UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc.	)	**Docket No. ER16-307-000**

REQUEST FOR REHEARING OF THE NRG COMPANIES

Pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the NRG Companies[1] ("NRG") hereby request rehearing of the Commission's January 8, 2016, *Order Accepting Filing*, 154 FERC § 61,008 (2016) ("Order"), allowing for significant changes to the Installed Capacity Requirement ("ICR") without requiring the Independent System Operator of New England ("ISO-NE") to file tariff revisions and allowing ISO-NE to include these changes without a meaningful stakeholder process as required by the Commission's previous order.

I. INTRODUCTION

Distributed resources are becoming an increasingly important part of our Nation's energy mix. This includes the type of distributed solar resources at issue in this proceeding that may not formally participate in Commission's jurisdictional capacity markets, but may still have a major impact on price formation in the wholesale energy and capacity markets. As rooftop solar systems, home battery storage systems, and other innovative technologies proliferate, the Commission must adopt a reasoned and tariff-based approach to incorporating these technologies into load projections, and ultimately, into ICR.

[1] The NRG Companies are NRG Power Marketing LLC and GenOn Energy Management, LLC.

Prior to each Forward Capacity Auction ("FCA"), ISO-NE makes determinations as to the values that it will use in the FCA, which includes the ICR. The ICR is a projection of the minimum amount of capacity to serve load reliably in the New England region. For FCA 10, ISO-NE sought to add behind-the-meter photovoltaic resources that were not yet reflected in historical loads.

NRG respectfully suggests that the Commission's underlying order sets the dangerous precedent of allowing ISOs unfettered discretion to set reserve margins and other critical wholesale capacity metrics, without ever being forced to document their processes in a tariff filing. For example, the reduction in ICR attributed to behind-the-meter solar installations in this docket is expected to shift approximately $700 million in capacity revenues *annually* between buyers and sellers. By allowing ISO-NE to shift these revenues with no express tariff authority governing how behind-the-meter technologies should be incorporated into wholesale market calculations, the Commission effectively bypasses the prior notice requirement of section 205 of the Federal Power Act, as well as follow the notice and comment requirements of the Administrative Procedure Act.

At a minimum, NRG requests that the Commission clarify that any further changes to the Installed Reserve Margin forecasting methodology to take into account behind-the-meter resources will provide market participants advance notice, and the opportunity to comment on, methodological changes to ICR calculations.

II. RELEVANT BACKGROUND

On November 10, 2015, ISO-NE filed the values for the tenth FCA, which include the ICR, the Hydro Quebec Interconnection Capability Credits ("HQICCs"), the Local Sourcing Requirement for the Southeastern New England Capacity Zone, and capacity requirement values

used to develop the demand curve for the 2019-2020 Capacity Commitment Period. ISO-NE proposes an ICR (net of HQICCs) of 34,151 MW. The only change in assumptions for FCA 10 as compared to FCA 9 in "the set of assumptions used to calculate the ICR-Related Values is the inclusion of behind-the-meter photovoltaic resources that are not yet reflected in historical loads as a reduction in the load forecast," which ISO-NE refers to with the unwieldy acronym "BTMNEL."[2] ISO-NE estimates that the non-embedded PV resulted in a 390 MW reduction in the ICR for the 2019-2020 Capacity Commitment Period.

ISO-NE proposed the same ICR methodology that it proposed for FCA 9. However, the Commission did not accept that methodology and instead directed ISO-NE to fully explore the incorporation of distributed generation into the ICR calculation in the stakeholder process. Specifically, the Commission directed ISO-NE to work with stakeholders to consider the "market and operational" effects of reducing ICR based on projections of the MWs of installed behind the meter distributed generation. Only after the "market and operational" effects were discussed and analyzed should ISO-NE incorporate these changes "if determined appropriate."[3]

III. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2),[4] NRG presents the following identification of errors and statement of issues:

> 1. The Order is arbitrary, capricious, and unsupported by substantial evidence because the Commission erroneously concluded that ISO-NE's change to calculating the ICR was not a "significant and material" change. Consequently, the Commission's decision is both (i) arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law, and (ii) a deviation from its existing precedent without a reasoned explanation.

[2] *ISO New England, Inc.*, Filing of Proposed Installed Capacity Requirements, Hydro Quebec Interconnection Capability Credits and Related Values for the 2019/2020 Capacity Commitment Period, Docket No. ER16-307 (filed November 11, 2015) at pages 2-3.
[3] *ISO New England Inc.*, 15 FERC ¶ 61,003 at P 20 (2015).
[4] 18 C.F.R. § 385.713(c)(2) (2015).

Ark. La. Gas Co. v. Hall, 453 U.S. 571 (1981); *Fla. Mun. Power Agency v. FERC*, 602 F.3d 454 (D.C. Cir. 2010); *ANR Pipeline Co. v. FERC*, 71 F.3d 897 (D.C. Cir. 1995). *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010); ISO New England Inc. and New England Power Pool Participants Committee, 147 FERC ¶ 61,173 (2014) *order on reh'g and clarification*, 150 FERC ¶ 61,065 (2015).

2. The Order is arbitrary and capricious because the Commission failed to respond meaningfully to concerns raised by NRG.

See, e.g., EPSA v. FERC, 753 F.3d, 216, 224 (2014); *PPL Wallingford, LLC and PPL EnergyPlus, LLC v. FERC*, 419 F.3d 1194, 1198 (2005); *American Gas Ass'n v. FERC*, 593 F.3d 14, 21 (D.C. Cir. 2010); *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989). Instead, the findings in the Order with respect to these issues rely on unsupported findings, misstate the facts, and are inconsistent with other Commission statements. *See, e.g., Allentown Mack Sales and Service Inc. v. NLRB*, 522 U.S. 359, 374 (1998); *Motor Vehicle Manufacturers Assn. of the U.S., et al. v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29, 43 (1983).

3. The Order unlawfully deprived market participants the ability to meaningfully comment on significant changes to ISO-NE's methodology for determining ICR, because the first time the Commission considered the changes was in the context of an informational filing ratifying an already implemented tariff change.

5 U.S.C. § 553(c); *Xcel Energy Servs. v. FERC*, 510 F.3d 314, 317 (D.C. Cir. 2007), *citing Revised Public Utility Filing Requirements*, 99 FERC P 61,107 P 46 (2002). Practices that significantly affect rates, terms and conditions of service must be included in a Commission-approved tariff rather than in other documents. *Quest Energy, L.L.C. v. Detroit Edison Co.*, 106 FERC ¶ 61,227, at P 20 (2004) ("a company's tariffs, not its manuals or handbooks, must define the rates, terms and conditions of jurisdictional services").

4. The underlying order unlawfully switched the burden of proof in this proceeding. Instead of requiring ISO-NE, as the utility-proponent, to demonstrate that its proposed changes to its ICR methodology were just and reasonable, the Order instead suggests that market participants objecting to the new methodology bore the burden of proving that the changes were not just and reasonable.

Section 205 of the Federal Power Act, 16 U.S.C.§ 824d; *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,147, at P 58 (2009) (finding that consistent with the Commission's policy, as implemented through the rule of reason, a provision "that significantly affects rates, terms and conditions of service … must be filed for Commission approval and made a part of the … tariff.")

IV. REQUEST FOR REHEARING

A. The Commission Erroneously Concluded That A Tariff Change Was Not Warranted.

The Commission erred in determining that ISO-NE's inclusion of non-embedded PV is not a material change to the way ISO-NE conducts its ICR calculations. The principle underlying the Filed Rate Doctrine is "the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."[5] Here, parties were not properly on notice that ISO-NE would depart from its historical process of calculating ICR by incorporating a new class of behind-the-meter technologies into its calculations that were not contemplated in ISO-NE's initial tariff filing. As a result, NRG respectfully submits that the Commission erred in agreeing with ISO-NE that it did not need to make a Section 205 filing in order to provide parties with the necessary notice that a significant change to ISO-NE's calculation of ICR was taking place.

Likewise, NRG submits that the Commission erred in finding that ISO-NE's fundamental changes to its ICR calculation process is allowed under the Commission's "rule of reason" precedent. The Commission has stated on several occasions, "the determinations of what agreements 'affect or relate to' electric service… must be judged by the rule of reason."[6] The D.C. Circuit has stated that the rule of reason allows the Commission to exercise its discretion to allow utilities to forego filing particular contracts that deal only with matters of "practical insignificance."[7] In *PacifiCorp*, the Commission further elaborated on the rationale underlying the rule of reason:

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[5] *Ark. La. Gas Co. v. Hall,* 453 U.S. 571 at 578 (1981) (citations omitted).
[6] *See Town of Easton, Maryland v. Delmarva Power and Light Co.*, 24 FERC ¶ 61,251 (1983) *(Town of Easton*) (quoting *Pacific Gas and Elec. Co*., 7 FERC ¶ 61,267, at 61,565 (1979)).
[7] *Pub. Serv. Comm'n of New York v. FERC,* 813 F.2d 448, 454 (D.C. Cir. 1987).

> Under the rule of reason, the Commission does not require [contracts such as the Agreement] to be filed unless they significantly affect rates and services. In deciding what must be filed, the Commission balances the need for full disclosure of pertinent contracts, which provide real benefits to existing and potential customers, against the burden that would be imposed by requiring public utilities to file contracts that do not significantly affect rates and services. The Commission does not believe it is appropriate to deprive utilities of the flexibility to manage their operations by introducing delay and layered decision-making as would arise from filing obligations for agreements that have an insignificant impact on rates, where such filing and posting would serve no practical purpose.[8]

Here, the Commission erred in its analysis under the rule of reason because ISO-NE estimates that the non-embedded PV resulted in a 390 MW reduction in the ICR for the 2019/2020 Capacity Commitment Period, which has a significant impact on rates. Based on the slope of the demand curve in New England, a 390 MW reduction in Net ICR can be expected to change the clearing price by approximately $1.70/kW-month. A decrease of $1.70/kW-month represents a massive shift in FCA prices, which have cleared at between $2.95/kW-month in FCAs 3 and 4, to $17.73 for new resources in FCA 9 in certain constrained zones. Measured in total dollars, the change approved in the underlying order decreases clearing prices in New England by approximately $700 million dollars.

The impact of approximately $700 million per year is a significant impact and a material change that clearly triggers the requirement that ISO-NE seek a tariff change under Section 205. Indeed, the shift in prices as a result of ISO-NE's unilateral recalculation of ICR dwarfs the value of several proceedings the Commission has recently considered, including the Commission's approval of up to 200 MWs of new renewables allowed to enter the market annually without triggering buyer-side market power mitigation rules.[9]

[8] PacifiCorp, 127 FERC ¶ 61,144 at P 11 (2009) (citing *Town of Easton*, 24 FERC ¶ 61,251).
[9] *See, e.g.*, *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,173 (2014) *order on reh'g and clarification*, 150 FERC ¶ 61,065 (2015) (approving a 200 MW "renewables exemption").

The Commission therefore erroneously concluded that the impact of ISO-NE's changes to the ICR was not large enough to warrant a tariff change and should require ISO-NE to file a Section 205 seeking a tariff change. Simply put, there must be a discernable limit in how ISO-NE is allowed to conduct its load forecast. That limit is lacking in the Commission's underlying order and therefore rehearing is warranted.

B. The Order Erred In Finding That The Plain Language Of The Existing Tariff Contemplated The Type Of Revisions To ICR That ISO-NE Proposed Here.

NRG respectfully submits that the Commission erred in finding that its 2006 order approving ISO-NE's methodology for calculating ICR contemplated things like reducing ICR by 390 MW to account for behind-the-meter solar resources. The Commission characterizes the 2006 order as standing for the proposition that:

> As ISO-NE notes, the Commission has not previously required tariff revisions under section 205 each time ISO-NE revised the methodology used to calculate the ICR, and the existing tariff provisions recognize that those revisions may require ISO-NE to have sufficient flexibility to update its assumptions as necessary.

In so concluding, the Order cites (i) tariff provisions adopted in that docket explaining the ICR process and (ii) a transmittal letter in the 2006 docket characterizing the ICR process. However, a closer review of both documents shows that neither contemplated the incorporation of new types of behind-the-meter resources attributable to new technologies.

For example, the Order relies on tariff sections III.12.1 and III.12.8 for the proposition that ISO-NE already has tariff authority to adjust ICR to incorporate new behind-the-meter resources. Section III.12.1 states, in relevant part that:

> Prior to each Forward Capacity Auction, the ISO shall calculate the Installed Capacity Requirement for the New England Control Area for each upcoming Capacity Commitment Period . . . . If the Installed Capacity Requirement shows a consistent bias over time, either high or low, the ISO shall make adjustments to

> the modeling assumptions and/or methodology through the stakeholder process to eliminate the bias in the Installed Capacity Requirement.

Section III.12.8 states that:

> [F]or each Load Zone within the New England Control Area . . . . Each year, the load forecasts and underlying methodologies, inputs and assumptions shall be reviewed with Governance Participants, the state utility regulatory agencies in New England and, as appropriate, other state agencies. If the load forecast shows a consistent bias over time, either high or low, the ISO shall propose adjustments to the load modeling methodology to the Governance Participants, the state utility regulatory agencies in New England and, as appropriate, other state agencies to eliminate the bias.

It is impossible to detect in either of these tariff provisions any hint that the Commission intended these provisions to allow ISO-NE to massively decrease ICR to incorporate projected installations of new behind-the-meter technologies. While ISO-NE clearly has the authority to adjust its load forecast and to eliminate "systematic biases," the Commission's decision that this general tariff authority also allows ISO-NE to reduce ICR to account for new behind-the-meter technologies is unsupported by the plain language of the tariff, which includes no references to behind-the-meter technologies. If the Commission were to approve such a reading, there would be no discernable limiting principle to how far ISO-NE's authority would stretch.

The Order likewise cites to ISO-NE's 2006 cover letter as evidence that the Commission intended to provide ISO-NE substantial discretion in how to calculate ICR. However, a review of the filing letter in Docket No. ER07-365-000, filed December 22, 2006, shows that ISO-NE highlighted several "key aspects of the process associated with formulating assumptions for and calculating the ICR, Local Sourcing Requirements and the Maximum Capacity Limits for use in the FCM[.]" Among those "key" elements were how to calculate "Local Sourcing Requirements," the "Maximum Capacity Limits," and "the criteria for determining what new transmission elements will be included in the base network model for the upcoming Power

Years." Indeed, the proceeding in Docket No. ER07-365-000 appears far more interested in interties between ISO-NE and the transmission system operated by the New York Independent System Operator than it does in behind-the-meter solar calculations.

C. The Order Denies Market Participants Prior Notice That ISO-NE Would Reduce ICR And Provides No Meaningful Ability To Provide Comments.

As noted above, there is nothing in either the tariff language or filing letter cited by the Order that would put parties on notice that ISO-NE has the authority to incorporate a new class of behind-the-meter resources into its calculation of ICR. On rehearing, we respectfully request that the Commission acknowledge that parties in Docket No. ER07-365-000 were never put on notice that ISO-NE would be using the tariff provisions put into place in that docket to eliminate 390 MW from ICR for the 2019/2020 auction cycle because of projected adoption of behind-the-meter solar panels. Because parties were never put on notice that this would become a part of ISO-NE's methodology, they were denied their rights under the FPA and Administrative Procedure Act ("APA").

As the courts have routinely stated, the purpose of the prior notice requirement of the FPA is to "provide FERC with timely information from which it can 'monitor the reasonableness of prices and undue discrimination in the marketplace' and 'assist the public in filing complaints' by providing it with 'good information about energy transactions.'"[10] Similarly, the notice and comment provisions of the APA require that:

> [a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[11]

[10] *Xcel Energy Servs. v. FERC*, 510 F.3d 314, 317 (D.C. Cir. 2007), *citing Revised Public Utility Filing Requirements*, 99 FERC P 61,107 P 46 (2002).
[11] 5 U.S.C. § 553(c).

Moreover, as the courts have explained, the "general test of adequacy of notice is whether notice of rule-making affords interested parties with notice of significant subjects and issues involved, allowing public to effectively participate in rulemaking process."[12] The issue before the Commission was outside the scope of the issues that were initially teed up for discussion. The Commission never provided market participants sufficient notice that the issue of rooftop solar and other behind-the-meter technologies was within the scope of the issue they were considering in Docket No. ER07-365-000.

Finally, another consequence of the Commission's decision of incorporating new technologies into the calculation of ICR, is that parties opposing ISO-NE's calculation methodology are put into the position of having to demonstrate that the tariff is unjust and unreasonable, rather than requiring the utility-proponent of the rate to bear the burden of showing that its proposed changes are just and reasonable. Even an active party in the 2007 tariff changes docket would have found it difficult (if not impossible) to challenge ISO-NE's ability to enter into changes that were not even being contemplated at the time. Thus, the Commission's decision in this docket impermissibly shifts the burden onto parties challenging the calculation and provides ISO-NE a level of insulation from ever having to show that its preferred methodology is, in fact, just and reasonable.

D. The Commission Erred In Determining That ISO-NE Conducted A Stakeholder Process As Required By A Previous Order.

The Commission erred in determining that an appropriate stakeholder process was conducted as required under a prior Commission order. In January 2015, the Commission addressed the same issue as it now addresses here regarding non-embedded PV being included in

[12] *Abington Memorial Hospital v Heckler*, 474 U.S. 863 (1985).

the ICR.[13] In that order, the Commission found that ISO-NE must first "fully explore the incorporation of distributed generation into the ICR calculation in the ICR process" and "examine the market and operational issues associated with incorporating distributed generation into the ICR calculation."[14] The Commission further stated:

> Accordingly, while we are accepting ISO-NE's proposed values for FCA 9, we expect ISO-NE to fully explore the incorporation of distributed generation into the ICR calculation in the stakeholder process. We expect ISO-NE to do this on a schedule that will allow these factors to be reflected, *if determined appropriate*, in the ICR calculation for FCA 10. (emphasis added)

In ISO-NE's filing in this matter, ISO-NE explains that it worked with stakeholders, which included a presentation of ISO-NE's framework to include PV resources in the ICR calculations. Although ISO-NE explains that there were presentations and discussions at various committees, ISO-NE fails to demonstrate that the type of stakeholder process that the Commission required was undertaken. The Commission was specific that ISO-NE was expected to "explore the incorporation of distributed generation" and "examine the market and operational issues associated with incorporating distributed generation in the ICR calculation." Once ISO-NE did its exploring and examining, only "if determined appropriate" should these factors be reflected in the ICR calculation for FCA 10.

ISO-NE provided no evidence that it meaningfully "explore[d] the incorporation of distributed generation" and "examine[d] the market and operational issues." The Commission erred in agreeing with ISO-NE that it abided by the Commission's earlier order. Indeed, ISO-NE failed to truly evaluate the market impacts and operational issues with stakeholders. Because of the lack of discussion on market impacts and operational issues, ISO-NE could never determine if including forecasted distributed generation into the ICR was appropriate, as required by the

[13] *ISO New England Inc*., 15 FERC ¶ 61,003 (2015).
[14] *Id.* at P 20 (2015).

previous order. As such, the Commission's ruling is arbitrary and capricious, as there was no evidence provided by ISO-NE that could have allowed the Commission to determine that it conducted a meaningful stakeholder process as required by the Commission's order.

V. CONCLUSION

Wherefore, for the foregoing reasons, the NRG respectfully requests that the Commission grant rehearing in this proceeding.

February 8, 2016

Respectfully submitted,

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Certificate Of Service

I hereby certify that I have served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Princeton, New Jersey this 8th day of February, 2016.

/s/ *Maria DeLuca*