

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

PSEG Power Company LLC,)	
)	
Complainants)	
)	
v.)	Docket No. EL10-58-000
)	
ISO New England Inc.,)	
)	
Respondent)	
)	

**MOTION FOR LEAVE TO ANSWER AND ANSWER
OF ISO NEW ENGLAND INC.**

Pursuant to Rules 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.212 and § 385.213 (2009), ISO New England Inc. (the “ISO” or “ISO-NE”)¹ submits this answer to the May 2, 2010 Motion for Leave to Answer of PSEG Power Connecticut LLC (“PSEG”) (the “May 2 Pleading”). In the alternative, should the Commission grant PSEG’s motion, the ISO moves pursuant to Rule 212 for leave to submit a limited response to the answer included in the May 2 Pleading (“PSEG Answer”) to the ISO’s April 22, 2010 answer (“ISO Answer”) to the April 2, 2010 complaint filed by PSEG (“Complaint”) in the instant docket.

¹ Capitalized terms not defined herein have the meanings ascribed thereto in the ISO New England Inc. Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3 (“ISO Tariff”). Section II of the ISO Tariff contains the Open Access Transmission Tariff (“ISO OATT”) and Section III contains Market Rule 1.

I. ISO ANSWER TO PSEG MOTION FOR LEAVE TO ANSWER

The Commission should deny PSEG's motion for leave to answer, as an answer is not permitted in response to a respondent's answer.² The PSEG Answer largely repeats the same legal arguments raised in the Complaint, but amends its Complaint with some new arguments that PSEG could and should have included in the Complaint.³

II. ISO MOTION FOR LEAVE TO ANSWER

If the Commission nonetheless decides to accept the PSEG Answer, the Commission should also accept the ISO's response herein, provided in Section III below. A complainant's amendments to its complaints may be answered by the respondent as of right.

If, nonetheless, the Commission should find that the ISO may not answer the PSEG Answer as of right, the ISO hereby moves, pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2009), for leave to file the response contained in the remainder of this document. The Commission has accepted such a response in similar circumstances when a complainant has raised new arguments not included in its complaint⁴ or when the respondent has provided information that has assisted the Commission

² 18 C.F.R. § 385.213(a)(2) ("An answer may not be made to...an answer..."); *see City of Watertown, NY v. Niagara Mohawk Power Corp.*, 49 FERC ¶ 61,231 (1989) (rejecting a motion by complainant to answer the respondent's answer).

³ 18 C.F.R. § 385.206(b) requires complaints to be comprehensive and complete.

⁴ *See, e.g., Tesoro Refining and Marketing Company v. SFPP, L.P.*, 118 FERC ¶ 61,092 at P 3 (2007) (accepting a respondent's answer when the complainant raised new arguments in response to the respondent's initial answer).

perform its decision-making process.⁵ The ISO believes that its response herein satisfies both of these standards, as it will assure a more complete record in this proceeding and otherwise assist the Commission in understanding and resolving the issues presented.

III. ANSWER

In its unauthorized answer, PSEG contends that its actions do not constitute a Material Modification under the ISO's Large Generator Interconnection Procedures ("LGIP") provided in Schedule 22 of the ISO OATT⁶ and modeled on those provided in Order No. 2003, because PSEG is not making any changes to the design or operating characteristics of its existing BH-3 and BH-4 Generating Facilities; therefore, PSEG is not required to submit a new Interconnection Request in order to increase its Capacity Network Resource Capability (or "CNRC") rating.⁷ Furthermore, PSEG disputes the ISO's explanation that PSEG's grandfathered interconnection agreement with United Illuminating (the "United Illuminating IA") constitutes an interconnection agreement subject to the provisions of Section 5.2.3 of the ISO's LGIP (contained in ISO OATT Schedule 22) because it does not fit the definition for Interconnection Agreement that currently appears in Section I of the ISO Tariff;⁸ therefore, the ISO should ignore

⁵ See, e.g., *Carville Energy LLC v. Entergy Services, Inc.*, 119 FERC ¶ 61,156 at P 14 (2007); *Central Iowa Power Cooperative v. Midwest Independent Transmission System Operator*, 110 FERC ¶ 61,093 at P 27 (2005).

⁶ Appendix 6 of the LGIP contains the Standardized Large Generator Interconnection Agreement ("LGIA").

⁷ PSEG Answer at 2-6.

⁸ *Id.* at 7-9.

the limitations the United Illuminating IA places on PSEG and determine the PSEG facilities' CNRC based on historic capabilities.⁹

The Commission should reject these arguments because, as explained below:

- The ISO simply seeks to treat PSEG on a comparable basis with other Market Participants with grandfathered interconnection agreements.
- All interconnection agreements – including grandfathered ones – are subject to the Material Modification provisions of Order No. 2003 and the ISO's LGIP.
- PSEG's desired CNRC level represents an increase in the plant output capability level specified in the grandfathered United Illuminating IA and, thus, is a *per se* "Material Modification" requiring a new interconnection request and LGIA.

A. The ISO Simply Seeks to Treat PSEG on a Comparable Basis to Other Market Participants with Grandfathered Interconnection Agreements

The PSEG Answer suggests an inappropriate¹⁰ and/or absent¹¹ motive for the ISO's handling of the CNRC for BH-3 and BH-4. This is puzzling, as the ISO's motive is quite appropriate and straightforward: it seeks to treat all existing generators on a consistent basis for purposes of administering the LGIP, and the CNRC levels that cannot exceed the maximum output levels specified in interconnection agreements, by looking to existing interconnection agreements for the stated output levels in each given case. Here, PSEG has a grandfathered interconnection agreement that explicitly states specific output levels for its generating facilities.

⁹ *Id.* at 9-10.

¹⁰ The PSEG Answer (at 7) attributes as a motive for the ISO's handling of the BH-3 and BH-4 issues "how ISO-NE thinks the term ["Interconnection Agreement"] would work best for ISO-NE...."

¹¹ The PSEG Answer (at 6) states that "ISO-NE offers no adequate explanation as to what it hopes to accomplish...."

These specified output levels govern the upper limit for CNRC levels, absent a new Interconnection Request by PSEG.

B. All Interconnection Agreements – Including Grandfathered Ones – Are Subject to the Material Modification Provisions of Order No. 2003 and the ISO’s LGIP

PSEG’s swirl of arguments about the ISO Tariff’s definition for “Interconnection Agreement”¹² – and its related and unavailing attempts to pretend that the United Illuminating IA does not constitute an interconnection agreement¹³ for the purposes of the Commission and the ISO Tariff – cannot obscure the legal principle that Order No. 2003 intended to make all interconnection agreements, including grandfathered ones, subject to the Material Modification provisions of the LGIP established in that Order. A tangible statement of that principle is evident in the definition of “Interconnection Request” in the LGIP attached to Order No. 2003, which incorporates a “request... to increase the capacity of, or make a Material Modification to the operating characteristics of, an existing Generating Facility that is interconnected with the Transmission Provider’s Transmission System.” Significantly, there is no distinction made by the Commission as to whether the existing Generating Facility is “interconnected with the Transmission Provider’s Transmission System” pursuant to a Schedule 22 LGIA or a pre-Order No. 2003 interconnection agreement.

Given the confusion that may have been sown by the PSEG Answer, the ISO will restate its explanation of the “Interconnection Agreement” definitional issue. The definition for

¹² PSEG Answer at 7-9.

¹³ PSEG Answer at 4, 10 *et seq.*

Interconnection Agreement – currently located in Section I of the ISO Tariff and upon which PSEG relies – was not intended to apply to Schedule 22 of the ISO OATT, a point made clear both by the history of the definition, which was originally added to Market Rule 1, and the fact that the ISO never sought a variation from the controlling law of the Commission’s Order No. 2003, which clearly applied to existing interconnection agreements and created rules for grandfathered treatment of those agreements.

The initial Order No. 2003-compliant New England LGIP, *which became effective in 2004*, capitalized the term “Interconnection Agreement,” even though Schedule 22 did not define that term. Similarly, Section 5.2.3 of the LGIP, introduced in the FCM/Queue filing that became effective on February 1, 2009,¹⁴ also capitalized “Interconnection Agreement,” yet Schedule 22 still did not define that term. Later, the ISO added a definition for “Interconnection Agreement” *to Market Rule 1 (i.e., Section III of the ISO Tariff)* that became effective on February 26, 2009 – more than *four years* after the term had been used in Schedule 22.¹⁵ Neither when first implementing the Order No. 2003-compliant LGIP nor when amending the procedures to address the implementation of Capacity Network Resource Interconnection Service through the FCM queue¹⁶ did the ISO intend to limit the interconnection agreements recognized under the LGIP to exclude grandfathered interconnection agreements.

¹⁴ ISO New England Inc. and New England Power Pool, Joint Filing of Proposed Revisions to the Generator Interconnection Process and Forward Capacity Market Participation Provisions Set Forth in the ISO New England Inc. Transmission, Markets and Services Tariff, Filing Letter at 43-44, Docket Nos. ER09-237-000, et al. (Oct. 31, 2008) (“FCM/Queue Amendments”).

¹⁵ See ISO New England Inc. and New England Power Pool, Various Revisions to FCM Rules Related to Bilateral Contracts and Reconfiguration Actions, at 5th Revised Sheet No. 7035, submitted December 1, 2008 in Docket No. ER09-356-000.

¹⁶ See ISO Answer at 8-11.

More recently, in a filing unrelated to the substance of the ISO's LGIP, the ISO relocated definitions scattered *in the different main sections of the ISO Tariff* (including the main bodies of the ISO OATT and Market Rule 1) to a centralized location in Section I of the ISO Tariff.¹⁷ This filing became effective on January 24, 2010. The purpose of centralizing the definitions for the ISO Tariff in one location was to implement a ministerial change to make the ISO Tariff easier for Market Participants to use and the ISO to amend, and was not intended to substantively change any definitions in the tariff. Relocating the "Interconnection Agreement" definition in Market Rule 1 to a centralized definitions list in the ISO Tariff certainly was not intended to surreptitiously circumvent Order No. 2003's interconnection agreement grandfathering.

In any event, the impact of adding a definition for "Interconnection Agreement" for use in connection with Market Rule 1, then later making a ministerial filing to relocate the definitions section of Market Rule 1 to create one centralized definitional list in Section I of the ISO Tariff, was not intended to change what constitutes an Interconnection Agreement under the ISO OATT. This combination of events should not be interpreted as the ISO somehow implementing a deviation from the rules established in Order No. 2003.¹⁸

Even if the "Interconnection Agreement" definition in the ISO Tariff were argued to be improperly formulated so as to limit "Interconnection Agreements" referenced in Section 5.2.3 of the LGIP solely to those formulated under ISO OATT Schedule 22 procedures, the ISO Tariff

¹⁷ See ISO New England Inc., et al., *Tariff Revisions to Create Centralized Definitions Section*, Docket No. ER10-108-000 (October 26, 2009). In particular, Attachment 6 at page 39 of this filing indicates that the definition for "Interconnection Agreement" appeared at the time only in Market Rule 1, and therefore applied only to Market Rule 1.

¹⁸ See *ISO New England Inc., Order Accepting Informational Filing*, 122 FERC ¶ 61,018 at PP 48 (2008) (the Commission has declined to direct a different result or to find a violation of the filed rate doctrine where the ISO has administered a tariff provision as the Commission intended, in that case finding that the ISO did not violate the ISO Tariff when it considered existing resources when conducting overlapping impacts analysis even though the ISO Tariff omitted existing resources from the tariff provision in question).

could not deviate, without Commission approval, from the legal principle of Order No. 2003 that treats grandfathered agreements the same as executed LGIAs for purposes of Schedule 22 material modification triggers and procedures.

For instance, Order No. 2003 allowed RTOs and ISOs “to *seek* ‘independent entity variations’ from the Final Rule pricing and non-pricing provisions.”¹⁹ In order to seek such a variation, the ISO was required to expressly request it, and the Commission would have to grant it, before the ISO could implement an Order No. 2003 deviation. The Commission in fact granted some independent entity variations from Order No. 2003 for New England.²⁰ However, neither the ISO nor NEPOOL ever requested, and the Commission never granted, a waiver from the Order No. 2003 provisions governing how pre-LGIA interconnection agreements are to be grandfathered.

Nonetheless, to correct the unintended definitional error that was created with the Market Rule 1 filing adding a “Interconnection Agreement” definition, the ISO intends to develop with its stakeholders, and file with the Commission, a change to the ISO Tariff to ensure that term’s meaning is consistent with the grandfathering provisions of Order No. 2003 so that it can be applicable for use in Schedules 22 and 23 as well as in Market Rule 1.

¹⁹ Order No. 2003 at P 827 (emphasis added).

²⁰ *See New England Power Pool; Bangor Hydro-Electric Co.*, 109 FERC ¶ 61,155 at P 4 (2004).

C. PSEG’s Desired CNRC Level Represents an Increase in the Amount Specified in the Grandfathered United Illuminating IA and, Thus, a *Per Se* “Material Modification,” Which Requires a New Interconnection Request for an LGIA

PSEG asserts that it seeks no Material Modification to BH-3 or BH-4 because it has made no “change to the design or operating characteristics of an existing Generating Facility, including its Interconnection Facilities.”²¹ PSEG is incorrect. As the ISO explained in its answer, the circumstances presented with respect to BH-3 and BH-4 clearly fall within the first prong of the definition for “Material Modification” in Schedule 22, which states, in pertinent part, that a new Interconnection Request is required when there is:

A request to: (1) increase the energy capability or capacity capability output of a Generating Facility from that specified in an Interconnection Request, an existing Interconnection Agreement (whether executed or filed in unexecuted form with the Commission)... shall require a new Interconnection Request for the incremental increase... .

PSEG’s desired CNRC levels would represent an increase above the current generator output levels specified in the existing grandfathered interconnection agreement, and thus requires the submission of an Interconnection Request for an LGIA for the facility. As the Commission has stated: “Order No. 2003 provides for the interconnection of new generators and expansion of existing generators, not to existing generators already interconnected to the transmission grid where there is no proposed increase in output....”²² This clearly indicates that Order No. 2003 *does* apply to existing generators already interconnected to the transmission grid if they are proposing an output increase.

²¹ PSEG Answer at 2-3; *see generally id.* at 2-6.

²² *Midwest Independent Transmission System Operator, Inc.*, 118 FERC ¶ 61,270 at P 12 (2007) (citing *New England Power Company*, 109 FERC ¶ 61,364 at P 13 (2004), and *Entergy Services, Inc.*, 115 FERC ¶ 61,294 at P 4 (2006)).

“[T]he Commission explained [in Order No. 2003] that ‘New Interconnection Requests’ include ... requests to increase the capacity of, or modify the operating characteristics of, an existing Generating Facility.”²³ “In other words, *any* request to increase the capacity of an existing Generating Facility is an Interconnection Request [requiring a new Interconnection Agreement] regardless of whether the capacity increase is also a Material Modification.”²⁴ In *Midwest Independent Transmission System Operator, Inc.*, the Commission found this distinction “critical” because “a request to increase capacity *always* requires a new Interconnection Request.”²⁵ This requirement is true even when a generator does not physically modify its facilities, but a pre-existing interconnection agreement provides injection rights for less than its full capacity.²⁶ This approach is wholly consistent with the ISO’s explanation in its FCM/Queue Filing that, *inter alia*, clarified what actions required an Interconnection Request:

The proposed revisions modify the Interconnection Procedures to clarify that any request to increase the energy capacity or capacity capability output of a generating facility from that specified in an Interconnection Request, an existing Interconnection Agreement, an approval pursuant to Section I.3.9 of the ISO Tariff, or determined based on historical values maintained by the ISO, will require a new Interconnection Request.²⁷

²³ *New England Power Co.*, 109 FERC ¶ 61,364 at P 12 (2004) (citing Order No. 2003 at P 4 & n.5).

²⁴ *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,210 at P 14 (2008).

²⁵ *Id.* (emphasis added).

²⁶ The Commission has distinguished this from the situation in which “a QF’s existing interconnection agreement provides for capacity greater than the capacity sold by the QF to the interconnecting utility under the PURPA power purchase contract, [in which case] the QF’s contract conversion will not trigger an obligation to file an Interconnection Request *if its transmission requirements are consistent with the capacity provided for in the existing interconnection agreement.*” Standardization of Small Generator Interconnection Agreements and Procedures, Final Rule, 111 FERC ¶ 61,220 at P 559 (2005) (emphasis added).

²⁷ FCM Queue Amendments Filing Letter at 43-44; *see* also Section 4.4 of the LGIP, which was implemented through that filing. ISO New England Inc. and New England Power Pool, Joint Filing of Proposed Revisions to the Generator Interconnection Process and Forward Capacity Market Participation Provisions (continued...)

Under PSEG’s view, the grandfathered United Illuminating IA does not state relevant capacity levels because “the United Illuminating IA is not the same as an Exhibit A of the LGIA.”²⁸ This position directly contradicts Commission policy, as Order No. 2003 clearly recognized that grandfathered interconnection agreements would not necessarily match the Order No. 2003 LGIA format.²⁹ Furthermore, under PSEG’s view, a grandfathered interconnection agreement could never experience a Material Modification that would require it to be replaced by the *pro forma* LGIA, even if physical modifications *were* made to increase a facility’s generating capacity, because it does not fall within the “Interconnection Agreement” definition in the ISO Tariff (which, as explained above, is incorrect).³⁰ This view is clearly inconsistent with the Commission’s policy that any increase in capacity beyond that specified in a grandfathered interconnection agreement is a *per se* material modification requiring a new interconnection agreement.³¹

(...continued)

Set Forth in the ISO New England Inc. Transmission, Markets and Services Tariff, Filing Letter at 43-44, Docket Nos. ER09-237-000, et al. (Oct. 31, 2008) (“FCM/Queue Amendments”).

²⁸ PSEG Answer at 3.

²⁹ Order No. 2003 at P 187 (“Final Rule LGIP Section 5.1.1.3 states that an executed or unexecuted interconnection agreement submitted for approval by the Commission before the effective date of the Final Rule will be grandfathered and *will not be rejected simply for failing to conform to the Final Rule LGIA.*”).

³⁰ Such an outcome would also be contrary to the Commission’s policy to allow for grandfathered agreements until a change was made that would affect that agreement, at which point the grandfathered agreement should be replaced with an LGIA in order to address discriminatory terms between different interconnection agreements. *See Pacific Gas & Elec. Co.*, 124 FERC ¶ 61,196 at P 19 (2008) (“Once the LGIP and LGIA were approved, it was no longer appropriate to add the Transmission Facilities to the grandfathered Integrated Agreements. Instead, the CAISO LGIA should govern the interconnection of the Transitioning Facilities to the CAISO-controlled grid because the CAISO is the transmission provider. This is consistent with the policy underlying Order No. 2003, which required public utilities, such as the CAISO, to file revised tariffs containing pro forma LGIP and LGIA in order to achieve greater standardization of interconnection terms and conditions, and thereby remedy undue discrimination.”).

³¹ *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,210 at P 14 (2008).

PSEG's argument that the ISO must establish the CNRC ratings for BH-3 and BH-4 based on their historical capabilities (*i.e.*, the third prong of Section 5.2.3) must also be rejected. As explained in the ISO's answer, this provision is used only when a generating facility has neither a grandfathered interconnection agreement or LGIA, and in the absence of a grandfathered interconnection agreement or LGIA, also has no approval under Section I.3.9 of the ISO Tariff (or a predecessor provision). To allow otherwise would render the levels specified in existing interconnection agreements or I.3.9 approvals, as well as the material modification provisions of Order No. 2003 and Schedule 22, without effect. A resource would not need to take any other route to increase its output other than to exceed specified output characteristics and test at a higher level.

IV. CONCLUSION

WHEREFORE, the ISO respectfully requests that the Commission deny PSEG's Answer or, in the alternative, grant the ISO's motion for leave to submit this answer, and consider the response included herein.

For the reasons set forth herein and in the ISO Answer, the ISO requests that the Commission deny PSEG's Complaint.

Respectfully submitted,

ISO NEW ENGLAND INC.

/s/ Theodore J. Paradise
Theodore J. Paradise
Senior Regulatory Counsel
Monica Gonzalez
Regulatory Counsel
ISO New England Inc.
One Sullivan Road
Holyoke, MA 01040
(413) 535-4000 (ph)
(413) 535-4379 (fax)
rhepper@iso-ne.com
tparadise@iso-ne.com
mgonzalez@iso-ne.com

Howard H. Shafferman
Daniel R. Simon
Ballard Spahr LLP
601 13th Street, N.W., Suite 1000 South
Washington, D.C. 20005
Tel: (202) 661-2200
Fax: (202) 661-2299
hhs@ballardspahr.com
simond@ballardspahr.com

May 20, 2010

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C. this 20th day of May, 2010.

/s/ Daniel R. Simon
Daniel R. Simon
Ballard Spahr LLP
601 13th Street NW
Suite 1000 South
Washington, DC 20005