

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England Inc.)	Docket Nos. ER19-1428-000
)	ER19-1428-001

**REQUEST FOR REHEARING OF
THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY**

Pursuant to sections 205(g)(1)(A)¹ and 313(a)² of the Federal Power Act (“FPA”) and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),³ the New England States Committee on Electricity (“NESCOE”)⁴ submits this request for rehearing of the Commission’s acceptance of the filing made by ISO New England Inc. (“ISO-NE”) in this proceeding (“Filing”),⁵ which went into effect by operation of law.⁶

The issues that ISO-NE’s filing present are of great importance to the region and consumers. It is critical that the agency with sole oversight over wholesale electric rates ensures that the programs ISO-NE implements achieve their intended goals—in this case, assuring fuel

¹ 16 U.S.C. § 824d(g)(1)(A). Section 205(g) of the FPA was enacted as part of the America’s Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3006.

² 16 U.S.C. § 825/(a).

³ 18 C.F.R. § 385.713.

⁴ NESCOE submitted a timely motion to intervene in this proceeding on March 29, 2019. As explained therein, NESCOE is the Regional State Committee for the New England region. NESCOE is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. NESCOE’s mission is to represent the interests of the citizens of the New England region by advancing policies that will provide electricity at the lowest reasonable cost over the long term, consistent with maintaining reliable service and environmental quality.

⁵ ISO New England Inc., Inventoried Energy Program, Docket No. ER19-1428-000 (Mar. 25, 2019).

⁶ Massachusetts and Connecticut did not take a substantive position in response to the Filing and remain neutral on the merits of ISO-NE’s proposal.

security for the two winter periods during Forward Capacity Auction (“FCA”) 14 and FCA 15—and that the resulting rates are just and reasonable and not unduly preferential.⁷ In this case, the Commission has failed to do so. It is equally critical that consumers have the opportunity to understand why the prices they pay have been deemed just and reasonable. Accordingly, NESCOE seeks rehearing.

I. INTRODUCTION AND BACKGROUND

FPA section 205(g)(1)(A) provides that if, as a result of the absence of a quorum (among other things), the Commission fails to issue an order accepting or denying a rate change submitted pursuant to FPA section 205(d), such failure “shall be considered to be an order issued by the Commission accepting the change for purposes of” FPA section 313(a). That is precisely what has happened here.

On March 25, 2019, pursuant to FPA section 205, ISO-NE made the Filing to implement an inventoried energy program in the Capacity Commitment Periods associated with FCAs 14 and 15 to compensate resources for maintaining inventoried energy during the winter months of 2023-2024 and 2024-2025 (“Inventoried Energy Program”). A number of parties submitted timely protests of the Inventoried Energy Program, including the Vermont Department of Public Service (“VT DPS”),⁸ the Maine Public Utilities Commission (“ME PUC”),⁹ and the New Hampshire Public Utilities Commission jointly with the New Hampshire Office of Consumer

⁷ Capitalized terms not defined in this filing are intended to have the meaning given to such terms in the ISO-NE Transmission, Markets and Services Tariff (the “Tariff”).

⁸ Vermont Department of Public Service Motion for Intervention and Protest, Docket No. ER19-1428-000 (Apr. 12, 2019) (“VT DPS Protest”).

⁹ Notice of Intervention and Protest of the Maine Public Utilities Commission, Docket No. ER19-1428-000 (Apr. 12, 2019) (“ME PUC Initial Protest”).

Advocate (“NH Parties”).¹⁰ The Vermont Public Utilities Commission submitted comments supporting the VT DPS Protest.¹¹ NESCOE did not file a substantive pleading.

On May 8, 2019, Commission Staff issued a letter to ISO-NE informing ISO-NE that its filing was deficient and seeking additional information.¹² On June 6, 2019, ISO-NE submitted its response to that letter.¹³ Following ISO-NE’s submission of the Deficiency Response, several additional protests were submitted, including one by the ME PUC.¹⁴

Notwithstanding the fact that there were four sitting Commissioners on August 5, 2019 (*i.e.*, 60 days after ISO-NE filed its Deficiency Response), on August 6, 2019, the Commission’s Secretary issued a Notice of Filing Taking Effect by Operation of Law (“Notice”). The Notice stated that in the absence of Commission action on or before August 5, 2019, ISO-NE’s proposal, as amended on June 6, 2019, became effective by operation of law, with an effective date of May 28, 2019. The Notice stated that the Commission did not act on the Filing because of a lack of quorum at this time.¹⁵ Consistent with FPA section 205(g)(1)(B), each Commissioner submitted in the record of this proceeding a statement explaining his or her views with respect to the change. Commissioners LaFleur and McNamee submitted statements

¹⁰ Protest of the New Hampshire Public Utilities Commission and the New Hampshire Office of the Consumer Advocate, Docket No. ER19-1428-000 (Apr. 15, 2019) (“NH Parties Protest”).

¹¹ Comments of the Vermont Public Utility Commission, Docket No. ER19-1428-000 (Apr. 15, 2019).

¹² Letter from Kurt M. Longo, Director, Division of Electric Power Regulation – East to Maria Gulluni, Attorney for ISO New England Inc., Docket No. ER19-1428-000 (May 8, 2019) (“Deficiency Letter”).

¹³ ISO New England Response to Commission Request for Additional Information Regarding the Inventoried Energy Program, Docket No. ER19-1428-000 (June 6, 2019) (“Deficiency Response”).

¹⁴ Protest of the Maine Public Utilities Commission, Docket No. ER19-1428-001 (June 27, 2019) (arguing that the Deficiency Response failed to address the deficiencies identified in the Deficiency Letter) (“ME PUC Deficiency Response Protest”).

¹⁵ At least three Commissioners must be present to compose a quorum. 42 U.S.C. § 7171(e); 18 C.F.R. § 375.101(e).

indicating recusal.¹⁶ As a result, with only two Commissioners participating, there was a lack of quorum.

Chairman Chatterjee issued a statement noting that he would have voted to accept the proposed Tariff revisions.¹⁷ By contrast, Commissioner Glick stated that in his view, ISO-NE's "Inventoried Energy program is patently unjust and reasonable" but explained that "without a quorum there is nothing the Commission could do to prevent this program from taking effect."¹⁸ As far as NESCOE is aware, this is the first time in the nation that FPA section 205(g) has been invoked.

NESCOE understands that whether or not the Commission operates at any point in time at its intended state of five Commissioners is not within the Commission's control. NESCOE also recognizes that half of the sitting Commissioners concluded that something precluded them from participating in this case. We respect those judgments but note that some level of transparency around the basis for recusals, consistent with FERC's ethics rules, would be helpful to the public's understanding of why the Commission landed without a quorum in this matter and whether those recusals are likely to repeat on other matters.

While the six New England states were not of one mind on the merits of the ISO-NE Filing, NESCOE is of one mind on the need for the Commission to explain the acceptance of the Inventoried Energy Program: consumers paying the bills should have the opportunity to

¹⁶ Statement of Commissioner LaFleur, Docket No. ER19-1428-001 (Aug. 8, 2019) ("I am not participating in this docket and therefore am unable to comment with respect to the changes proposed."); Statement of Commissioner McNamee, Docket No. ER19-1428-001 (Aug. 8, 2019) ("I am not participating and therefore am unable to comment with respect to the changes proposed.").

¹⁷ Statement of Chairman Chatterjee, Docket No. ER19-1428-001 (Aug. 8, 2019) ("Chatterjee Statement"), at P 2.

¹⁸ Statement of Commissioner Glick, Docket No. ER19-1428-001 (Aug. 8, 2019) ("Glick Statement"), at P 2.

understand whether and why costs approved by the Commission are just and reasonable. This rehearing request seeks Commission action to fill this gap.

II. SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

NESCOE provides the following statement of issues in accordance with Rule 713(c)(2).¹⁹

This statement of issues also serves as the concise specification of errors required under Rule 713(c)(1).²⁰

1. The Commission erred in failing to articulate a satisfactory explanation and otherwise to engage in reasoned decision-making in accepting ISO-NE's Inventoried Energy Program, thus rendering such acceptance "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *New England Power Generators Ass'n. v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission has not responded meaningfully—indeed, at all—to the arguments raised before it. *New England Power Generators*, 881 F.3d at 210; *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992).

2. The Commission erred in accepting the Inventoried Energy Program without addressing the substantial evidence in the record, contrary to the Administrative Procedure Act, 5 U.S.C. §706(2)(E).

3. The Commission erred in failing to provide a reasoned explanation for departing from precedent. *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006); *Brusco Tug &*

¹⁹ 18 C.F.R. § 385.713(c)(2).

²⁰ 18 C.F.R. § 385.713(c)(1).

Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001). The Commission failed to explain how the Inventoried Energy Program would not undermine a key element that the Commission relied upon when it found ISO-NE’s Capacity Auctions with Sponsored Policy Resources (“CASPR”) program just and reasonable in *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018), *reh’g pending*. And the Commission failed to explain how the objectives of ISO-NE’s Inventoried Energy Program do not conflict with the goals of a prior ISO-NE program approved by the Commission, the “Pay-for-Performance” (“PFP”) program. *ISO New England Inc. & New England Power Pool*, 147 FERC ¶ 61,172 (2014), *reh’g denied*, 153 FERC ¶ 61,233 (2015).

III. REQUEST FOR REHEARING

The Commission has allowed rates to go into effect without having engaged in reasoned decision-making, considered record evidence on the justness and reasonableness of the ISO-NE Filing, or explained potential departures from precedent. By allowing the filing to go into effect by operation of law, the Commission’s failure to act—here, because of a lack of quorum, notwithstanding that there were four sitting Commissioners at the time—is deemed by FPA section 205(g)(1)(A) “to be an order issued by the Commission accepting the change for purposes of” FPA section 313(a). NESCOE recognizes and appreciates that there is a vacancy on the Commission, and that the Commission does not have control over filling such vacancies. However, consumers are nonetheless left in an untenable position. The record in this proceeding shows that (i) Commission Staff found ISO-NE’s filing to be deficient, (ii) a number of parties including several state regulatory agencies protested the Inventoried Energy Program as unjust and unreasonable, and (iii) one of two sitting Commissioners participating in the docket believed

the program to be “patently unjust and unreasonable”²¹ and “an utter waste of ratepayers’ money.”²² While NESCOE did not and does not here take a substantive position on any of the pleadings filed in this proceeding, it is critical that the Commission respond to this record evidence and allow consumers to understand why the rates they will pay are deemed just and reasonable.

NESCOE seeks rehearing because of its concern about a program with substantial cost and policy implications being allowed to go into effect in New England without the Commission’s consideration of record evidence and how the program may depart from past orders. Although FPA section 205(g) now deems inaction under specified circumstances (in this case, lack of a quorum) to be an order accepting a section 205 filing, it does not obviate the need for reasoned decision-making.²³ In this case, it is impossible to conclude anything other than the Commission failed to engage in reasoned decision-making, contrary to the fundamental tenets of the Administrative Procedure Act.²⁴

²¹ Glick Statement at P 2.

²² *Id.* at P 8.

²³ Under FPA section 205(d), the failure of the Commission when able to act on a rate change application within 60 days of filing means that the rate change becomes effective by operation of law. *See Public Citizen v. FERC*, 839 F.3d 1165, 1167 (D.C. Cir. 2016). FPA section 205(g), however, addresses the situation in which the Commission, for the reasons specified in that section, is unable to act within 60 days. In that circumstance, Congress provided that such failure of the agency to act within 60 days would be deemed “an order issued by the Commission accepting the change for purposes of section 8251(a) of this title.” There is no suggestion in FPA section 205(g) that the standards on appeal from such an order by operation of law are any different than the standards applicable to any final Commission order.

²⁴ 5 U.S.C. § 706(2)(A) (FERC’s orders must be vacated if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

A. The Commission Erred in Failing To Engage in Reasoned Decision-making.

1. The Commission Failed To Articulate a Satisfactory Explanation for Allowing the Inventoried Energy Program To Go into Effect.

Under the Administrative Procedure Act, “[t]he arbitrary-and-capricious standard requires the agency to ‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”²⁵ The lack of a quorum due to the recusal of two of the four sitting Commissioners resulted in the Commission not articulating *any* explanation for its action, let alone a satisfactory one.

The standard of review under the Administrative Procedure Act is clear: “It is well established that the Commission must ‘respond meaningfully to the arguments raised before it.’”²⁶ This has not occurred in this case. Although Chairman Chatterjee and Commissioner Glick each added their individual statements to the record of this proceeding in accordance with FPA section 205(g)(1)(B), nothing in FPA section 205(g) suggests that Congress intended that the individual statements of Commissioners in the absence of a quorum would constitute agency action.²⁷

Commissioner Glick was adamant in his position that he would not have voted to approve the program. Indeed, he expressed his belief “that any order accepting ISO New England’s proposed tariff changes would have violated the Administrative Procedure Act’s basic requirement that agency actions be the product of reasoned decisionmaking and be based on

²⁵ *New England Power Generators Ass’n v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)).

²⁶ *New England Power Generators*, 881 F.3d at 210 (quoting *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015); see also *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D. C. Cir. 1992) (“It most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it — that it conduct a process of *reasoned* decisionmaking.”) (emphasis in original)).

²⁷ And even if it had, Chairman Chatterjee and Commissioner Glick took different views of the proposal, thus a one-to-one deadlock.

substantial evidence in the record.”²⁸ While Chairman Chatterjee took the opposite view, he stated:

[G]iven the lack of quorum at the time of the statutory deadline for Commission action on this proposal, I was unable to fully discuss the complex issues involved in the proposal with all of my fellow Commissioners. I was open to discussions with my colleagues regarding their positions, and would have thoughtfully considered their arguments. To the extent any of those discussions raised new issues for my consideration, I would have carefully considered those matters and incorporated them into my decision-making process.^[29]

NESCOE understands that the two participating Commissioners could not have debated their way to consensus here due to the lack of a quorum. Nonetheless, what remains is acceptance of the Inventoried Energy Program without any reasoned decision-making on the part of the Commission. Accordingly, the Commission should grant rehearing and issue an order on the merits.³⁰

2. The Commission Erred in Allowing the Inventoried Energy Program To Go Into Effect Contrary to Substantial Evidence in the Record.

When reviewing an agency’s actions, the Courts must “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (E) unsupported by substantial evidence”³¹

²⁸ Glick Statement at P 20.

²⁹ Chatterjee Statement at P 13.

³⁰ Pursuant to new FPA section 205(g)(2), if the Commission fails to act on the merits of this rehearing request within 30 days because it continues to lack a quorum, then NESCOE has the right to appeal pursuant to FPA section 313(b).

³¹ 5 U.S.C. §706(2).

The Commission’s acceptance of the Inventoried Energy Program is not based on substantial evidence in the record. Without expressing a view on them, NESCOE notes that parties made arguments to this effect, including:

- ISO-NE failed to define any qualitative or quantitative determination of need, thereby rendering it impossible to measure the success of the Inventoried Energy Program;³²
- ISO-NE did not provide any quantitative estimate of the incremental reliability improvements to be achieved by its Inventoried Energy Program;³³
- ISO-NE’s proposed program did not include any mechanisms to minimize the cost burden on ratepayers;³⁴
- The program will substantially increase costs to consumers without providing commensurate reliability benefits;³⁵ and
- Not only is there no record support for the view that ISO-NE’s program would deter energy-secure resources from pursuing retirement, but ISO-NE itself acknowledged that it “‘cannot guarantee’ that the program will ‘deter any particular resource that would otherwise be uneconomic from retiring.’”³⁶

Commission Staff agreed that there was insufficient evidence in the record and, thus, issued the Deficiency Letter. ISO-NE’s Deficiency Response was protested by several parties. The ME PUC, for example, pointed out that the Deficiency Response failed to explain why the program is necessary³⁷ and that ISO-NE did not conduct any quantitative analysis regarding the

³² ME PUC Initial Protest at 4-6; NH Parties Protest at 11, 14.

³³ ME PUC Initial Protest at 7-8.

³⁴ VT DPS Protest at 3-4 (“As explained in ISO-NE’s supporting testimony, the design of the proposal does not include...a mechanism ‘to buy this product from the set of suppliers that could sell it at [the] lowest cost.’”) (quoting Testimony of Dr. Christopher Geissler on Behalf of ISO New England Inc. at 8).

³⁵ NH Parties Protest at 10-11.

³⁶ *Id.* at 9 (quoting ISO-NE Filing at 7).

³⁷ ME PUC Deficiency Response Protest at 3.

impact of the program on energy prices and fuel availability.³⁸ NESCOE does not opine on that assertion, but it believes the ME PUC is entitled to understand the Commission’s position.

As described in another protest, in response to the Deficiency Letter, ISO-NE acknowledged that it “did not conduct [any] analysis to determine the expected impact on total system costs...”,³⁹ “did not conduct any specific analysis that sought to estimate how much additional fuel would have been available during previous cold weather events if the program were in place;”⁴⁰ and “has not quantitatively evaluated the extent to which the program would decrease the likelihood of retirements by resource or fuel type.”⁴¹ Commissioner Glick referred to the lack of any analysis determining the expected impact on total system costs⁴² and stated that “there is no evidence in the record indicating that the payments under the Inventoried Energy program are likely to have any effect on retirements, much less an effect that could be conceivably be worth consumers paying an additional several hundred million dollars.”⁴³ Without addressing such evidence (or lack thereof), the Commission’s acceptance of the filing is not an agency action supported by substantial evidence.

³⁸ *Id.* at 3-5.

³⁹ Joint Protest of the New England Consumer-Owned Systems, Energy New England, LLC, and Direct Energy Business, LLC Concerning ISO-NE Deficiency Letter Response, Docket No. ER19-1428-001 (June 27, 2019), at 5 (quoting ISO-NE Deficiency Response at 7).

⁴⁰ *Id.* (quoting ISO-NE Deficiency Response at 8).

⁴¹ *Id.* (quoting ISO-NE Deficiency Response at 15).

⁴² Glick Statement at n.20.

⁴³ *Id.* at P 17.

3. The Commission Erred in Failing To Provide a Reasoned Explanation for Departing from Precedent.

It is, of course, “textbook administrative law that an agency must provide[] a reasoned explanation for departing from precedent or treating similar situations differently.”⁴⁴ In this case, there is no Commission order providing such a reasoned explanation. Instead, there are two individual statements by Commissioners, one of whom, Commissioner Glick, expressed his view that “creating a program to funnel money to uneconomic resources in order to prevent their retirement would seem to undermine a key element of the balancing act that the Commission relied upon when it found the Capacity Auctions with Sponsored Policy Resources (CASPR) program just and reasonable.”⁴⁵

Additionally, Commissioner Glick agreed with protestors that the objectives of the Inventoried Energy Program may conflict with the goals of a prior ISO-NE program approved by the Commission, ISO-NE’s PFP program.⁴⁶ As he explained, “PFP was designed to improve reliability, including fuel security, by creating an incentive for resources to be available when called upon,”⁴⁷ and the Inventoried Energy Program “will interfere with PFP’s objectives if it succeeds in retaining resources that can store fuel, but cannot reliably perform when needed during a PFP event.”⁴⁸ Indeed, Staff raised this concern in the Deficiency Letter.⁴⁹

⁴⁴ *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (internal citation and quotation marks omitted) (alteration in original). See also *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (“[I]t is ‘axiomatic that [agency action] must either be consistent with prior [action] or offer a reasoned basis for its departure from precedent’” (alterations in original) (quoting *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001))).

⁴⁵ Glick Statement at P 11 (citing *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 7 (2018)).

⁴⁶ *ISO New England Inc. & New England Power Pool*, 147 FERC ¶ 61,172 (2014).

⁴⁷ Glick Statement at P 18.

⁴⁸ *Id.* (citing ME PUC Initial Protest at 6-7).

⁴⁹ Deficiency Letter at 9.

Here, the Commission has failed to provide any response to arguments that the Inventoried Energy Program represents a departure from precedent. It should grant rehearing and provide a reasoned explanation so that consumers have the opportunity to understand the Commission's judgment about the justness and reasonableness of the costs consumers will pay.

IV. CONCLUSION

For the reasons discussed herein, the Commission should grant rehearing of what is deemed by FPA section 205(g)(1)(A) to be an order accepting ISO-NE's program.

Respectfully Submitted,

/s/ Jason Marshall
Jason Marshal
General Counsel
New England States Committee on Electricity
655 Longmeadow Street
Longmeadow, MA 01106
Tel: (617) 913-0342
Email: jasonmarshall@nescoc.com

/s/ Phyllis G. Kimmel
Phyllis G. Kimmel
McCarter & English, LLP
1301 K Street, NW, Suite 1000 West
Washington, DC 20005
Tel: (202) 753-3400
Email: pkimmel@mccarter.com

Attorneys for the New England States Committee
on Electricity

September 4, 2019

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 Cambridge, Massachusetts this 4th day of September, 2019.

/s/ Jason Marshall

Jason Marshall
General Counsel
New England States Committee on Electricity
655 Longmeadow Street
Longmeadow, MA 01106
Tel: (617) 913-0342
Email: jasonmarshall@nescoc.com