 61,108 (2013) ("Order").

I. BRIEF BACKGROUND AND INTRODUCTION

On December 3, 2012, ISO-NE filed proposed revisions ("Compliance Filing") to the Transmission, Markets and Services Tariff in response to the Commission's directives on the Forward Capacity Market ("FCM").[2] On December 28, 2012, NESCOE filed a Complaint pursuant to Section 206 of the FPA ("Complaint") against ISO-NE, alleging that the buyer-side mitigation provisions contained in the proposed tariff revisions are unjust and unreasonable without an exemption for certain state-sponsored renewable resources.[3] The Commission issued its Order denying the Complaint on February 12, 2013 and concurrently issued an order accepting ISO-NE's Compliance Filing.[4]

NESCOE participated actively and openly in the region's multi-year stakeholder discussions around changes to the FCM. NESCOE's Complaint was filed only after its avenue for redress in the stakeholder process was exhausted and, ultimately, ISO-NE's buyer-side mitigation mechanism—commonly known as the Minimum Offer Price Rule ("MOPR")—failed to include a limited exemption for renewable resources developed in furtherance of state statutes and regulations or otherwise failed to make any reasonable accommodation for policies reflected in state laws that are common across the New England states.

NESCOE appreciates the Commission's challenge in balancing its responsibility under the FPA to ensure competitive outcomes in the wholesale electricity markets with its interest in

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2 *ISO New England Inc.*, Compliance Filing, Docket No. ER12-953-001 (filed Dec. 3, 2012).

3 *New England States Committee on Electricity v. ISO New England Inc.*, Complaint, Docket No. EL13-34-000 (filed Dec. 28, 2012). On the same day, NESCOE filed, pursuant to Section 205 of the FPA, a Protest to the Compliance Filing and a Motion to Intervene in that proceeding. NESCOE's Complaint also included a Motion to Consolidate the two proceedings so that the Commission could properly consider the public policy implications of the buyer-side mitigation provisions of the proposed tariff revisions.

4 *See ISO New England Inc.*, 142 FERC ¶ 61,107 (2013).

accommodating public policies. As detailed in the Complaint, such a balance is achievable. However, the Order fails to consider the full range of relevant factors set forth in the Complaint and does not squarely address the Commission's obligation to ensure that consumers are not paying for excess capacity. Accordingly, the Order is both impermissible as a matter of law and devoid of any reasoned balance between competing considerations.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

NESCOE provides the following statement of issues in accordance with Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2) (2012), discussed further below in Section III. This statement of issues also serves as the concise specification of errors required under Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1) (2012).

1. **The Commission erred by abdicating its obligation under Sections 205 and 206 of the FPA to ensure just and reasonable rates.** The Order focuses on assigning responsibility to the states for the procurement of excess capacity, rather than on ensuring that consumers do not pay more for capacity than is needed for resource adequacy. 16 U.S.C. §§ 824d, 824e (2006); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010) (holding that all wholesale electricity rates, including those in a capacity market, must be just and reasonable); Order at P 34; *ISO New England Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 at PP 160, 167 (2011) ("April 2011 Order").

2. **The Commission erred in failing to engage in reasoned decision-making by not undertaking a meaningful balancing between promoting efficient wholesale markets and accommodating the states' interest in pursuing public policy objectives codified in state law and under their jurisdiction.** While the Commission itself acknowledges that it must balance these two considerations in making a determination on NESCOE's Complaint,[5] the Order is devoid of an explanation of the balancing the Commission was required to undertake. The Commission's denial of the Complaint without a sufficient articulation of the

[5] *See* Order at P 35 (stating that "the Commission must balance . . . its responsibility to promote economically efficient markets and efficient prices [and] its interest in accommodating the ability of states to pursue other legitimate state policy objectives"); *id*. at *Dissenting Opinion of Chairman Wellinghoff and Commissioner Norris* at 2 ("The Commission acknowledges the need to strike this balance, but fails to explain how it does so here").

relevant factors considered in making its decision is arbitrary and capricious and does not constitute reasoned decision-making. 16 U.S.C. §§ 824d, 824e (2006). *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (the Commission "must examine the relevant data and articulate a satisfactory explanation for its action"); *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010) (the Commission must make a reasoned decision based on substantial evidence); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006); *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099 (D.C. Cir. 1993).

3. **The Commission erred in disregarding record evidence showing that the proposed tariff revisions are unjust and unreasonable absent a narrowly tailored exemption for renewable resources.** Contrary to the Order,[6] NESCOE provided ample support for its assertion that the MOPR is unjust and unreasonable without including a limited exemption for certain state-sponsored resources. 16 U.S.C. §§ 824d, 824e (2006). *See, e.g., Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 (the Commission "must examine the relevant data and articulate a satisfactory explanation for its action"); *Florida Gas Transmission Co.*, 604 F.3d at 639 (the Commission must make a reasoned decision based on substantial evidence); *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 839; *Gulf Power Co.*, 983 F.2d at 1099.

4. **The Commission erred in failing to provide sufficient support for its determination that NESCOE has not adequately demonstrated that the MOPR will undermine state policies reflected in state laws and regulations.** In finding that NESCOE has failed to support its assertion that the proposed tariff revisions undermine state policies, the Order either fails to provide a sufficient explanation of its decision, or misconstrues the Complaint. 16 U.S.C. §§ 824d, 824e (2006). *See, e.g., Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43 (the Commission "must examine the relevant data and articulate a satisfactory explanation for its action"); *Florida Gas Transmission Co.*, 604 F.3d at 639 (the Commission must make a reasoned decision based on substantial evidence); *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 839; *Gulf Power Co.*, 983 F.2d at 1099.

III. ARGUMENT

A. The Commission Erred by Abdicating its Obligation under the FPA to Ensure Just and Reasonable Rates.

The FPA is clear in its requirement that rates under the Commission's jurisdiction be just and reasonable. However, rather than satisfy that requirement in the instant case by ensuring that consumers do not pay unjust and unreasonable capacity rates, the Commission lays responsibility

[6] *Id.* at P 33.

for any excess capacity beyond the Installed Capacity Requirement ("ICR")—and by inference increased costs to transmission ratepayers—on the states' actions to implement state laws.[7] The Commission explains:

> [E]ven with an exemption for state-sponsored resources, the FCM cannot and will not procure more than the ICR. As noted by ISO-NE, "if the states choose to build uneconomic resources outside of the FCM pursuant to current or future initiatives to further various policy interests, the states, not the FCM are responsible for procuring redundant capacity." Because nothing in the proposed FCM rules require nor cause the purchase of capacity in excess of the ICR, NESCOE's argument does not persuade us to find the proposed rules to be unjust and unreasonable. In fact, the Commission ordered the MOPR in part because, rather than procuring capacity in excess of the ICR, the MOPR mechanism ensures procurement of "just the ICR and no more."[8]

This analysis obfuscates the core question before the Commission: whether consumers are charged excessive prices by virtue of purchasing more capacity from the FCM than is necessary for resource adequacy. Assigning responsibility to one entity over another (i.e., the states through actions to execute state laws or ISO-NE through its MOPR) for an over-procurement of capacity does not fulfill the exacting statutory standards set forth in the FPA to ensure just and reasonable rates.[9]

Moreover, the Commission's reasoning that the proposed rules are structured to prevent the FCM from procuring capacity in excess of the ICR is an insufficient proxy for ensuring just and reasonable rates. Indeed, new renewable resources that are commercially available and providing valuable capacity will likely be treated as uneconomic entry in the FCM under the

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7 *Id.* at P 34.

8 *Id.* (footnotes omitted)

9 *See, e.g., NRG Power Mktg., LLC*, 558 U.S. at 167 ("The Federal Power Act . . . authorizes the [FERC] to superintend the sale of electricity in interstate commerce and provides that all wholesale-electricity rates must be "just and reasonable") (citations omitted).

proposed MOPR, forcing consumers to procure and purchase redundant capacity in the FCM.[10] The MOPR may be designed to limit the FCM to procuring "just the ICR and no more," but the total capacity available on the system, all of which will be contributing to the region's reliability, will invariably exceed the ICR and thereby undermine the Commission's objective of protecting consumers by disallowing the purchase of "additional capacity above the ICR."[11] It also accords the FCM a primacy over resource adequacy that places the theoretical purity of the price signal above the actual impact of requiring customers to purchase more than is necessary.

Such an outcome fails to accord ratepayers the full value of their investments in capacity resources, is unjust and unreasonable, and results in an energy market blind to the requirements of state laws, which is unsustainable over the long run.[12] The Commission should grant rehearing and, consistent with its obligation under the FPA, address squarely the harm to consumers resulting from the FCM's procurement of more capacity than is necessary for resource adequacy.[13]

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10 *See* Complaint at 8-9.

11 April 2011 Order at P 160; Order at 34. *See* April 2011 Order at P 167 ("[O]ffer-floor mitigation would spare customers the cost of procuring capacity in excess of the ICR – excess capacity that is not needed to meet ISO-NE's reliability objectives."). *See also Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("[T]he ICR is better understood not as a capacity *requirement* but as something more like a peak demand estimate . . . and the purpose of the Forward Market is only to locate the price at which market incentives will be sufficient to meet that expected demand.") (emphasis in original).

12 Indeed, in 2012, renewable resources constituted roughly half of all new capacity added nationwide. *See* FERC, Office of Energy Projects, *Energy Infrastructure Update For December 2012*, at 5, *available at* http://www.ferc.gov/legal/staff-reports/dec-2012-energy-infrastructure.pdf. The current year reflects continued additions of renewable capacity, with renewable generation representing the *entirety* of new installed capacity coming online in January 2013. *See* FERC, Office of Energy Projects, *Energy Infrastructure Update For January 2013*, at 3, *available at* http://www.ferc.gov/legal/staff-reports/2013/jan-energy-infrastructure.pdf.

13 16 U.S.C. §§ 824d, 824e (2006). *Accord North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008), quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("An [agency's]

B. The Commission Failed to Engage in Reasoned Decision-Making by Failing to Undertake a Meaningful Balancing Between Promoting Efficient Wholesale Markets and Accommodating the States' Interest in Pursuing Policy Objectives Codified in State Law and Within Their Jurisdiction.

The Commission recognizes that in determining the merits of the Complaint it must balance two considerations: (1) the Commission's "responsibility to promote economically efficient markets and efficient prices," and (2) the Commission's "interest in accommodating the ability of states to pursue other legitimate state policy objectives."[14] As to the latter, the Commission has recognized in other contexts, such as Order No. 1000, that state policies must be considered to help ensure just and reasonable rates.[15] If the Commission believes that it is impossible for ISO-NE to recognize resources developed pursuant to state law in the context of New England's current market structure, then the Commission's requirement in Order No. 1000 that ISO-NE—and others—spend time and resources for purposes of transmission planning considering those very same projects required by state public policies is at best internally inconsistent and at worst unjust and unreasonable.

The Order fails to demonstrate that the Commission in fact undertook a requisite meaningful balancing between ensuring efficient markets and accommodating public policies. This omission is dispositive. As the dissent notes:

> The Commission acknowledges the need to strike this balance, but fails to explain how it does so here. Instead, the Commission asserts that it is state actions, and not the capacity market, that will result in procurement of additional unneeded capacity. In addition, the Commission focuses on

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action is 'arbitrary and capricious' if it . . . 'entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency[.]").

14 Order at P 35.

15 *See, e.g., Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 at P 203 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

> the structure, size and design of New England's capacity market to conclude that ISO-NE's FCM could not allow for alternative buyer-side mitigation mechanisms to accommodate legitimate state policy goals. These responses fail to grapple with the question of how to accommodate states' legitimate interest in pursuing fuel diversity goals within their resource planning jurisdiction with our responsibility to ensure just and reasonable wholesale rates.[16]

At best, the Commission's attempt to detail the balancing it undertook appears to be limited to a comparison of the PJM and ISO-NE capacity markets.[17] The Order highlights key differences in market structure and design between the two regions and implies that state-sponsored renewable resources in New England may never be allowed an exemption absent a fundamental change to ISO-NE's market structure (i.e., implementing a demand curve). Such a comparison does not evidence a meaningful balancing of considerations. To the contrary, it suggests an *im*balanced analysis of interests, where core market design changes become a prerequisite to the Commission even considering whether to allow an exemption for renewable resources that further state laws and regulations. That is neither a fair nor a reasonably articulated balancing of obligations and interests.[18]

Further, the Commission draws inapposite distinctions between ISO-NE and PJM based on market size and load growth rates.[19] While an exemption from the MOPR may have different price impacts in both regions, this truism is a function of the respective regions' supply and demand balance and cannot be accurately generalized as the Commission has done here. Renewable Portfolio Standards ("RPS") are proportional to load and vary from state to state.

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16 Order at *Dissenting Opinion of Chairman Wellinghoff and Commissioner Norris* at 2.

17 *Id.* at P 35.

18 *See, e.g., Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 839 (setting forth the standard of review in analyzing the Commission's actions); *Gulf Power Co.*, 983 F.2d at 1099 ("hurdle of deference" to the Commission overcome by demonstration of arbitrary conduct, with "little evidence that FERC actually engaged in any meaningful balancing").

19 Order at P 35.

Load growth is influenced by many factors, including state-sponsored energy efficiency programs. A limited, capped exemption in a smaller market with more aggressive RPS goals and energy efficiency programs will not necessarily have a greater price suppression impact than an uncapped exemption in a larger market. Moreover, if the extent of price suppression is a relevant factor in deciding whether or not to accommodate public policies in the FCM, the Commission's Order does not explain what level of price suppression is permissible and why.

Accordingly, on its face, the Order fails to reflect that the Commission engaged in reasoned decision-making and its determination was arbitrary, capricious and impermissible as a matter of law. The Commission should grant rehearing and fully articulate the rationale for its decision and the factors considered in balancing between ensuring efficient wholesale markets and accommodating state policies such as, among others set forth in the Complaint, promoting fuel diversity and renewable energy, both of which are critically important in New England.

C. The Commission Failed to Consider Record Evidence Demonstrating that the MOPR is Unjust and Unreasonable Without an Exemption for Renewable Resources.

In the Order, the Commission states that NESCOE failed to provide new evidence showing that the proposed MOPR is unjust and unreasonable because it lacks a categorical exemption for certain resources.[20] This finding is factually incorrect and disregards, without explanation, the testimony provided by Jeffrey W. Bentz, contained in Attachment A of NESCOE's Complaint.

On NESCOE's behalf, Mr. Bentz detailed how much of the capacity provided by new renewable resources developed pursuant to state statutes and regulations would likely not count

[20] *Id.* at P 37.

toward the region's resource adequacy requirements if the MOPR were implemented.[21] In this manner, Mr. Bentz's testimony lays the foundation for NESCOE's contention that the MOPR is overly broad and, pursuant to Section 206 of the FPA, "unjust, unreasonable, unduly discriminatory or preferential."[22] Mr. Bentz further testifies to how NESCOE's proposed renewables exemption achieves the proper balance between the Commission's and the states' shared interest in promoting competitive outcomes in the wholesale electricity markets and supporting public policies.[23]

Despite this newly filed evidence supporting NESCOE's claims that the MOPR is unlawful absent a narrowly tailored exemption, the Order ignores Mr. Bentz's testimony. The Commission's failure to consider this record support is an abuse of discretion and does not constitute reasoned decision-making.[24]

D. The Commission Provides Insufficient Support for its Finding that NESCOE has Failed to Demonstrate that the MOPR Will Undermine State Policies.

The Commission has also abused its discretion by not providing adequate support for its determination that NESCOE failed to meet its burden of showing that the proposed tariff revisions will undermine state statutes and regulations.[25] In support of its finding that NESCOE did not support its contention, the Commission notes that "NESCOE states in its complaint that state energy policies 'promote the development of new renewable resources irrespective of the FCM rules and related price signals.'"[26] This cursory finding alone falls short of reasoned

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21 Complaint at Attachment A, at 10-19.
22 Complaint at 8.
23 *Id.* at Attachment A, at 19-26.
24 *See, e.g., Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 46.
25 Order at P 36.
26 *Id.*

decision-making and the "satisfactory explanation" the Commission is required to provide to justify its actions.[27]

However, even assuming that the Commission's reasoning is sufficiently detailed, it misconstrues the sole language it cites in support of its finding. While the state policies NESCOE references are intended to *promote* the development of new renewable resources absent an FCM revenue stream, despite strong state leadership and best efforts, there are many factors, across a wide spectrum, that could impede renewable generating projects from becoming operational.[28] As detailed in the Complaint, the MOPR is an example of one such impediment.[29] By effectively precluding renewable resources from receiving capacity payments, the MOPR withholds an additional market-based revenue stream from renewable resources developed pursuant to state statutory mandates. This makes the cost of a power purchase agreement, required to facilitate project financing in tight credit conditions, more expensive for consumers. It also compounds the challenge of supporting new technologies that are still in the early stages of development and that hold the promise of lower costs through innovation and economies of scale, a central underpinning of state policies supporting emerging renewable resources.

NESCOE's Complaint additionally details how the MOPR will undermine state policies supporting fuel diversity.[30] The combination of a lower asset-class-specific benchmark price

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27 *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 839, quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

28 In Order No. 1000, the Commission communicated its point of view that federal actions beyond state laws supporting renewable resources may be needed to move proposed projects to operation. *See, e.g.,* Order No. 1000 at P 52 ("We conclude that the narrow focus of current planning requirements and shortcomings of current cost allocation practices create an environment that fails to promote the more efficient and cost-effective development of new transmission facilities, and that addressing these issues is necessary to ensure just and reasonable rates").

29 Complaint at 12-14.

30 *Id.*

assigned to natural gas-fired resources relative to renewable resources, coupled with the dominance of natural gas generating units in New England's interconnection queue, reinforces the likelihood that new resources clearing the FCM will be fueled by natural gas. Renewable capacity would help moderate the region's concentration of natural gas-fired resources and the risk to consumers of overreliance on any one power source. However, by not counting these resources toward the ICR, the FCM procures yet more gas-fired resources, negating the states' efforts to diversify the region's fuel and technology mix to better enable the region to withstand fuel price volatility, fuel supply or delivery disruptions. As a result, the Commission would have a region already increasingly dependent on natural gas for its electric generation *decrease* its fuel diversity and, ironically, reduce reliability with each new capacity auction.[31]

The Commission's finding that NESCOE has not adequately supported its contention that the MOPR will undermine state policies fails to constitute reasoned decision-making and is arbitrary and capricious. The Commission should grant rehearing and address in sufficient detail NESCOE's arguments that the MOPR will impede state policy objectives, including addressing why lack of intent to suppress prices is not relevant to the scope of the remedy.

[31] *Id.* at 13-14. In her Concurrence, Commissioner LaFleur notes the "presently acute" gas-electric coordination issues in New England in the context of emphasizing the importance of accurate market prices for reliability. Order at *Concurrence in Part of Commissioner LaFleur* at 2.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, NESCOE respectfully requests that the Commission grant rehearing and, on rehearing, correct the errors specified herein and take appropriate action to strike an achievable balance between ensuring an efficient, sustainable FCM and accommodating policy objectives codified in state laws of the New England states.

Respectfully submitted,

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Date: March 14, 2013

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, I hereby certify that I have this day served by electronic mail a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Boston, Massachusetts this 14th day of March, 2013.

Respectfully submitted,

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