

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

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

**REQUEST FOR REHEARING OF THE
MAINE PUBLIC UTILITIES COMMISSION**

Pursuant to Section 313(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251(a) and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. §§ 385.713, and Section 205(g)(1) of the FPA, 16 U.S.C. § 824d(g), the Maine Public Utilities Commission (“MPUC”) requests rehearing of the Commission’s August 6, 2019 Notice of Filing Taking Effect by Operation of Law, which provides notification that the proposed tariff provisions filed by ISO New England Inc. (“ISO-NE”) on March 25, 2019 to implement an inventoried energy program (“IEP”) went into effect on May 28, 2019 by operation of law. The Notice states that the Commission failed to act on the IEP because of a lack of a quorum.¹

I. BACKGROUND

On March 25, 2019, pursuant to Section 205 of the FPA,² ISO-NE filed revisions to the ISO-NE Transmission, Markets and Services Tariff (“Tariff”) to implement an inventoried energy program in the Capacity Commitment Periods associated with the 14th and 15th Forward Capacity Auctions (“FCA 14” and “FCA 15”, respectively) to compensate resources for maintaining inventoried energy during the winter months of

¹ Consistent with FPA Section 205(g)(B), Commissioners Glick, LaFleur, and MacNamee and Chairman Chatterjee filed written statements on August 8, 2019 (“Written Statements”), explaining their views on the IEP filing by ISO-NE.

² 16 U.S.C. § 824d (2012).

2023-2024 and 2024-2025 (“Inventoried Energy Program” or “IEP”) (“March 25 Filing”). On May 8, 2019, Commission staff issued a letter to ISO-NE informing ISO-NE that its March 25 Filing was deficient and seeking additional information (“Deficiency Letter”). On June 6, 2019, ISO-NE submitted its response to that letter (“Deficiency Response”). On June 27, 2019, MPUC, among a host of others, submitted a detailed Protest, protesting ISO-NE’s Deficiency Response and the March 25 Filing. Without addressing any of the arguments in the MPUC or any other Protest, the Commission issued its Notice of Filing Taking Effect by Operation of Law, stating that “[p]ursuant to section 205 of the FPA, in the absence of Commission action on or before August 5, 2019, ISO-NE’s proposal, as amended, became effective by operation of law. Accordingly, the effective date of the proposed tariff sheets is May 28, 2019.” The Notice of Filing Taking Effect by Operation of Law further stated that “[t]he Commission did not act on ISO-NE’s filing because of a lack of quorum at this time. Consistent with section 205(g)(1)(B) of the FPA, any written statement explaining the views of a Commissioner with respect to ISO-NE’s filing will be added to the record of the Commission in the captioned proceeding.”

II. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2) of the Commission’s Rules of Practice and Procedure,³ the MPUC provides the following statement of issues regarding the Notice of Filing Taking Effect by Operation of Law, supported by representative precedent:

1. The Commission erred in allowing ISO-NE’s IEP to go into effect without addressing any of the issues raised by protesters in the proceeding, as doing so does not constitute reasoned decisionmaking.

³ 18 C.F.R. § 385.713(c)(2).

Relevant authority: New England Power Generators Ass'n v. FERC, 881 F.3d 202 (2018), (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (“The 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.’”). *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) (“It is well established that the Commission must respond meaningfully to the arguments raised before it.”) (quoting *Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005)).

2. The Commission erred in allowing the rates established under ISO-NE’s IEP to go into effect in the absence of substantial evidence evaluating the specific need for inventoried fuel or the quantity needed, as the Commission is required to demonstrate that it has made a reasoned decision based on substantial evidence in the record.

Relevant authority: See California Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n, 854 F.3d 1136, 1146 (9th Cir. 2017) (“FERC must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.” (internal quotation marks and citation omitted)); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Public Utilities Comm'n of California v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000).

3. The Commission erred in allowing ISO-NE’s IEP to go into effect in the absence of substantial evidence demonstrating that the program will make any difference in resources’ retirement decisions.

Relevant authority: See California Pub. Utilities Comm'n v. Fed. Energy Regulatory Comm'n, 854 F.3d 1136, 1146 (9th Cir. 2017) (“FERC must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.” (internal quotation marks and citation omitted)); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Public Utilities Comm'n of California v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000).

4. The Commission erred in allowing ISO-NE’s IEP to go into effect, as the short-term nature of the IEP does not excuse the absence of reasoned decisionmaking.

Relevant authority: See Westar Energy, Inc., 137 FERC ¶ 61,142 at P30 (2011) (finding that the Commission's recognition of the potentially temporary nature of the need for the proposal should not be misconstrued as the Commission using a lower standard for evaluating the proposal); *see also*,

PJM Interconnection, LLC, 157 FERC ¶ 61, 235 at P 11 (2016) (stating that temporary solutions are not subject to a lower standard of evaluation).

III. ARGUMENT

A. **The Commission Must Review and Address the Issues Raised by Protesters to the ISO-NE’s March 25 Filing, Including Those Raised by the MPUC, to Ensure That the Rate That Results From the “Order” Consisting of a Notice of Filing Taking Effect by Operation of Law Is a Product of Reasoned Decisionmaking.**

The MPUC understands that at the time the sixty (60) day clock was running out on the March 25 Filing, the Commission lacked a quorum, and such lack of quorum resulted in the Notice of Filing Taking Effect by Operation of Law. However, such lack of quorum does not supplant the requirement that an agency decision (order) must be based on reasoned decisionmaking. The most recent revision to the Federal Power Act makes clear that the Commission’s “Notice of Filing Taking Effect by Operation of Law” is, in fact, an “order issued by the Commission accepting the change for purposes of” section 205 of the FPA,⁴ and as such, the change to the ISO-NE’s Tariff that went into effect by operation of law, the IEP, must be held to the same standard as any other decision (order) of the Commission. If this were any other section 205 filing to change the ISO-NE’s Tariff, the Commission would be required to address each material issue of fact or law in rendering its decision in order to meet its obligation to be able to articulate a reasoned explanation for its action,⁵ and the instant situation should not be treated any differently. Therefore, the MPUC requests that the Commission grant rehearing of the Notice of Filing Taking Effect by Operation of Law for the purpose of examining the

⁴ 16 U.S.C. § 824d(g).

⁵ California Pub. Utilities Comm’n, 854 F.3d at 1146 (“The Court . . . must ensure that FERC articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”)(internal quotation marks and citation omitted).

ISO-NE's March 25 Filing on the merits, including the issues raised by the MPUC in its Protest and reiterated below as "errors" of the Commission in issuing its Notice of Filing Taking Effect by Operation of Law.

B. In the Absence of Record Evidence Evaluating the Specific Need for Inventoried Fuel or the Quantity Needed, the Rates Established Under the IEP Are Not Just and Reasonable.

The March 25 Filing, which the Commission permitted to take effect without addressing any of the issues raised by MPUC or others, follows a series of filings and Commission orders relating to fuel security. These include ISO-NE's Waiver Petition in which it sought a waiver of multiple provisions of the ISO-NE Open Access Transmission Tariff ("OATT") to allow ISO-NE to enter into a cost of service (also known as a Reliability-Must-Run ("RMR")) contract with the owners of Mystic Units 8 and 9 for the purpose of addressing fuel security concerns⁶; the Commission Show Cause Order in which it denied ISO-NE's petition and instituted a proceeding under section 206 of the FPA concerning the justness and reasonableness of the ISO-NE Tariff⁷; ISO-NE's August 31, 2018 compliance filing in which it proposed provisions allowing it to retain resources for fuel security reasons, as well as provisions for short-term cost-of-service

⁶ See Petition of ISO New England Inc. for Waiver of Tariff Provisions, FERC Docket No. ER18-1509 (filed May 1, 2018).

⁷ See Order Denying Waiver Request, Instituting Section 206 Proceeding, and Extending Deadlines, 164 ¶ 61,003 (issued July 2, 2018) ("July 2, 2018 Order Denying Waiver Request").

agreements for retained units⁸; and the Commission’s December 3, 2018 order⁹ on the August 31, 2018 compliance filing. The Commission’s Show Cause Order did not direct ISO-NE to file an interim program such as the IEP. Rather, ISO-NE unilaterally committed to establishing such a program, and the March 25 Filing proposed the IEP as an interim program for the winters of 2023-2024 and 2024-2025. According to ISO-NE, the program “will provide incremental compensation to resources that maintain inventoried energy during cold periods when winter energy security is most stressed.”¹⁰

In light of these facts, and the absence of any quantitative analysis regarding the need for fuel inventory and the quantity needed in the March 25 Filing,¹¹ the MPUC and numerous other parties asked the Commission to reject the filing. The same concerns underlie the ISO-NE’s Deficiency Response. Specifically, the Deficiency Letter asked ISO-NE to explain, among other things, why the program is necessary and specifically requests an explanation of how identified fuel security concerns for the winters of 2023-2024 and 2024 and 2025 are not adequately addressed by the existing interim fuel security program approved in the December 3 Order.¹²

Nothing in the March 25 Filing or the ISO-NE Deficiency Response addresses this question. Nor does the record contain a quantitative estimate of the incremental

⁸ See ISO New England Inc. Compliance Filing to Establish a Fuel Security Reliability Standard, Short-Term Cost-of-Service Mechanism, and Related Cost Allocation for Out-of-Market Compensation, FERC Docket Nos. EL18-182-000 and ER18-2364-000 (filed August 31, 2018) (“August 31, 2018 Filing”).

⁹ See Order Accepting Compliance Filing and Requiring Informational Filings, 165 FERC ¶ 61,202 at PP 82-88 (issued December 3, 2018).

¹⁰ March 25 Filing at 4.

¹¹ See Deficiency Response at 7-8 (ISO-NE acknowledging that no quantitative analysis was performed).

¹² See Deficiency Letter at 2.

reliability that will be provided by the IEP. And while ISO-NE provided an estimate that the program could cost approximately \$148 million per year for the two-year duration of the IEP, the MPUC commented on the usefulness of the estimate in its Protest: “If the Commission approves this program, consumers in New England will know what they may be paying, but they won’t know what they have bought.”¹³ Without any analysis of the additional level of reliability achieved by the IEP, there is no basis for a determination that the IEP’s costs are just and reasonable.

Commissioner Glick’s August 8 Written Statement in the instant docket articulated the insufficiency of the record to support a finding that the program’s costs are just and reasonable:

But even if we assume, for the sake of argument, that the Inventoried Energy program will make an incremental contribution to fuel security, ISO New England has not shown that this contribution is likely to be worth the program’s considerable price tag. As noted, the ISO estimates that the Inventoried Energy program will cost New England ratepayers between \$200 and \$300 million over just two years. But the record is insufficient to determine whether that is just and reasonable. For one thing, there is no evidence of how much incremental “inventoried energy” the ISO might get in response to those payments—i.e., we do not know what New England consumers will be paying for. In addition, because the ISO did not perform any analysis of how much “inventoried energy” it needs, we have no way of knowing whether the program will satisfy any need for “inventoried energy” that New England may or may not have. And without that information, we simply cannot assess what benefit, if any, New England customers will receive from the program, and therefore whether it is just and reasonable.¹⁴

ISO-NE’s suggestion, as set forth in its Deficiency Response, that the Commission accepted its analyses in the context of the short-term fuel security program approved in the December 3 Order does not supply the needed quantitative analyses

¹³ MPUC Protest at 7-8.

¹⁴ Commissioner Glick Written Statement at P12 (internal citation omitted).

demonstrating the incremental reliability that this additional short-term program will provide. In fact, ISO-NE states up front in its Deficiency Letter that it has not performed detailed analyses with respect to the inventoried energy program.¹⁵ Further, even if the record supported a finding – and it does not - that there is a fuel security problem that is not being addressed by the short-term fuel security provisions approved in the December 3 Order, not every solution that tries to address the problem is necessarily just and reasonable. As Commissioner Glick correctly stated in his Written Statement:

But that does not mean that every proposal that purports to address fuel security is a good idea. To the contrary, taking fuel security seriously means that ISO New England, stakeholders, and the Commission itself must ensure that efforts to address this issue actually help the region procure the services needed to operate the grid reliably. It also means that we must not waste consumers' money on poorly designed solutions that do little, if anything, to improve the region's fuel security.¹⁶

C. The Commission's Acceptance of the IEP By Operation of Law Is Not Supported by Substantial Evidence Demonstrating that the Program Will Make Any Difference in Resources' Retirement Decisions.

ISO-NE's March 25 Filing and its Deficiency Response make no showing that the program will make any difference in resources' retirement decisions. Rather, the program is framed in aspirational terms. For example, ISO-NE states the "compensation provided by the program *may* incent resources to take actions that they otherwise would not take that improve the region's winter energy security."¹⁷ ISO-NE further states that the program will improve the region's winter reliability "*if* the compensation provided deters resources that provide winter energy security during stressed winter conditions from pursuing retirement, thereby reducing the likelihood that such resources and their

¹⁵ See Deficiency Response at 1.

¹⁶ Commissioner Glick Written Statement at P6.

¹⁷ March 25 Filing at 5.

attributes exit the market or are retained through out-of-market actions that may adversely impact the wholesale markets.”¹⁸ These bald assertions are not supported by any evidence that the IEP will actually change resources’ behavior. As stated by

Commissioner Glick:

Most importantly, ISO New England does not point to any evidence that there is a near-term operational problem that cannot be adequately addressed by its existing rules or any evidence that the Inventoried Energy program would address any such problem by making the region more fuel secure. Without such analysis, there is no foundation to evaluate whether the program will achieve its intended purpose or do so in a manner that is just and reasonable.¹⁹

D. The Short-Term Nature of the Program Does Not Excuse the Absence of Supporting Evidence.

In its Deficiency Response, ISO-NE suggests that detailed analysis regarding the need for and efficacy of the IEP was not warranted given the short-term nature of the program. The Commission has previously rejected the argument that the burden to demonstrate that a rate is just and reasonable is somehow lessened if the rate will be in effect for a limited timeframe.²⁰ Simply stating that the program is “directionally correct,” or an “interim step” or stating the ISO-NE’s hopes for what the project may accomplish does not meet ISO-NE’s burden to provide adequate support for its proposal.

¹⁸ *Id.* (emphasis added).

¹⁹ Glick Written Statement at 6. *See also id.* at P17 (“As noted, however, 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 conceivably be worth consumers paying an additional several hundred million dollars. Without such evidence, there is simply no excuse for pursuing a half-baked operational solution that will not take effect until the middle of the next decade.”)

²⁰ *See Westar Energy, Inc.*, 137 FERC ¶ 61,142 at P30 (2011) (finding that the Commission's recognition of the potentially temporary nature of the need for the proposal should not be misconstrued as the Commission using a lower standard for evaluating the proposal); *see also, PJM Interconnection, LLC*, 157 FERC ¶ 61, 235 at P 11 (2016) (stating that temporary solutions are not subject to a lower standard of evaluation).

Here, ISO-NE has provided insufficient analysis to determine whether its proposed tariff provisions are just and reasonable,²¹ and any decision approving the program in the absence of such support does not meet the requirement that the decision be the product of reasoned decisionmaking based on substantial evidence.²²

IV. CONCLUSION

For the reasons stated herein and in the Protest of the MPUC, the MPUC respectfully requests that the Commission grant rehearing of its Notice of Filing Taking Effect by Operation of Law, and on rehearing, reject the IEP submitted by ISO-NE.

Dated: September 4, 2019

Respectfully Submitted,

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²¹ See *ISO New England, Inc.*, 113 FERC ¶ 61,055 at P 22 (2005) (Under section 205 of the Federal Power Act, the applicant bears the burden of demonstrating that its proposed rate change is just and reasonable).

²² *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1077 (D.C. Cir. 2003) (The Commission orders were arbitrary and capricious in relying upon a state agency's prior approval to support the conclusion that rates are in the public interest, without undertaking any independent analysis to support that conclusion); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and choice made") (citations omitted)).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document either by first class mail or electronic service upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Hallowell, Maine, this 4th day of September, 2019.

/s/ Lisa Fink

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