UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.	)	Docket No. ER20-739-000

COMMENTS OF THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to the Federal Energy Regulatory Commission's ("Commission" or "FERC") January 6, 2020 Notice of Filings #1, the New England States Committee on Electricity ("NESCOE") hereby submits these comments in the above-captioned proceeding.[1]

I. BACKGROUND

On January 6, 2020, ISO New England Inc. ("ISO-NE") filed pursuant to Federal Power Act ("FPA") Section 205[2] proposed revisions to its Open Access Transmission Tariff ("OATT")[3] to incorporate a mechanism to facilitate the recovery of certain specified Critical Infrastructure Protection ("CIP") costs by facilities that ISO-NE designates as critical to the derivation of Interconnection Reliability Operating Limits ("IROL") (such costs are referred to as "IROL-CIP Costs").[4] ISO-NE makes these designations in accordance with the methodology that the North American Electric Reliability Corporation ("NERC") has established.[5] ISO-NE's proposed cost recovery mechanism is reflected in its proposed new OATT Schedule 17, Recovery of Critical

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1 NESCOE filed a doc-less motion to intervene in this proceeding on January 13, 2020.

2 16 U.S.C. § 824d.

3 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"). The OATT is Section II of the Tariff.

4 ISO New England Inc., Cost Recovery Mechanism for Facilities Designated Critical to the Derivation of Interconnection Reliability Operating Limits, Docket No. ER20-739-000 (filed Jan. 6, 2020) ("ISO-NE Filing").

5 *Id.*, Transmittal Letter, at 5.

Infrastructure Protection Costs by Facilities Critical to the Derivation of the Interconnection Reliability Operating Limits ("Schedule 17"). ISO-NE seeks an effective date of March 6, 2020 for the proposed revisions, referred to as the "IROL-CIP Cost Recovery Rules."[6]

According to ISO-NE, Bulk Electric System ("BES") generation and transmission facilities that it identifies as critical to the derivation of IROLs ("IROL-Critical Facilities") must comply with NERC CIP Reliability Standards for medium impact BES Cyber Systems, and meeting these standards "imposes additional costs on these facilities."[7] ISO-NE's view is that because the costs will only be incurred by a subset of the resources in the region, the IROL-Critical Facilities that incur these costs will be at a financial disadvantage to other resources participating in the ISO-NE wholesale markets.[8] For this reason, ISO-NE is proposing the Schedule 17 IROL-CIP Cost Recovery Rules to provide a mechanism for IROL-Critical Facilities to seek to recover these incremental costs outside of the New England wholesale market structure using a cost-based methodology.[9]

II. COMMENTS

NESCOE appreciates ISO-NE's work with states, market participants, and other stakeholders to develop a proposal that balances the interests of affected owners of IROL-Critical Facilities under unique circumstances and the customers that ultimately will pay the costs associated with Schedule 17. NESCOE conditionally supports the ISO-NE Filing given

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6 *Id.* at 2.

7 *Id.*

8 *Id.* (citation omitted).

9 *Id.* at 2, 7-8.

these unique circumstances, subject to the Commission providing the requested guidance and clarifications described below.

NESCOE understands that at this time only a limited number of resources are designated as IROL-Critical Facilities[10] and that ISO-NE designed Schedule 17, *inter alia*, to ensure that only incremental costs related to the designation may be recovered and there is no double recovery.[11] The guidance and clarifications that NESCOE requests would help ensure that Schedule 17 is, as ISO-NE intends, limited.

A. The Commission Should Clarify That Any Order Approving Schedule 17 Is Limited in Scope and Does Not Set Broad Precedent.

The proposal to allow certain resources to obtain cost-based recovery of IROL-CIP Costs outside of New England's market structure reflects an extraordinary departure from the region's overall market design—a design that already takes into account the various risks that resources assume in participating in the market. As ISO-NE explains, the "costs of complying with the low impact [CIP] requirements . . . are recoverable through participation in the New England Markets as ordinary costs of doing business."[12] NESCOE urges the Commission to confirm in any order accepting Schedule 17 that such acceptance is a very limited exception and may not serve as broad precedent for further ISO-NE programs targeting recovery of costs outside of ISO-NE's market structure.

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[10] *Id.* at 2.

[11] *Id*. at 8.

[12] *Id.*, Testimony of Jonathan B. Lowell on Behalf of ISO New England Inc., at 4.

B. The Commission Should Confirm That Under No Circumstances May IROL-Critical Facilities Recover Costs Subject to Recovery Under Another Provision of the Tariff or Under Any Other Mechanism.

The Commission has for years permitted market-based rates in regions where the relevant market is competitive. In its proposed rule that culminated in Order No. 697, the Commission emphasized that its "authorization of market-based rates has been found to satisfy the just and reasonable standard of the FPA," noting that "[t]he United States Court of Appeals for the D.C. Circuit has long held that 'when there is a competitive market the [Commission] may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result.'"[13] The salient phrase here is "in lieu of" – not "in addition to" costs recovered through traditional cost-based rates. As relevant to ISO-NE's proposal here, the generators that would be eligible to recover costs pursuant to proposed Schedule 17 are already earning revenues in ISO-NE's wholesale markets; therefore, any cost-based rates they are permitted to earn on top of that must be very narrowly constructed.

The Commission has implemented protections and provided guidance to ensure that generators and other entities may not over-recover costs by virtue of recovering costs under both market-based rates and under cost-based rates. For example, in 2017, the Commission issued a policy statement providing guidance to electric storage resources seeking to receive cost-based rate recovery for certain services (*e.g.,* grid support services or to address certain needs identified by a regional transmission organization ("RTO")) where those resources also receive market-

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[13] *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Notice of Proposed Rulemaking*, 115 FERC ¶ 61,210 at P 3 (2006) (quoting *Elizabethtown Gas Company v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993)) (additional citation omitted).

based revenues for providing separate market-based rate services. The Commission's guidance was aimed at providing protections against the potential for double recovery of costs.[14]

The Commission's concern about protecting against over recovery of costs has also been reflected in its approach to reliability must-run units which receive out-of-market, cost-based compensation when directed by an RTO to run for reliability reasons. The Commission recently explained that it "has accepted clawback provisions to address the concern that a retiring generator may enter into a reliability must-run cost-of-service agreement, recover the costs of significant upgrades under that agreement, and subsequently return to service without reimbursing ratepayers for those upgrade costs."[15]

Although proposed Schedule 17 appears to prohibit the situation where an IROL-Critical Facility Owner could recover the same costs under Schedule 17 and on a market-based rate basis in ISO-NE's markets, the Commission should nonetheless affirm this principle to close any unintended loophole that may arise from either (i) a situation where the IROL-Critical Facility designation is terminated;[16] or (ii) where an entity seeks to exercise its right to make a filing with the Commission pursuant to FPA Section 205 seeking to recover IROL-CIP Costs through a

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[14] *Utilization of Electric Storage Resources for Multiple Services When Receiving Cost-Based Rate Recovery, Policy Statement*, 158 FERC ¶ 61,051 at P 1 (2017).

[15] *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 at P 212 (2018) (citing *Midcontinent Indep. Sys. Operator, Inc.*, Opinion No. 556, 161 FERC ¶ 61,059 at P 55 (2017)). *See also N.Y. Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,076 at P 116 (2016) (requiring New York Independent System Operator, Inc. to propose rules to "eliminate, or at least minimize, incentives for a generator needed for reliability to toggle between receiving RMR compensation and market-based compensation for the same units.").

[16] *See* Schedule 17, Section 1 (providing for ISO-NE review of IROL-Critical Facility designations and, if applicable, termination of such designations).

means other than Schedule 17.[17] Providing this guidance will enable the Commission to be vigilant in ensuring no over-recovery of costs.

C. The Commission Should Clarify That Costs Eligible for Recovery Under Proposed Schedule 17 Must Be Solely and Directly Related to ISO-NE's Designation.

The Commission should guard closely against allowing costs to be recovered under Schedule 17 for anything that goes beyond the *incremental* costs paid by an IROL-Critical Facility Owner for compliance with the NERC CIP Reliability Standards corresponding to the medium impact category and ISO-NE's designation, as set forth in Schedule 17. In order to effectuate adequate protections, the Commission should confirm that any IROL-Critical Facility Owner seeking recovery under Schedule 17 bears the burden to demonstrate that the IROL-CIP Costs for which it seeks cost-based rate recovery are solely and directly related to incremental compliance costs arising from ISO-NE's designation of the resource as an IROL-Critical Facility.

For example, the IROL-Critical Facility Owner bears the burden to show that the costs it seeks to recover under Schedule 17 are distinct from the costs that it incurs to comply with NERC CIP Reliability Standards corresponding to *low impact* BES Cyber System requirements, in addition to demonstrating that the rates are just and reasonable. In other cases, a facility may have been classified as medium impact several years before ISO-NE's designation of that unit as an IROL-Critical Facility. In those situations, the resource owner is already incurring costs to comply with the medium impact classification that are wholly unrelated to ISO-NE's designation

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[17] Schedule 17 provides that nothing therein "shall restrict or limit the rights of an IROL-Critical Facility Owner to make a filing with the Commission pursuant to Section 205 of the Federal Power Act to recover IROL-CIP Costs through a means other than this Schedule 17."

of that facility as "IROL-Critical." The "incremental costs" associated with ISO-NE's designation would, therefore, be zero unless the owner can demonstrate that they are not otherwise required to incur those costs for reasons unrelated to ISO-NE's "IROL-Critical" designation.

NESCOE believes that the language reflected in proposed Schedule 17 appropriately sets the boundaries for cost recovery. Nonetheless, the Commission's clear guidance in this docket would provide further assurance that cost recovery under Schedule 17 is limited in scope and would minimize the possibility for disputes in response to what may be dozens of individual Section 205 filings this year and in later years.[18]

Such guidance would be particularly useful given the potential for generators to seek recovery of indirect costs such as legal expenses and other professional services as part of their revenue requirement.[19] During the stakeholder process considering proposed Schedule 17, representatives of generating entities pressed for clarification that they could seek recovery for legal and regulatory expenses.[20] Their proposed amendment to modify ISO-NE's proposal failed to garner the threshold needed for Transmission Committee support.[21] ISO-NE amended its final proposal to include "the potential recovery of regulatory costs"[22] and not the broader language

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[18] ISO-NE states that 27 generation units at 15 plant locations and one merchant transmission facility are currently incurring costs related to ISO-NE's IROL-Critical Facilities designation. Transmittal Letter at 2.

[19] *See, e.g., LWP Lessee, LLC*, 156 FERC ¶ 61,105 at P 12 (2016) (generator proposing to allocate certain "indirect cost components" including "professional services" to part of its revenue requirement).

[20] *See, e.g.,* Meeting Minutes of the NEPOOL Transmission Committee, Oct. 10, 2020, at 6, available at https://www.iso-ne.com/static-assets/documents/2019/12/a00_tc_2019_10_10_minutes.docx.

[21] *Id.*

[22] Comments of the New England Power Pool Participants Committee, Docket No. ER20-739-000 (filed Jan. 22, 2020), at 6.

that these generators requested. NESCOE expects that some generators will seek recovery for these costs under the language reflected in Schedule 17,[23] requiring close scrutiny regarding whether cost recovery for any such expenses is allowable.

A recent example outside the ISO-NE region likewise illustrates the need for Commission guidance in this area: Following an Administrative Law Judge's decision stating that she did "not have sufficient guidance from Commission policy and precedent regarding what types of indirect costs would not be 'related to reactive power production' to allow [her] to remove them,"[24] a group of generators filed a petition for declaratory order, asking the Commission to declare, among other things, that particular itemized indirect cost items (including professional and legal costs) are recoverable under the Commission's methodology for reactive power development.[25]

To the extent that an IROL-Critical Facility Owner can demonstrate that "associated administrative and regulatory costs" are, in fact, "incremental" and incurred as part of compliance with ISO-NE's IROL-CIP designation, the costs should be eligible for recovery under Schedule 17. But it is the IROL-Critical Facility Owner's burden to demonstrate that those costs are specifically tied to the designation. General legal or other consulting type costs that cannot be tied specifically to the IROL-CIP designation should not be permitted to be recovered pursuant to Schedule 17.

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[23] *See* Schedule 17 (introductory language and Section 2.2) (allowing for recovery of "associated administrative and regulatory costs").

[24] *Panda Stonewall LLC*, Initial Decision, 167 FERC ¶ 63,010 at n. 322 (2019).

[25] *Indicated Generation Owners*, Petition for Declaratory Order of Ares EIF Management LLC, et al., Docket No. EL19-70-000, at 4 (May 3, 2019). The Commission has not, to date, acted on this petition.

NESCOE also emphasizes that eligibility for cost recovery under proposed Schedule 17 does not mean automatic recovery. Costs must still be demonstrated to be just and reasonable and prudently incurred. Commission guidance is critical to ensuring that cost recovery under Schedule 17 is strictly limited to truly incremental costs that are solely and directly related to ISO-NE's designation of an IROL-Critical Facility. Such guidance should go a long way toward minimizing disputes in initial Section 205 filings seeking cost recovery under Schedule 17.

D. The Commission Should Clarify That Only Going-Forward Costs Are Eligible for Recovery under Schedule 17.

The Commission should provide clear guidance that only going-forward costs are eligible for recovery under Schedule 17. On its face, this is what Schedule 17 provides.[26] Such guidance would be consistent with the Commission's long-standing prohibition against retroactive ratemaking. Rates charged by utilities regulated under the FPA may not exceed those on file with the Commission.[27] When a public utility wishes to alter the rates it charges, it must provide 60-days' notice to the Commission and file new rate schedules "stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect."[28] The Commission may waive the 60-day notice requirement for good cause, but the Commission has no authority under the FPA to allow a retroactive change in

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[26] *See* Schedule 17, Section 2.2 ("IROL-CIP Costs, including capital . . . costs, are recoverable only to the extent they (i) are incurred by the IROL-Critical Facility Owner during the period in which the subject facility is designated as an IROL-Critical Facility; (ii) are paid by the IROL-Critical Facility Owner during the cost recovery period . . . .").

[27] *Towns of Concord, Norwood, and Wellesley Mass. v. FERC, 955* F.2d 67, 68 (D.C. Cir. 1992).

[28] 16 U.S.C. § 824d(d).

the rates charged to consumers.[29] Pursuant to the filed rate doctrine, "a regulated seller of [power]" is prohibited "from collecting a rate other than the one filed with the Commission," and "the Commission itself" cannot retroactively "impos[e] a rate increase for [power] already sold."[30] Similarly, the rule against retroactive ratemaking "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."[31]

For this reason, the Commission should make abundantly clear that any IROL-Critical Facility Owner seeking cost recovery under Schedule 17 cannot seek recovery of IROL-CIP Costs incurred prior to their Section 205 filings, including sunk costs for investments it made prior to its Section 205 filing made in accordance with Schedule 17. Such an attempt would violate the retroactive ratemaking prohibition. At the same time, NESCOE recognizes the possibility that IROL-Critical Facility Owners may have made capital investments directly related to the designation that are still not yet fully depreciated. NESCOE does not intend to object to a IROL-Critical Facility Owner seeking to recover the *undepreciated* portion of such capital expenses as of the date of its Section 205 filing.

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[29] *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 795-796 (D.C. Cir. 1990); *see also Consolidated Edison Co. v. FERC*, 958 F.2d 429, 434 (D.C. Cir. 1992); *AEP Appalachian Transmission Co., Inc., et al*., 164 FERC ¶ 61,180 at P 18 (2018) ("granting the effective date requested by AEP Transmission would result in a retroactive revision to its formula rates that would result in the retroactive recovery of costs related to a past service.") (citation omitted).

[30] *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223, 1227 (2018) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

[31] *Towns of Concord, et al.,* 955 F.2d at 71, n. 2. That otherwise categorical prohibition against retroactively charging rates that differ from those that were on file during the relevant time period yields in only two limited circumstances: (i) when a court invalidates the set rate as unlawful, and (ii) when the filed rate takes the form not of a number but of a formula that varies as the incorporated factors change over time. *See West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22-23 (D.C. Cir. 2014). Neither of those exceptions would apply here.

However, once again, the Commission must be vigilant against the potential for any over-recovery of costs, and NESCOE urges the Commission to set out clear guidance that only undepreciated amounts of capital expenditures as of the date of IROL-Critical Facility Owner's Section 205 filing are eligible for recovery under Schedule 17. NESCOE believes that this guidance would substantially reduce the potential for litigation on this issue in numerous individual filings anticipated to be made seeking recovery of costs under proposed Schedule 17.

III. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission accept ISO-NE's proposed Schedule 17 conditioned on providing the guidance and clarifications requested herein.

Respectfully Submitted,

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Date: January 27, 2020

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 27th day of January, 2020.

/s/ Jason Marshall

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