UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.) Docket No. ER20-739-001

ANSWER OF THE
NEW ENGLAND STATES COMMITTEE ON ELECTRICITY

Pursuant to Rule 213(a)(3) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. § 385.213(a)(3), the New England States Committee on Electricity ("NESCOE") files this answer in the above-captioned proceeding.[1]

I. INTRODUCTION AND REQUEST FOR LEAVE TO FILE RESPONSE

On March 27, 2020, ISO-NE submitted a response[2] to a deficiency letter which had requested additional information regarding ISO-NE's proposed Schedule 17.[3] Specifically, the Deficiency Letter asked ISO-NE to explain if it intends to allow the recovery of costs incurred prior to the requested effective date of March 6, 2020 and if so, how this would be consistent with the filed rate doctrine and the rule against retroactive ratemaking.[4] A group called the IROL-Critical Facility Owners filed comments in response to the ISO-NE Deficiency Response,[5]

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1 NESCOE filed comments in this proceeding on January 27, 2020 ("NESCOE Comments") and filed an Answer in this proceeding on February 12, 2020 ("NESCOE Answer"). Capitalized terms not defined in this filing are intended to have the meaning given to such terms in the ISO New England ("ISO-NE") Transmission, Markets and Services Tariff (the "Tariff"). The OATT is Section II of the Tariff.

2 Response to Commission Deficiency Notice Regarding Schedule 17 – Recovery of Critical Infrastructure Protection Costs by Facilities Critical to the Derivation of Interconnection Reliability Operating Limits, Docket No. ER20-739-001 (Mar. 27, 2020) ("ISO-NE Deficiency Response").

3 Letter from Kurt M. Longo, Director, Division of Electric Power Regulation-East to Monica Gonzalez, Docket No. ER20-739-000 (Feb. 26, 2020) ("Deficiency Letter").

4 Deficiency Letter at 2 (citations omitted).

5 Comments of IROL-Critical Facility Owners, Docket No. ER20-739-000, -001 (Apr. 17, 2020) ("Merchant Group Deficiency Comments"). NESCOE refer to the commenters as the "Merchant Group."

repeating arguments they made in earlier comments[6] that they believe they are entitled to recovery of historic costs. NESCOE provides here a limited response to the Merchant Group Deficiency Comments. NESCOE seeks leave to file this Answer in order to correct certain factual and legal characterizations and to ensure the Commission has a more complete and accurate record on which to make a decision.[7]

II. ANSWER

First, the Merchant Group Deficiency Comments mischaracterize the Commission's precedent with their argument that recovery of prior expenditures would not violate the filed rate doctrine because Schedule 17 and the associated section 205 filings cannot be considered an "existing rate on file that can be retroactively altered."[8]

The Commission has been clear in how it differentiates between an existing rate and an initial rate. As the Commission has explained, since 1987, it has "defined an initial rate as one that provides for a new service to a new customer."[9] The Commission emphasized that "both elements must be satisfied" and that it is not sufficient for a utility "to demonstrate that it is providing a new service if that service is to an existing customer."[10] The Commission explained that its "broadened definition of a change in rate is consistent with and serves to further the

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6 Motion to Intervene and Comments of IROL-Critical Facility Owners, Docket No. ER20-739-000 (Jan. 27, 2020).

7 *See, e.g., Southwest Power Pool, Inc.*, 170 FERC ¶ P61,164 at P 13 (2020) (accepting answer to protest because it provided information that assisted the Commission in its decision-making process).

8 Merchant Group Deficiency Comments at 4 (citation omitted).

9 *Pac. Gas and Electric Co.; San Francisco Bay Area Rapid Transit District v. Pac. Gas and Electric Co.*, 154 FERC ¶ 61,025 at P 10 (2016) ("*Pac. Gas*") (citing *Southwestern Elec. Power Co*., 39 FERC ¶ 61,099 at 62,293 (1987) ("*Southwestern*")).

10 *Pac. Gas* at P 11.

policies which underlie the [Federal Power Act]. The primary purpose of the legislation is the protection of customers from excessive rates and charges."[11]

Schedule 17 is a new cost recovery mechanism. Neither the service provided nor the customers are new. As ISO-NE explained in its filing, here, the facility owners at issue already participate in the ISO-NE wholesale markets.[12] And the Transmission Customers who would pay these costs already take service under the ISO-NE Tariff. That the facility owners are not yet charging Transmission Customers allowable incremental compliance costs is irrelevant to the classification of the rate as a changed rate. As the Commission held in a series of reactive power cases, if the utility is providing the service, even at no charge, it is still considered a "changed rate" and not an "initial rate."[13] NESCOE emphasizes that it is not arguing there should be no cost recovery for capital investment made prior to the effective date of the section 205 filing. As NESCOE explained in its prior comments, it believes it may be appropriate for IROL-Critical facility owners to recover the undepreciated portion of their capital expenditures made to comply with the medium impact designation.[14]

Second, the Merchant Group's back-up argument mischaracterizes both the relevant law and facts. They argue that even if the Commission were to find that the rule against retroactive ratemaking applied here, "all parties had sufficient notice that rates could be changed to allow for

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[11] *Id*. at P 10 (quoting *Southwestern* at 62,293 (additional citations omitted)).

[12] *See* ISO New England Inc., Cost Recovery Mechanism for Facilities Designated Critical to the Derivation of Interconnection Reliability Operating Limits, Docket No. ER20-739-000 (Jan. 6, 2020) ("ISO-NE Filing") at 2.

[13] *See Chehalis Power Generating, L.P.,* 145 FERC ¶ 61,052 at P 11 (2013) (Chehalis should have earlier filed a rate schedule for its provision of reactive power service, making its later filing a changed rate). *See also Calpine Oneta Power, L.P.*, 103 FERC ¶ 61,338 at P 11 (2003) (finding that since Oneta Project had been supplying reactive power, albeit without charge, its filing was a changed rate, not an initial rate).

[14] *See* NESCOE Comments at 10.

recovery of all prudently incurred IROL-Critical compliance costs."[15] They state that all ISO-NE stakeholders were on notice since 2015 that there would be a cost recovery mechanism to enable IROL-Critical facilities to recover prudently incurred costs necessary to meet the IROL-Critical medium impact designation.[16] But as ISO-NE notes, its first proposal relating to IROL-CIP cost recovery was not provided to stakeholders until early 2019.[17] In any event, discussion in a stakeholder process fails to meet the notice required for a rate change to go into effect,[18] or for a new rate to go into effect for that matter.

Finally, there is one thing that NESCOE and the Merchant Group appear to agree upon—that the Commission should provide clarity regarding the scope of cost recovery.[19] Although NESCOE disagrees with the Merchant Group's mistaken view of the scope of cost recovery, NESCOE does agree that "[a] generic finding on this threshold legal issue is administratively efficient, as it would avoid litigating this common issue in the individual dockets established for each facility seeking cost recovery."[20]

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15 Merchant Group Deficiency Comments at 4-5 (citation omitted).

16 *Id*. at 5.

17 ISO-NE Filing at 13.

18 *See Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018) (rejecting argument that notice on website indicating that PJM was seeking FERC's approval for certain generators to exceed the rate-cap gave customers the required prospective notice that emergency retroactive rate increases could ensue, emphasizing that "the website statement was not filed with the Commission. That is required for all rate changes." (citations omitted). This is decidedly *not* the situation in *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979), where the Court approved "a seemingly retroactive rate because a pre-existing contractual agreement provided ratepayers prospective notice of the impending rate change from the date of the contract." *Old Dominion* at 1232.

19 *See* NESCOE Comments at 9-11; NESCOE Answer at 6-8.

20 Merchant Group Deficiency Comments at 6.

III. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission consider its answer in this proceeding, and provide the requested guidance that NESCOE sought in its comments in this proceeding.

Respectfully Submitted,

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Date: April 24, 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 Washington, DC this 24th day of April, 2020.

/s/ Phyllis G. Kimmel

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