UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.	)))))	Docket No. ER22-1528

PROTEST OF THE AMERICAN COUNCIL ON RENEWABLE ENERGY

Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[1] the American Council on Renewable Energy (ACORE) respectfully submits this protest and comment on ISO New England Inc.'s ("ISO-NE" or "ISO") proposal[2] filed on March 31, 2022 in the above-captioned docket.

As demonstrated in the ISO's own filing, the proposed delay in the removal of the Minimum Offer Price Rule (MOPR) would perpetuate a rule that is unjust, unreasonable and unduly discriminatory. ACORE therefore asks that the Commission, acting in its authority under Section 206 of the Federal Power Act (FPA), require that ISO-NE implement a replacement rate that removes the MOPR beginning with Forward Capacity Auction (FCA) 17.

I STANDARD OF REVIEW[3]

Under Section 205 of the FPA, the Commission must determine if proposed changes in rates, terms and conditions, and other tariff provisions are "just, reasonable, and not unduly

[1] 18 C.F.R. §§ 385.211 and 214.

[2] ISO New England, Revisions to ISO New England Transmission, Markets and Services Tariff of Buyer-Side Market Power Review and Mitigation Reforms (Mar. 31, 2022), FERC Docket No. ER22-1528, Accession No. 20220331-5296 ("ISO-NE Filing").

[3] See the Protest of the Clean Energy Advocates filed in this docket for a more detailed discussion.

discriminatory,"[4] but the burden of establishing this lies with the filing utility.[5] Upon a finding that a tariff is not just or reasonable, FERC's authority in the Section 205 context is limited to rejecting the filing in whole or in part,[6] or with the filing parties' consent, the Commission may suggest "minor" modifications to a proposal, so long as such modifications are in line with the general scheme of the tariff.[7]

The requirement that rates be just, reasonable, and not unduly discriminatory is the same in both FPA Sections 205 and 206 and Commission decisions under both Sections must be based on reasoned decision-making supported by substantial evidence.[8] Where the Commission has found—on its own motion or in response to a complaint—that a rate is unjust, unreasonable, or unduly discriminatory, Section 206 gives the Commission the authority to set the just and reasonable rate, rule, or practice.[9] As a result, a Section 205 proceeding may be transformed into a Section 206 proceeding and the Commission can impose a specific replacement rate if three conditions are met: (1) the proposed rate under Section 205 is determined to be unjust and

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[4] 16 U.S.C. § 824d(a)-(e); *Wisconsin Pub. Power, Inc. v. F.E.R.C.,* 493 F.3d 239, 260 (D.C. Cir. 2007); *ISO New England Inc., New England Power Pool*, 118 FERC ¶ 61,224, 62,144 (2007) ("The burden to provide a rationale and support for a proposed tariff revision in the first instance is on the Applicants and not the Commission" and rejecting applications based on unsupported assertions.).

[5] *See City of Winnfield v. FERC*, 744 F.2d 871, 874-75 (D.C. Cir. 1984).

[6] *See, e.g.*, *NYPSC*, 642 F.2d at 1345; *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1574 (D.C. Cir. 1993); *Sea Robin Pipeline Co.*, 795 F.2d at 183, 187; *City of Winnfield*, 744 F.2d at 875, 876 (D.C. Cir. 1984).

[7] *W. Res., Inc.*, 9 F.3d at 1579; *Constellation Mystic Power, LLC*, 172 FERC ¶ 61,043, P 45 (2020).

[8] 16 U.S.C. § 825*l*(b). *See also Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017) ("Thus, while "[t]he 'just and reasonable' lodestar is no loftier under section 206 than under section 205," *FirstEnergy*, 758 F.3d at 353, the showing required of FERC to exercise its section 206 authority to change an existing rate is different from anything required for FERC to approve a utility's proposed rate adjustment under section 205.").

[9] 16 U.S.C. § 824e(a). *See also* at *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993).

unreasonable,[10] (2) the existing rate is unjust and unreasonable,[11] and (3) the replacement rate is just, reasonable, and supported by substantial evidence and reasoned rulemaking.[12]

II COMMENTS AND PROTEST

A. The MOPR Rests on an Unsupported Premise

ACORE strongly supports the elimination of the anti-competitive Minimum Offer Price Rule (MOPR) and replacement with reforms to its buyer-side market power mitigation rules, as described in ISO-NE's proposal.

Removal of the MOPR is long overdue. The fundamental premise of this rule, that "a load-side interest would promote the entry of new capacity into the FCM as a way of increasing supply so that clearing prices fall below a competitive level,"[13] has never been supported by real-world practices. Instead of a determination that market power is actually being exercised, the ISO defines market power by a resource's offer price, explaining that this "construct focuses on the conduct that is necessary for an exercise of buyer-side market power—a below-cost offer from a new capacity resource."[14] But this "conduct" does not provide evidence of the exercise of market power and instead reflects the implementation of state policies seeking to achieve what

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[10] *Western Resources* v. *FERC,* 9 F.3d 1568, 1579 (D.C. Cir. 1993).

[11] *Id. See also Emera Maine v. FERC,* 854 F.3d 9, 25 (D.C. Cir. 2017) ("Section 206 therefore imposes a "dual burden" on FERC. *FirstEnergy, 758 F.3d at 353.* Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate. *See Fla. Gas Transmission Co. v. FERC,* 604 F.3d 636, 640–41 (D.C. Cir. 2010) (examining similar requirement under the NGA); *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 187 (D.C. Cir. 1986) (same)).

[12] *Id* at 1579-80 (*citing Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446, 456 (D.C.Cir.1988) (FERC must first determine "that the presumptively just and reasonable existing rate is no longer just and reasonable") (emphasis in original); *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 184 (D.C.Cir.1986) (FERC must find "that the existing rate is unjust or unreasonable and the proposed new rate is both just and reasonable")*; ANR Pipeline Co. v. FERC,* 771 F.2d 507, 514 (D.C.Cir.1985) (same)).

[13] ISO-NE Filing at 9.

[14] *Id.* at 11.

the capacity market alone cannot -- a decarbonization of the power sector and associated reductions in harmful air and water emissions. These state polices are not an exercise of market power but a correction of the market failure that occurs when negative externalities are not accounted for in a price,[15] with such externalities being the pollution and contribution to climate change caused by conventional generation resources. Because the MOPR rests on a fundamentally inaccurate premise, this rule has created an inefficient and uncompetitive market.

B. The ISO's Filing Itself Demonstrates that the MOPR is Not Just and Reasonable

ISO-NE's own arguments provide ample justification for the immediate removal of the MOPR. The ISO states that the continuation of the MOPR "will likely exclude large amounts of state-sponsored capacity from entering the Forward Capacity Market."[16] The ISO then refers to the "efficient overbuild problem" that will occur because "these resources will ultimately be built regardless to achieve the region's decarbonization goals."[17] Such a situation will greatly increase the cost of building renewable resources at a time when transitioning to a clean energy grid is more essential than ever.

ACORE strongly agrees with the ISO's finding regarding the MOPR that "this situation is no longer sustainable"[18] and that under the current construct "the evidence is clear that consumers will be forced to pay for a substantial quantity of capacity twice—once 'in market' to

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[15] See for example, Thomas Helbling, *Externalities: Prices Do Not Capture All Costs," International Monetary Fund* (February 2020), stating that "Neoclassical economists long ago recognized that the inefficiencies associated with technical externalities constitute a form of 'market failure.' Private market–based decision making fails to yield efficient outcomes from a general welfare perspective."

[16] ISO-NE Filing at 7.

[17] *Id.*

[18] *Id.* at 31.

achieve the region's resource adequacy objectives, and a second time 'out of market' for additional resources developed to meet state decarbonization policies."[19]

Central to these reforms is the ISO's proposed replacement of the MOPR with a more narrow and targeted form of buyer-side market power mitigation. A central component this new regime is the exemption from such mitigation of state-sponsored renewable resources, which as explained by ISO-NE, are "federally or state-sponsored resources receiving or expecting to receive revenues from outside of ISO-administered wholesale markets that are doing so as part of some federal or New England state renewable, clean, decarbonization, net-zero carbon or alternative energy program."[20] Removing these resources from the possibility of buyer-side mitigation is essential for decarbonization to move forward without the imposition of an additional and unnecessary cost or risk.

C. ISO-New England Has Not Justified the Delay in the MOPR Removal

Unfortunately, the ISO in this filing proposes to delay the urgent need for the MOPR removal until FCA 19, to be held in 2025 and procuring capacity for the twelve-month period beginning in June 2028. Given the strong argument presented in favor of the MOPR's removal, the ISO faces a significant burden in justifying its proposal to delay the removal of the MOPR for over two years. Several arguments are provided for this delay, each of which is addressed below.

First, ISO-NE argues that: "Allowing significant quantities of state-sponsored resources to enter the market unmitigated is, in the short-term, likely to impact the clearing price in a

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[19] *Id.*

[20] *Id.* at 47.

manner that could lead to the premature retirement of resources that have important reliability benefits for the region."[21] This is discussed in more detail in the Testimony of Vamsi Chadalavada, but no actual projection of such retirements and their impact on achievement of reliability measures is provided. Mr. Chadalavada acknowledges that: "It is very difficult to quantify these risks and their consequences."[22] While such a quantification may be difficult, conjecture cannot be used to support retaining an unjust and unreasonable rule. For example, the testimony references the August 2020 outages that occurred in California and the findings of the Root Cause Analysis of that event conducted by the California Independent System Operator, Public Utilities Commission and Energy Commission. But this example ignores that this analysis found that "the extreme heat wave negatively impacted conventional generation (such as thermal resources fueled by natural gas), which typically operates less efficiently during temperature extremes."[23] The Root Cause Analysis especially notes the contribution of individual gas plant outages and downrates.[24]

A second argument in support of a delay in the MOPR removal is that "the ISO's current FCA capacity accreditation rules have not yet been modernized to account for this inefficient displacement as resource mix changes begin to alter the system's reliability risks."[25] But there are biases within the capacity accreditation rules that also overstate the capacity value of natural gas-fired resources, especially those resources without on-site storage. A complaint filed last month by RENEW Northeast, Inc. and the American Clean Power Association demonstrates how

[21] *Id.* at 26.

[22] Chadalavada Testimony at 17.

[23] California ISO, California Public Utilities Commission and California Energy Commission*, Final Root Cause Analysis, Mid-August 2020 Extreme Heat Wave* (January 13, 2021) at 21.

[24] *Id.* at 47.

[25] Chadalavada Testimony at 15.

the accreditation process overstates the valuation of natural gas-fired generators that have neither dual-fuel capability nor dedicated, firm natural gas supply arrangements.[26] On a broader scale, a recent analysis by Astrape Consulting for Advanced Energy Economy found that traditional methodology for capacity valuation "can overstate the capacity value of thermal generating resources by 2.7% to over 20% in winter and 4.6% to over 10% in summer, depending on regional conditions and other relevant factors."[27] Therefore, improvements in capacity accreditation could actually demonstrate that there is an excess reliability valuation currently assigned to conventional resources.

Finally, Mr. Chadalavada expresses the concern that there could be delays in the completion of new state-sponsored resources, and such resources would not be developed until after the retirement of other resources. But as the testimony recognizes, all infrastructure projects may be susceptible to delays. The two most notable delays or cancellations thus far within the ISO involve natural-gas fired resources which have had their capacity supply obligations terminated -- the Killingly Energy Center, a 632 megawatt (MW) combined cycle plant that obtained a capacity supply obligation in the Forward Capacity Auction 15,[28] and the Clear River Energy combined-cycle plant, which had cleared FCA 10.[29]

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[26] *Complaint and Request for Expedited Consideration*, RENEW Northeast, Inc. and the American Clean Power Association (March 15, 2022)

[27] Advanced Energy Economy, Getting Capacity Right: How Current Methods Overvalue Conventional Power Sources (March 2022) at 2.

[28] *ISO New England Inc. Resource Termination Filing*, Docket No. ER22-355 (November 4,2021); *Order Addressing Arguments Raised on Rehearing*, Federal Energy Regulatory Commission, 178 FERC ¶ 61,130 (February 23, 2021),

[29] *Order Accepting Termination Filing and Denying Waiver*, Federal Energy Regulatory Commission 165 FERC ¶ 61,137 (November 19, 2018)

D. The Renewable Technology Resource Exemption is Not Sufficient to Compensate for Retention of the MOPR

A component of ISO's proposed "transition" during the retention of the MOPR is the exemption of 300 MW of state-sponsored resources from the buyer-side mitigation rules in FCA 17 and an additional 400 MW in FCA 18.[30] But this aspect of the proposal does not appear to be based on any analysis of the need for such an exemption, and is far from sufficient to account for the thousands of megawatts of renewable resources that will be coming on-line in the near future. ISO-NE notes that "the region has committed to a total procurement of up to 10,622 MW in clean and renewable resources," including "3,600 MW of legislatively authorized procurement authority" not yet procured.[31] Moreover, the ISO plans to keep in place the substitution auction created under the Competitive Auctions with Sponsored Policy Resources (CASPR), demonstrated to be ineffective in providing a pathway for renewable resources to avoid mitigation. Of the 900 MW of state policy resources that attempted enter the FCM over CASPR's four-year history, only 54 MW was able to do so.[32] Therefore, these two components of the transition mechanism do not constitute a just and reasonable rate.

CONCLUSION

The ISO-NE's filing fails to justify the retention of the MOPR for two more FCAs and will therefore impose unjust costs on clean energy resources. ACORE urges the Commission to

[30] ISO-NE Filing at 42.

[31] *Id.* at 21.

[32] *Id.* at 27.

reject this proposal and require, under Section 206 of the FPA, that ISO-NE adopt and implement the elimination of the MOPR, as proposed in this filing, prior to FCA 17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this pleading has been served this day upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 21st day of April 2022.

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