UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

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] ISO-NE has requested the Commission's acceptance of its proposal to implement 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").[2] ISO-NE proposed the addition of a new Schedule 17 to the OATT for this cost recovery mechanism, with those Tariff revisions referred to as the "IROL-CIP Cost Recovery Rules."[3] NESCOE provides here a limited response[4] to comments

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1 NESCOE filed comments in this proceeding on January 27, 2020 ("NESCOE Comments"). *See* http://nescoe.com/wp-content/uploads/2020/01/IROL-CIP_ER20-739_1-27-20.pdf. 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 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"). ISO-NE refers to the facilities it identifies as critical to the derivation of IROLs as "IROL-Critical Facilities" and refers to the incremental costs such facilities incur as "IROL-CIP Costs." *Id.* at 2.

3 *Id.*

4 Although the Commission's Rules of Practice and Procedure prohibit answers to protests, the pleadings to which NESCOE responds are styled as "comments" and are generally supportive of ISO-NE's proposed tariff changes. More importantly, although the comments refer to Rule 211, they seek affirmative relief (*i.e.*, asking the Commission to make certain clarifications) and thus are more appropriately characterized as motions, to which there is a right to answer. However, to the extent that leave of the Commission is required to answer these pleadings, NESCOE respectfully requests that the Commission accept this answer and submits that good cause exists to grant this request. *See* 18 C.F.R. §§ 385.101(e) and 385.213(a)(2). NESCOE's answer provides the Commission with a more complete and accurate record upon which to base its decision. *See, e.g., HORUS*

seeking clarification regarding the use of a formula rate approach and recovery of the costs of past investments.[5]

I. ANSWER

A. The Commission Should Decline Requests to Alter the Schedule 17 Process But Should Consider Encouraging ISO-NE to Explore Changes to the Process After Having the Benefit of Experience Implementing the IROL-CIP Cost Recovery Rules.

The Facility Owner Comments recount that stakeholder discussions preceding the ISO-NE Filing included consideration of a formula rate construct instead of the Section 205 approach reflected in the proposed Schedule 17.[6] ISO-NE also considered whether it could adopt a "proxy rate" mechanism similar to its method for compensating for black start services under Schedule 16 of the OATT.[7] ISO-NE ultimately rejected both of these potential approaches. Regarding use of a formula rate, ISO-NE explained that its rationale for using the Federal Power Act ("FPA") Section 205 approach included "minimiz[ing] future refund uncertainties that could be introduced by potential [FERC] proceedings challenging informational rate updates" as well as providing greater "regulatory certainty over IROL-CIP Costs before" transmission customers are

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Central Valley Solar 1, LLC, et al. v. California Independent System Operator Corp., 157 FERC ¶ 61,085 at P 29 (2016) (accepting answers because they provided information that assisted in the decision-making process).

5 Motion to Intervene and Comments of IROL-Critical Facility Owners, Docket No. ER20-739-000 (filed Jan. 27, 2020) ("Merchant Group Comments"), at 6-14; Motion to Intervene and Comments in Support of Cross-Sound Cable Company, LLC ("CSC"), Docket No. ER20-739-000 (filed Jan. 27, 2020) ("CSC Comments"), at 5-8. CSC is a signatory to the Merchant Group Comments. For convenience, where the Merchant Group Comments and the CSC Comments reflect a shared position, NESCOE will refer to the commenters collectively as the "Facility Owners" and to their comments as the "Facility Owner Comments." NESCOE's silence on any issues should not be construed as agreement with commenters' positions.

6 Merchant Group Comments at 6; CSC Comments at 5.

7 *See, e.g.,* ISO-NE, Interconnection Reliability Operating Limit Critical Infrastructure Protection Cost Recovery, New England Power Pool ("NEPOOL") Transmission Committee Meeting, Feb. 20, 2019 ("February 2019 Presentation"), at Slide 13, available at https://www.iso-ne.com/static-assets/documents/2019/02/a03_tc_2019_02_cip_irol_present.pptx. *See also* ISO-NE, Interconnection Reliability Operating Limit Critical Infrastructure Protection Cost Recovery, NEPOOL Transmission Committee Meeting, Mar. 27, 2019 ("March 2019 Presentation"), at Slide 17, available at https://www.iso-ne.com/static-assets/documents/2019/03/a05_tc_2019_03_27_present_cip_irol.pptx.

charged.[8] ISO-NE elected not to move forward with a proxy rate approach because, among other reasons, ISO-NE lacked sufficient information to identify an appropriate proxy facility and estimate representative IROL-CIP compliance costs.[9]

The Facility Owners request clarification that facilities ISO-NE has designated as IROL-Critical can use a formula rate approach to recovering costs under Schedule 17.[10] These commenters note the potential for numerous individual Section 205 filings in connection with Schedule 17, potentially on an annual basis.[11] They express concern about the administrative burden that these filings could impose and the potential resources required for participation, both for the IROL-Critical Facility owners and interested parties.[12] The Facility Owners prefer an approach where IROL-Critical Facility owners could make "informational filings with data on actual costs incurred."[13]

NESCOE generally shares the administrative and resource concerns that the Facility Owners have expressed. NESCOE appreciates the structure ISO-NE has developed to reduce the likelihood of contested issues once a Section 205 filing is made, such as a pre-filing review process and limiting recovery to actual costs. These are important features of Schedule 17. However, there is no experience with the IROL-CIP Cost Recovery Rules and little experience in the New England region with cost-of-service ratemaking for electric generation and other

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8 ISO-NE Filing at n. 45.

9 *See* March 2019 Presentation at Slide 17; February 2019 Presentation at Slide 13.

10 Merchant Group Comments at 10; CSC Comments at 6. It is unclear whether the Facility Owners are suggesting that each IROL-Critical Facility have the opportunity to propose its own individual formula rate and protocols (and whether each could simply propose it by a Section 205 filing), or if they envision a stakeholder-driven process to develop a unified consistent formula rate to be used by all such facilities in the region.

11 Merchant Group Comments at 7; CSC Comments at 7.

12 Merchant Group Comments at 7-8; CSC Comments at 7-8.

13 Merchant Group Comments at 7; CSC Comments at 7.

merchant resources. As of the ISO-NE Filing, ISO-NE had designated as IROL-Critical 27 generation units at 15 separate plants locations and one merchant transmission facility.[14] If all of these facilities initiate the Schedule 17 process, NESCOE and other interested parties would need to consider dedicating substantial resources to scrutinizing closely, potentially within the same short timeframe, the IROL-CIP Costs of over two dozen individual generating units and one merchant transmission facility. Once the Section 205 filings are made, the Commission would shoulder a significant burden as well in its review of multiple cost-of-service type filings.

Another factor adding to this burden is that Schedule 17 presents a novel cost recovery mechanism. Like others in New England, NESCOE has limited experience with cost-of-service ratemaking for resources participating in the ISO-NE wholesale markets. Those competitive markets were expressly designed to provide revenue opportunities for participating resources while, at the same time, requiring these resources to assume the risk of their participation including, as a general matter, "ordinary costs of doing business."[15] Reviewing IROL-CIP Costs would present a particular challenge because, like ISO-NE, NESCOE (and likely many other interested parties) do "not have expertise regarding the types of direct costs commonly associated with IROL-Critical Facilities' compliance" with mandatory CIP standards.[16] Schedule 17 also provides IROL-Critical Facilities the opportunity to recover certain indirect costs, such as administrative and regulatory costs, that will require close scrutiny.

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[14] ISO-NE Filing at 2

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

[16] *Id.* at 6. ISO-NE hired a consultant to help identify the cost categories reflected in Attachment A of its filing. *Id.*

Nonetheless, while NESCOE appreciates and generally shares the administrative and resource concerns that the Facility Owners expressed, it respectfully cautions the Commission against taking any action at this time that would modify the Schedule 17 process.[17] With the benefit of experience implementing the IROL-CIP Cost Recovery Rules, ISO-NE can and should consider the need for changes to the Schedule 17 process to improve transparency and meaningful review around cost recovery while mitigating the burden on participants in that process. But it is premature to begin those discussions.

To be clear, NESCOE does not at this time take a substantive position on the merits of eventually moving Schedule 17 toward a formula rate process. Experience with Schedule 17 will inform what, if any, enhancements to the process are needed. At that time, ISO-NE and stakeholders can revisit the formula rate approach, proxy rate approach, or other alternative or complementary constructs.[18] To help facilitate future discussions, the Commission could encourage ISO-NE to evaluate its Schedule 17 construct *after* having the benefit of experience implementing the process.

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[17] As a threshold matter, as the Commission has recognized, it is constrained in directing modifications to Section 205 filings in light of *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) ("*NRG*"). *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173 (2018), *reh'g pending* (finding that, pursuant to an *NRG* analysis, past Commission orders directing "major modifications" to a Section 205 filing made by the Midcontinent Independent System Operator exceeded the Commission's authority under the FPA).

[18] Any change to the Schedule 17 design or process would, at minimum, need to ensure that there is a mechanism available for consumer-interested parties to review and challenge the requested recovery of IROL-CIP Costs. Under the proposed Schedule 17 process, the required Section 205 filings provide a statutory avenue for reviewing and challenging such costs. While the Commission has accepted formula rate approaches for cost recovery in other areas such as transmission rates, the Commission has not acted on formula rate protocols for reviewing and challenging cost inputs like the types at issue here. *See, e.g., ISO New England Inc. Participating Transmission Owners Administrative Committee*, 153 FERC ¶ 61,343 at n. 18 (2015) (listing various proceedings addressing transmission formula rate protocols and FERC staff guidance). There is no Commission precedent directly addressing the development of protocols for the IROL-CIP Cost recovery at issue in this proceeding. NESCOE expects substantial interest among consumer-interested parties in informing the development of any such protocols.

B. The Merchant Group Comments Confirm the Need for Commission Guidance on the Scope of Cost Recovery for Past Investments and Appropriate Application of the Filed Rate Doctrine.

The Merchant Group Comments request "Commission clarification that facilities are entitled to seek recovery of all historic costs since designation as IROL-Critical in their individual requests for compliance cost recovery."[19] The Merchant Group Comments appear to seek certainty from the Commission that facility owners can recover investment costs as far back as 2014 or 2015 when, according to the comments, ISO-NE informed some facilities of the IROL-Critical medium impact designation.[20]

The NESCOE Comments likewise requested the Commission's clarification on cost recovery requests for past investments, asking the Commission to "provide clear guidance that only going-forward costs are eligible for recovery under Schedule 17."[21] NESCOE discussed how the FPA prevents the Commission from allowing a retroactive rate change and, accordingly, that Schedule 17 cannot provide for recovery of IROL-CIP Costs that preceded an IROL-Critical Facility owner's Section 205 filing.[22] However, NESCOE recognized that such facility owners may have made capital investments directly related to ISO-NE's designation that are not yet fully depreciated and stated that it did not intend to challenge cost recovery of the undepreciated portion of these capital expenses as of the date of the owner's Section 205 filing.[23]

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[19] Merchant Group Comments at 10. *See also id.* at 13 ("We believe that the Commission must confirm that designated facilities are entitled to recover all costs associated with CIP compliance, including costs historically incurred.").

[20] *Id.* at 11.

[21] NESCOE Comments at 9.

[22] *Id.* at 9-10.

[23] *Id.* at 10.

Stakeholders similarly sought clarity on the scope of cost recovery early in the stakeholder process. As NEPOOL counsel recounted, stakeholders inquired at a February 20, 2019 technical committee meeting whether CIP-related costs "incurred prior to [the Commission's] acceptance of cost recovery provisions would be recoverable through rates."[24] Counsel summarized the lens through which the Commission may review such cost recovery requests:

> For costs that are operating expenses incurred before the effective date for rates permitting such recovery, the filed rate doctrine and the rule against retroactive ratemaking would preclude recovery. If the costs, however, are properly considered capital expenditures amortized over the useful life of the asset, a reasonable case can be made for recovery through rates of those costs not yet fully amortized as of the effective date of the rates permitting such recovery.[[25]]

NEPOOL counsel stated that the treatment of past capital investments "should be addressed in the initial Section 205 filing of rate schedules allowing for the recovery of such costs."[26] ISO-NE declined to take a position on the issue of cost recovery for prior investments, leaving for the Commission to decide those questions in adjudicating a facility owner's Section 205 filing.[27]

NESCOE respectfully requests that the Commission provide clarity in this proceeding on the scope of cost recovery rather than defer the issue to individual Section 205 filings. As discussed above, there is a potential for numerous individual Section 205 filings within a short

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[24] Memorandum from NEPOOL Counsel to NEPOOL Transmission Committee, Recovery of Past CIP-Related Costs, Mar. 21, 2019, at 1, available at https://www.iso-ne.com/static-assets/documents/2019/03/a03a_tc_2019_03_27_nepool_counsel.DOCX.

[25] *Id*. at 1.

[26] *Id*. at 4.

[27] *See, e.g.,* Meeting Minutes of the NEPOOL Transmission Committee, May 16, 2019, at 5, available at https://www.iso-ne.com/static-assets/documents/2019/06/a00_tc_2019_05_16_minutes.doc.

timeframe. The Commission's clarification up front would greatly help to reduce the potential for contested issues in connection with those filings.

The Commission is well-positioned to provide this clarification based on the record in this proceeding. As discussed in the NESCOE Comments, the filed rate doctrine and the prohibition on retroactive ratemaking preclude the Commission from authorizing rates that exceed those on file or that are adjusted to account for a prior period of over- or under-collection.[28] Schedule 17 is a novel cost recovery mechanism. The Commission has not yet authorized the recovery of IROL-CIP Costs as a general matter through an ISO-NE funding mechanism let alone reviewed actual rates that a facility owner has filed with the Commission regarding its specific costs. The Section 205 filings would trigger that review. Activities preceding those filings, such as meetings with ISO-NE to discuss the potential development of a cost recovery mechanism or ISO-NE's commitment to work on a mechanism, fall short of the clear legal standard that the FPA requires for cost recovery.[29]

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[28] NESCOE Comments at 9-10, citing *Towns of Concord, Norwood, and Wellesley Mass. v. FERC*, 955 F.2d 67, 68, 71, n.2 (D.C. Cir. 1992).

[29] In support of the request for clarification on this issue, the Merchant Group Comments cite to a delegated letter order in which the Commission authorized a proposal to allow generators to recover compensation for black start service for prior periods. Citing to that order, the Merchant Group Comments argue that facility owners here "should not be penalized for utilizing the NEPOOL stakeholder process to develop a cost recovery mechanism." Merchant Group Comments at 14. However, the circumstances leading up to that delegated letter order were quite different than those present here. In finding good cause to grant waiver of the Commission's prior notice requirement, the delegated letter order relied on earlier orders explicitly recognizing that "an appropriate review process [was] underway to determine costs for providing black start capability" and therefore deferring action on that issue "until that review process is completed." *New England Power Pool*, 87 FERC ¶ 61,045 at p. 61,198 (1999). *See also USGen New England, Inc*., 90 FERC ¶ 61,323 at p. 62,090 (2000) ("As acknowledged by all parties in this proceeding, there is ongoing consideration of the issue of black start service within NEPOOL. The Commission has previously been asked to consider requiring black start service contracts within the NEPOOL service area and declined to do so, instead deferring to the NEPOOL review process on the issue. Now USGenNE is asking the Commission to bypass that deliberative process and approve the unilaterally derived SRS Agreement. We decline to do so at this time."). This is the first time a cost recovery mechanism for these IROL-CIP Costs is being brought before the Commission and there is no basis for allowing rates to be implemented retroactively.

II. CONCLUSION

For the reasons discussed above, NESCOE respectfully requests that the Commission consider its answer in this proceeding, and if necessary, grant NESCOE leave to file this answer.

Respectfully Submitted,

/s/ Jason Marshall

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Date: February 11, 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 11th day of February, 2020.

/s/ Jason Marshall

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