

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

ISO New England, Inc. and New England)	
Power Pool)	Docket No. ER09-1051-000
)	
)	

**LIMITED PROTEST AND COMMENTS OF
NEPOOL INDUSTRIAL CUSTOMER COALITION**

Pursuant to Rule 211¹ of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, the NEPOOL Industrial Customer Coalition hereby files this Limited Protest and Comments in the above-referenced proceeding.²

I. INTRODUCTION

On April 28, 2009, ISO New England, Inc. and New England Power Pool Participants Committee (collectively, "ISO-NE" or "ISO") submitted a compliance filing ("Compliance Filing") in response to the Commission's Final Rule on Wholesale Competition in Regions With Organized Power Markets issued on October 17, 2008.³ The ISO's Compliance Filing reflects ISO-NE's attempt to comply with directives in Order No. 719 regarding: (1) demand response resources; (2) long-term power contracting; (3) market monitoring policies; and (4) Regional Transmission Organization and Independent System Operator (collectively, "RTOs") responsiveness to customers and other stakeholders.

¹ 18 C.F.R. §385.211.

² NICC filed a Motion to Intervene in this docket on May 8, 2009.

³ *Wholesale Competition in Regions With Organized Power Markets*, 125 FERC ¶61,071 (2008) ("Order No. 719").

The following comments are limited to issues concerning long-term power contracting, RTO responsiveness, and market monitoring.⁴ As a threshold matter, NICC believes that the ISO's proposed mission statement falls short of satisfying Order No. 719's directives to improve RTO responsiveness to stakeholders and customers. As discussed herein, the ISO's proposed mission statement is not fully consistent with FERC precedent setting forth the RTO's role in ensuring customers realize the lowest reasonable cost necessary to meet system needs. As a result, the ISO's proposed mission statement does not set forth the proper measure against which the ISO should be judged to ensure adequate responsiveness, as required by Order No. 719.

In order to promote long-term contracting, Order No. 719 directed each RTO to dedicate a portion of its website to posting offers to buy or sell power on a long-term basis. In its Compliance Filing, the ISO indicates that it will pursue this measure, although efforts are not expected to begin until the second quarter of 2010 due to the press of other New England market initiatives. Based on the compliance filing by PJM Interconnection, L.L.C. ("PJM"), NICC is aware that PJM is offering to allow RTOs who are members of the ISO/RTO Council and their market participations to use PJM's website, which is expected to be available by early September 2009, at little or no cost. Given the upcoming availability of, and cost-effectiveness of using, the PJM website, NICC believes that the ISO should take advantage of this opportunity to enhance long-term contracting in New England or at least justify not pursuing this option.

Finally, in response to Order No. 719's information-sharing provisions, the ISO notes that the Tariff already includes protocols for releasing confidential market information. The ISO proposes to apply these provisions to any state regulatory commission's request for confidential information, including any information concerning New England market participants, from the

⁴ NICC, in conjunction with Comverge, Inc., CPower, Inc., Energy Connect, Inc., EnerNOC, Inc., and Viridity Energy, Inc., is contemporaneously filing a separate Protest and Comments addressing demand response issues.

External and Internal Market Monitoring Units. Given that the ISO's proposal seeks to expand the scope of FERC-approved protocols, the Commission should find that the ISO's proposal is consistent with Order No. 719.

II. LIMITED PROTEST

Recognizing the importance of an RTO's responsiveness to customers and other stakeholders within its footprint, the Commission directed each RTO to implement measures that increase the level of responsiveness of its board of directors or demonstrate such measures are already in place. In this vein, the Commission required each RTO to post on its website a mission statement and encouraged each RTO to include in its mission statement, among other things, the "organization's purpose, guiding principles, and commitment to responsiveness to customers and other stakeholders, and ultimately to the consumers who benefit from and pay for electricity services."⁵ According to the Commission, the mission statement requirement will improve communications between RTOs and their stakeholders, as well as provide a statement of goals by which an RTO's progress may be judged.⁶

In response to the Commission's directive, the Compliance Filing sets forth proposed changes to the ISO's mission statement. Specifically, the ISO proposes to add the following language:

In fulfilling this mission and consistent with the preceding principles, the ISO shall strive to perform all its functions and services in a cost-effective manner, for the benefit of all those served by the ISO. To assist stakeholders in evaluating any major ISO initiative that affects market design, system planning or the operation of the New England bulk power system, the ISO will provide quantitative and qualitative information on the need for and the impacts, including costs, of the initiative.⁷

⁵ See Order No. 719 at P 478.

⁶ *Id.* at P 557.

⁷ See Compliance Filing at 117.

The Compliance Filing contends that this language expresses the ISO's commitment to transparency of information and cost-effectiveness for the benefit of all stakeholders, including ultimate end-use customers.⁸

The Compliance Filing acknowledges that certain state regulatory commissions, end-user customers, municipal entities, and consumer advocates supported an alternative mission statement.⁹ The alternative mission statement provided:

To ensure just and reasonable rates as mandated by the Federal Energy Regulatory Commission, the ISO shall fulfill its mission at the lowest reasonable cost, consistent with the preceding principles ultimately to the benefit of all consumers who pay for electricity products and services. In evaluating any major ISO initiative that affects market design, system planning or operation of the New England bulk power system, and to improve the functioning of ISO-NE competitive markets for the benefit of consumers, the ISO will provide quantitative and qualitative information on the need for and the impacts, including costs, of the initiative.¹⁰

The key difference between the ISO's proposal and the alternative mission statement is the latter proposal's incorporation of the concept of "lowest reasonable cost." Proponents of the alternative mission statement believe that such language is necessary to ensure that the ISO advances the "lowest reasonable cost" alternative that meets an identified system need.

The ISO's chief objection to the alternative proposal focuses on the crux of the alternative mission statement. The Compliance Filing states that requiring the ISO to perform its responsibilities at the lowest reasonable cost "reflects a misunderstanding of ...ISO-NE's role in the region."¹¹ The Compliance Filing also asserts that the alternative proposal's reference to just and reasonable rates is inapposite, because the Commission is tasked with the duty to ensure just

⁸ *Id.*

⁹ *See id.* at 116-117.

¹⁰ *Id.* at 117-118 (emphasis added).

¹¹ *Id.* at 118.

and reasonable rates.¹² For these reasons, the Compliance Filing urges the Commission to adopt the ISO's mission statement.

The Federal Power Act ("FPA") charges the Commission with the duty to ensure just and reasonable rates.¹³ The FPA's emphasis on just and reasonable rates underscores that the Commission's "primary task" is to "guard the consumer from exploitation by non-competitive electric power companies."¹⁴ Congress contemplated jurisdictional sales "at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."¹⁵

The alternative mission statement more accurately captures the ISO's role in ensuring the lowest cost to consumers consistent with system needs. Commission orders addressing RTO formation and independent administration of the transmission grid characterized the transition to competition as a way to ensure just and reasonable prices for reliable service. In Order No. 888, the Commission stated: "[n]on-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition."¹⁶ The Commission subsequently underscored this point in Order No. 2000: "[c]ompetition in the wholesale electricity markets is the best way to protect

¹² *Id.* at 119.

¹³ 16 U.S.C. § 824d(a).

¹⁴ *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975), *cert. granted* 425 U.S. 662 (1976); *see also Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) (stating that customer protection is the FERC's primary purpose under the FPA); *Cal. Ex rel. Lockyer v. FERC*, 383 F.3d at 1017 (9th Cir. 2004); *see also Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C. Cir. 1980) (stating that FERC must "curb abusive activities by public utilities...and...protect consumers of electrical services from excessive rates").

¹⁵ *See Alt. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959). Although this case arose under the Natural Gas Act, the courts have "repeatedly recognized the similarity of the two statutes and held that they should be interpreted consistently." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmission Utilities*, Order No. 888, [1991-96 Reg. Preambles] FERC Stats. & Regs. ¶ 31,036, at p. 31,652 (1996) ("Order No. 888"), *clarified*, 76 FERC ¶¶ 61,009, 61,347 (1996), *order on reh'g*, Order No. 888-A [1996-2000 Regs. & Preambles] FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *aff'd and remanded sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. People of the State of New York and Public Service Commission of the State of New York v. FERC*, 122 S. Ct. 1012 (2002).

the public interest and ensure that electricity consumers pay the lowest price possible for reliable service."¹⁷ In Order No. 697-A, the Commission affirmed the price-lowering objective of wholesale market competition by stating that "the efficiencies in the transmission grid will help improve power market performance, which will ultimately result in lowering prices to the Nation's electricity consumers."¹⁸ Thus, greater efficiency leading to lower customer prices was, and remains, the stated objective of RTOs. The "lowest reasonable cost" language of the alternative mission statement is consistent with that objective.

As an RTO created by the Commission to fulfill the Commission's statutory obligations under the FPA, ISO-NE is bound by the FPA's just and reasonable mandate, as well as the Commission's duty to ensure reliable service at the lowest reasonable cost to consumers. To effectuate its consumer protection mandate under the FPA, the Commission must have the means to hold ISO-NE accountable for being responsive to this mandate. The ISO's proposed mission statement does not describe with sufficient specificity the ISO's objective to seek the lowest reasonable cost consistent with system needs. Thus, incorporating the concept of lowest reasonable cost into the ISO's mission statement is critical to holding the ISO accountable to New England customers, who are the intended beneficiaries and ultimate payers of the electricity services administered by the ISO.

For these reasons, the Commission should find that the alternative mission statement proposal is aligned with the ISO's contemplated role of ensuring the delivery of service at the lowest reasonable cost necessary to meet system needs. Accordingly, the Commission should

¹⁷ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs., Regulations Preambles ¶ 31,089, at 30,993 (1999) ("Order No. 2000") (emphasis added), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092, *petitions for review pending sub nom.*, *Public Util. Dist. No. 1 of Snohomish County v. FERC*, Nos. 00-1174, *et al.* (D.C. Cir. 2001).

¹⁸ *Promoting Transmission Investment through Pricing Reform*, Order No. 679-A, 117 FERC ¶ 61,345 at n. 141 (2006) (quoting Order No. 2000, FERC Stats. & Regs. ¶ 31,089 at 31,024).

direct the ISO to adopt the alternative mission statement proposal, rather than the ISO-endorsed mission statement.

III. COMMENTS

A. ISO-NE Should Cooperate with Other RTOs To Promote Long-Term Contracts.

Order No. 719 requires each RTO to "dedicate a portion of its website for market participants to post offers to buy or sell power on a long-term basis" (*i.e.*, "one year or more").¹⁹ According to the Commission, this requirement "is designed to improve transparency in the contracting process to encourage long-term contracting for electric service," especially for market participants that "may not be aware of the full range of contract options available to them, including the full range of potential contract counterparties."²⁰

ISO-NE has indicated that while it intends to comply with this Order No. 719 requirement, it will be unable to implement a website to facilitate posting of long-term energy transaction bids and offers until "the first quarter of 2011."²¹ According to ISO-NE, its "existing commitments in support of the Forward Capacity Market and Demand Response Integration Projects" will prevent initiation of this compliance measure "until the second quarter of 2010."²² Although ISO-NE has presented a tentative proposal that could arguably meet the Order No. 719 compliance requirement when eventually implemented, the suggested delay until 2011 for implementation is unnecessary and unreasonable.

On April 29, 2009, PJM submitted its Order No. 719 compliance filing, which proposes to establish an electronic "bulletin board" to facilitate this long-term contracting requirement.²³

PJM indicated that this bulletin board would be established on its website "on or about

¹⁹ Order No. 719 at P 301.

²⁰ *Id.* at PP 277 and 282.

²¹ Compliance Filing at 58.

²² *Id.*

²³ See PJM Interconnection, L.L.C., Compliance Filing, Docket No. ER09-1063-000 (Filed Apr. 29, 2009) ("PJM Compliance Filing").

September 1, 2009," and that the cost of this compliance measure would be minimal (*i.e.*, approximately \$50,000 to \$70,000).²⁴ Accordingly, PJM indicated that it does not intend to seek cost reimbursement from PJM stakeholders and additionally offered the use of its website bulletin board "to all other RTOs who are members of the ISO/RTO Council ("IRC") and their [members/market participants] at no cost" in order to "encourage greater beneficial cooperation between RTOs and to provide access to a larger pool of buyers and sellers of long term contracts for power."²⁵ PJM placed the following, very limited, conditions upon other RTOs that enter into an agreement for the use of this bulletin board:

- (a) PJM will cover the ongoing operating costs to maintain the bulletin board as long as they remain at or below \$20,000 per year;
- (b) Each RTO agrees to confirm and acknowledge that entities seeking to register as users of PJM's bulletin board are [members/market participants] of their RTO upon PJM's request; and
- (c) If annual operating expenses exceed \$20,000, PJM will provide other RTOs with six months notification that they can choose to begin to reimburse PJM for the increased costs on a *pro rata* basis, or can develop an alternative solution to support long term contracting in their regions.²⁶

PJM intends to post on its website the conditions under which buyers and sellers may post offers for long-term agreements, as well as a disclaimer that PJM is not responsible for the content posted by bulletin board users.²⁷

Considering the availability to ISO-NE of the PJM-administered bulletin board, there is simply no reason for the ISO to delay development of its own website application until 2011 and to invest the time and resources to do so. Rather, as an IRC member, the ISO should avail itself of the PJM bulletin board. ISO-NE's participation in the PJM bulletin board effort will provide a

²⁴ *Id.* at 35.

²⁵ *Id.*

²⁶ *Id.* at 35-36.

²⁷ *See id.* at 33-34.

cost-effective (indeed, no cost) approach that will not have a negative impact on stakeholders in the ISO-NE service territory (assuming the conditions established by PJM are maintained).

Even in the event that some of the costs of administering the PJM bulletin board are to be shared by ISO-NE and other RTOs, these costs are not likely to exceed the costs that ISO-NE would incur on its own if it were to proceed with the development of its own website. Specifically, though ISO-NE has not yet indicated the anticipated cost of its website application, using PJM's cost estimate as a guide (*i.e.*, \$50,000 to \$70,000 for implementation and a continuing \$20,000 annual administrative cost), NICC is confident that any portion of the annual administrative expenses that ISO-NE may have to assume for participating in the PJM bulletin board will not likely equal, much less surpass, the cost of establishing its own website.

In light of the Commission's immediate goals for advancing transparency of the electric supply contracting process and promoting long-term contracting, there is no reasonable justification for requiring New England market participants to wait until 2011 for benefits that could be available to them, at little or no cost, as early as September 1, 2009, through the PJM bulletin board. For these reasons, NICC strongly urges the Commission to direct ISO-NE to collaborate with PJM and other RTOs toward the development and utilization of a long-term contracting bulletin board spearheaded by PJM.

B. The ISO's Proposal To Expand the Application of Existing Confidentiality Protocols To Regulators' Requests for Commercially Sensitive Information from New England's Market Monitoring Units Should Be Accepted as Consistent with Order No. 719.

Order No. 719 directs Market Monitoring Units ("MMUs") to entertain from state regulatory commissions information requests regarding general market trends and market performance.²⁸ RTOs are further directed to develop confidentiality provisions to address

²⁸ See Order No. 719 at P 448.

information requests that involve commercially sensitive information.²⁹ Moreover, an RTO's confidentiality provisions should provide market participants with the opportunity to contest any information specific to them and to provide context to such data, as long as the process does not unduly delay the release of such information.³⁰ Finally, Order No. 719 requires that confidentiality provisions be no more restrictive than necessary to protect commercially sensitive information.³¹

The Compliance Filing notes the ISO Tariff already includes provisions that allow the ISO to release confidential market information to New England state regulatory commissions under certain circumstances and subject to non-disclosure protections.³² Specifically, Appendix A to Market Rule 1 of the ISO Tariff states that the ISO will make records available to state and federal agencies, upon request, subject to the restrictions on the release of confidential information set forth in the ISO New England Information Policy ("Information Policy").³³ In the event that a state regulatory commission requests confidential information that is subject to the ISO's Information Policy, the ISO will notify the market participant with an interest in the confidential information and disclose such information only if the governmental entity has served the ISO with compulsory process or the interested party agrees to the release of the information subject to confidentiality restrictions that are satisfactory to the interested party.³⁴

To comply with the requirements of Order No. 719, however, the Compliance Filing proposes changes to Appendix A to Market Rule 1. The proposed changes clarify that the ISO's current protocols for disclosure of commercially sensitive information would apply to the ISO's

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Compliance Filing at 93.

³³ *Id.*

³⁴ *Id.*

Internal and External MMUs.³⁵ The proposed changes further incorporate Order No. 719's requirement to permit the market participant whose confidential data is the subject of the request to contest the information disclosure and to provide context for retaining confidential status.³⁶ The ISO contends that the foregoing provisions should be acceptable under Order No. 719.³⁷ In the alternative, the ISO requests a waiver, arguing that similar provisions are found in the ISO's FERC-approved Information Policy.³⁸

NICC does not oppose the additional protections afforded through the Information Policy. As a threshold matter, the Information Policy has been approved by the Commission.³⁹ The ISO's proposed changes simply expand the terms of the Information Policy to apply to its Internal and External MMUs. Moreover, the proposed changes satisfy Order No. 719's requirement that market participants be provided with the opportunity to contest the release of, and provide context for, confidential information pertaining to them. The proposed changes further provide market participants with the ability to provide input on the terms and conditions under which that data may be released and the opportunity to bring any resulting dispute before the Commission.⁴⁰ In short, the ISO's proposal provides market participants with a meaningful opportunity to protect their commercially sensitive information to the extent such information is subject to an inquiry by a state regulatory commission. Thus, the Commission has a reasonable basis to find that the ISO's proposed revisions are consistent with Order No. 719's requirements.

³⁵ *Id.* at 94.

³⁶ *Id.*

³⁷ *Id.* at 95.

³⁸ *Id.* at 96.

³⁹ See Compliance filing at 96.

⁴⁰ *Id.* at 95.

IV. CONCLUSION

WHEREFORE, the NEPOOL Industrial Customer Coalition respectfully requests that the Commission: (1) direct the ISO to adopt the "alternative mission statement;" (2) find that the ISO should use the website being developed by PJM and available for use by ICR members and their market participants as the most expeditious and cost-effective means of establishing a long-term contract bulletin board; and (3) find that the ISO's proposal to expand the applicability of current protocols to a state regulatory commission's request for confidential information from the External or Internal MMU is consistent with Order No. 719's information-sharing requirements.

Respectfully submitted,

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Counsel to NEPOOL Industrial Customer Coalition

Dated: May 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Limited Protest and Comments of NEPOOL Industrial Customer Coalition *via* electronic transmission, hand-delivery or ordinary U.S. mail, postage prepaid, upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 26th day of May, 2009.

/s/ Robert A. Weishaar, Jr.

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