

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 19-1224, et al. (consolidated)

**BELMONT MUNICIPAL LIGHT DEPARTMENT, ET AL.,
*Petitioners,***

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.***

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF INTERVENOR
ISO NEW ENGLAND INC. IN SUPPORT OF RESPONDENT**

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Dated: February 16, 2021
Final Brief:

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in Petitioners' D.C. Circuit Rule 28(a)(1) certificates contained in their opening briefs.

B. Rulings Under Review

1. *ISO New England Inc.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER19-1428-001 (August 6, 2019) (R.85, JA____-JA____);
2. *ISO New England Inc.*, Notice of Denial of Rehearing by Operation of Law, 169 FERC ¶ 61,013 (October 7, 2019) (R.98, JA____-JA____);
3. *ISO New England Inc.*, Order Accepting Tariff Revisions, 171 FERC ¶ 61,235 (June 18, 2020) (R.110, JA____-JA____); and
4. *ISO New England Inc.*, Notice of Denial of Rehearings by Operation of Law, 172 FERC ¶ 62,095 (August 20, 2020) (R.117, JA____-JA____).

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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CORPORATE DISCLOSURE STATEMENT

ISO New England Inc. (the “ISO”) is filing this Corporate Disclosure Statement in compliance with Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1. The ISO is a private, not-for-profit corporation organized under the laws of the State of Delaware and is responsible for operation of New England’s bulk power system. The New England region controlled by the ISO encompasses Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

The ISO has no corporate parents. The ISO does not issue stock; therefore, no publicly held corporation owns 10% or more of its stock.

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GLOSSARY

Abbreviation/Term	Definition
Everett	Everett Marine Terminal
FERC or Commission or Respondent	Federal Energy Regulatory Commission
IEP Filing	Inventoried Energy Program of ISO New England Inc., Docket No. ER19-1428-000 (Mar. 25, 2019) (R.2, JA____-JA____)
ISO-NE or the ISO	ISO New England Inc.
kW-month	kilowatt-month
LNG	liquefied natural gas
Mystic	Mystic Generation Station
OFSA	<i>Operational Fuel-Security Analysis</i> , ISO New England Inc. (Jan. 17, 2018), https://www.iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf (JA____-JA____)
Resp't Br.	Brief of Respondent Federal Energy Regulatory Commission, <i>Belmont Mun. Light Dep't v. FERC</i> , Nos. 19-1224, et al. (D.C. Cir. Feb. 9, 2021)
Tariff Order	<i>ISO New England Inc.</i> , 171 FERC ¶ 61,235 (2020) (R.110, JA____-JA____)
Waiver Filing	Petition of ISO New England Inc. for Waiver of Tariff Provisions, Docket No. ER18-1509-000 (May 2, 2018)

SUMMARY OF THE ARGUMENT

ISO New England Inc. (the “ISO” or “ISO-NE”), as the Commission-designated independent operator of the region’s bulk power system, ensures the reliable delivery of electricity across the six New England states. However, the difficulty of that task is exacerbated by cold winters and the retirement of generators with reliable fuel sources. At issue in this case is approval of the ISO’s “Inventoried Energy Program,” which is intended to ameliorate the risk posed by these dual threats.

The ISO submits this brief, first, to further substantiate the reliance of the Federal Energy Regulatory Commission (“FERC,” “Commission,” or “Respondent”) on the ISO’s assessment of the reliability risk, or “reliability need,” underlying the Inventoried Energy Program. That reliability need arises from New England’s dependence on natural gas to power its generation fleet and its lack of adequate natural gas production or pipeline infrastructure to meet that demand.

Dependence on the inadequate pipeline system will increase after the retirement of Mystic Generation Station (“Mystic”) Units 8 and 9 and, potentially, the affiliated Everett Marine Terminal (“Everett”), a liquefied natural gas (“LNG”) import terminal. Instead of using pipeline gas, Mystic secures fuel from Everett, which is capable of additionally delivering up to 435 million cubic feet per day of

regasified LNG into two New England interstate pipelines and a local gas distribution utility. Mystic's retirement will occur following the first year of the Inventoried Energy Program, giving the program a significant role in the power system's transition.

Second, the ISO provides additional details on the anticipated cost of the Inventoried Energy Program. Petitioners rely upon cost estimates provided by the ISO, but fail to acknowledge that those are upper-bound estimates and those costs may be offset by reductions in other market costs.

BACKGROUND

The ISO first proposed a remedy for the impending reliability need presented by the Mystic retirement in May 2018. The ISO petitioned the Commission to waive portions of the ISO's Tariff to permit the ISO to retain Mystic Units 8 and 9 at a cost-based (rather than a market) price. The ISO asserted that the Mystic units' retirement, particularly if accompanied by retirement of the Everett terminal, would create unacceptable risk to the reliable operation of the New England electric system during winter cold spells. *See* Petition of ISO New England Inc. for Waiver of Tariff Provisions, Docket No. ER18-1509-000 (May 2, 2018) ("Waiver Filing").

The ISO thus sought to retain Mystic Units 8 and 9 for two years, encompassing the 2022-2023 and 2023-2024 winters. *Id.* at 7-15; *ISO New England*

Inc., 171 FERC ¶ 61,235, at P 3 (2020) (“Tariff Order”) (R.110, JA____). In support of this waiver request, ISO-NE cited a series of studies that addressed the significant reliability risk under a range of scenarios that could result from the retirement of the Mystic Units 8 and 9. *See* Waiver Filing at 3 n.6, 9; ISO New England Response to Commission Request for Additional Information Regarding Inventoried Energy Program, Docket No. ER19-1428-000, at 3 n.8 (June 6, 2019) (R.71, JA-____) (citing *Operational Fuel-Security Analysis*, ISO New England Inc. (Jan. 17, 2018), https://www.iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf (“OFSA”) (JA____-JA____)); Tariff Order at P 3 (R.110, JA____). These studies further reflected that the loss of Mystic Units 8 and 9 likely would lead to the retirement of the Everett LNG terminal. *See* Waiver Filing at 3; Tariff Order at P 3 (R.110, JA____). The ISO’s analysis indicated that the loss of Mystic Units 8 and 9 and Everett could lead to load shedding (i.e., rolling blackouts) during periods of winter cold weather when demand for natural gas is at its highest in New England. Waiver Filing at 3; Tariff Order at P 3 (R.110, JA____).

The Commission rejected ISO-NE’s waiver request, but acknowledged the region’s fuel security risks, stating its concern “that ISO-NE’s Tariff does not sufficiently address the fuel security issues currently facing the region.” *ISO New England Inc.*, 164 FERC ¶ 61,003, at P 55 (2018), *order on reh’g*, 173 FERC

¶ 61,205 (2020); Tariff Order at P 4 (R.110, JA____). Moreover, the Commission explicitly credited the ISO’s evidence, finding “ISO-NE’s methodology and assumptions in the OFSA and Mystic Retirement Studies reasonable and accept[ing] ISO-NE’s conclusions that the retirement of Mystic [Units] 8 and 9 . . . could cause ISO-NE to violate mandatory reliability standards as soon as 2022.” 164 FERC ¶ 61,003, at P 49; Tariff Order at P 4 (R.110, JA____). The Commission ordered the ISO to modify its Tariff to permit it to retain units, like the Mystics, that were needed for fuel security and also directed the ISO to propose changes to its Tariff to address the region’s winter reliability need.

After the ISO created explicit authorizing provisions in its Tariff, the Commission approved the retention of Mystic for two years, through May 2024. Tariff Order at P 5 (R.110, JA____); *see ISO New England Inc.*, 165 FERC ¶ 61,202 (2018); *Constellation Mystic Power, LLC*, 164 FERC ¶ 61,022 (accepting, subject to the outcome of an evidentiary hearing, the executed cost-of-service agreement for Mystic), *order following hearing*, 165 FERC ¶ 61,267 (2018), *order on compliance*, 172 FERC ¶ 61,045, *order on reh’g*, 173 FERC ¶ 61,261 (2020).

While the ISO worked on a long-term Tariff solution as ordered by the Commission, it proposed the Inventoried Energy Program for the 2023-2024 and 2024-2025 winters. The ISO acknowledged the region’s reliance on “electric energy from gas-fired resources that rely on the gas delivery from the interstate pipeline

network, which can become constrained during winter cold spells.” Inventoried Energy Program of ISO New England Inc., Docket No. ER19-1428-000, at 8 (Mar. 25, 2019) (“IEP Filing”) (R.2, JA___).

The ISO explained that this reliance on gas created energy security risks due to the lack of inventoried energy available for conversion to electricity during those winter cold spells, risks that stress the regional electric system and potentially lead to loss of load events. *Id.* (R.2, JA___). The Inventoried Energy Program seeks to reduce those concerns “by directly compensating resources for maintaining inventoried energy.” *Id.* (R.2, JA___). The ISO anticipates that this financial incentive may persuade resources to retain “greater inventoried energy levels than would occur otherwise[;]” reduce the “likelihood that resources with inventoried energy pursue retirement[;]” and lessen winter energy security concerns for the region in the short term. *Id.* (R.2, JA___). *See also* Tariff Order at P 58 (R.110, JA___) (describing the proposal as “a reasonable short-term measure, which will likely provide reliability benefits . . . during stressed winter conditions”). In other words, the program is intended both to create incentives for additional fuel inventory and prevent retirements by those generators that maintain fuel on-site.

STATUTES AND REGULATIONS

ISO-NE adopts the Statutes and Regulations contained in the Respondent's Brief. Brief of Respondent Federal Energy Regulatory Commission, *Belmont Mun. Light Dep't v. FERC*, Nos. 19-1224, et al. (D.C. Cir. Feb. 9, 2021) ("Resp't Br.").

ARGUMENT

I. FERC Correctly Relied on ISO-NE's Evidence of Reliability Need in Its Approval of the Inventoried Energy Program.

The Commission's approval of the Inventoried Energy Program was explicitly based on the fuel security issues that ISO-NE raised in 2018. *See* Tariff Order at P 58 (R.110, JA___). In particular, the region was (and still is) heavily reliant on natural gas-fired generation throughout the year, and the risk remains that gas delivery from the interstate pipeline network will be constrained during winter cold spells.

The ISO's OFSA, published in 2018, documented the region's fuel security issues. OFSA at 47-55 (JA___-JA___); *see also* Waiver Filing, Ex. No. ISO-1 at 18-26. This analysis examined power system reliability under a wide range of potential winter conditions when the most severe gas supply constraints can intersect with periods of high electricity demand in the region. OFSA at 18-29 (JA___-JA___); Waiver Filing, Ex. No. ISO-1 at 19. The analysis indicated that, under a range of possible scenarios in the winter, the constraints on fuel availability and delivery could require the ISO to employ emergency actions to maintain the reliable

operation of the electric system, including load shedding (i.e., rolling blackouts) in some scenarios. OFSA at 5 (JA___); Waiver Filing, Ex. No. ISO-1 at 20.

The Commission expressly referenced the OFSA in its Tariff Order, finding that the Inventoried Energy Program’s compensation of “fuel-secure resources is a reasonable short-term measure, which will likely provide reliability benefits, such as incenting up to 1.8 million [megawatt hours] of inventoried energy to be available during stressed winter conditions, in light of the fuel security concerns presented in the OFSA.” Tariff Order at P 58 (R.110, JA___). In short, the need for the program was well-established at the time of the ISO’s proposal.

The Inventoried Energy Program will be in place for the first winter for which it could be developed—the winter of 2023-2024. Resp’t Br. at 10-12 (describing the program’s interdependency with the forward capacity market, taking place on a three-year forward basis and providing secure revenue opportunities for an electric supplier in order to persuade it to retain, rather than retire, resources). It will also be in place for the following winter, 2023-2024, which will be the region’s first winter without Mystic Units 8 and 9. Specifically, in August 2020, Exelon Generation Company, LLC, the generation facility’s owner, announced that it will cease operation of Mystic Units 8 and 9 after the end of the two-year retention period, and that the units will retire in May 2024, which is one year into the two-year term of the Inventoried Energy Program. *See Constellation Mystic Power, LLC v. ISO New*

England Inc., 172 FERC ¶ 61,144, at P 10 n. 21 (2020), *appeal filed* (Petition for Review, *Constellation Mystic Power, LLC*, No. 20-1509 (D.C. Cir. Dec. 18, 2020)); *see also Statement Regarding the Retirement of Mystic Generating Station in 2024*, Exelon Corporation (Aug. 21, 2020), <https://www.exeloncorp.com/newsroom/statement-regarding-the-retirement-of-mystic-generating-station-in-2024>.

In short, the Inventoried Energy Program is intended to assist the region in the face of the closure of one of its largest generation facilities (approximately 1,400 megawatts), a resource that, critically, does *not* rely on fuel from the region's constrained natural gas pipeline system, and thus is a significant contributor to New England's fuel security. *See* Waiver Filing at 2, 10-11 (detailing the adverse consequences to the region's fuel security and the potential for significant reliability events should Mystic Units 8 and 9 retire). The closure of Mystic Units 8 and 9 also raises significant concerns about the continued viability of the Everett LNG terminal. *See id.* at 11; *id.*, Ex. No. ISO-2 at 18:19–22:2. Closure of the Everett terminal would further degrade New England's winter fuel security, and under certain scenarios could result in the violation of reliability standards established by the North American Electric Reliability Corporation and the Northeast Power Coordinating Council, potentially including load-shedding events. *See* Waiver Filing at 11-12. Accordingly, the Inventoried Energy Program will play a significant role as the

region works to ensure reliability without those units and possibly without the Everett LNG facility.

ISO-NE does not lightly undertake the establishment of an out-of-market program such as the Inventoried Energy Program. This program is intended to be a short-term fix while the region grapples with fundamental issues about the structure of its markets and the transition to a more modern power system. *See* IEP Filing at 5 (R.2, JA___) (emphasizing that the program is interim, to be in place for only two years); *id.* at 6 (R.2, JA___) (explaining that the program's simple design, necessary to ensure it can be implemented quickly, prevents it from meeting several important principles that would be necessary for it to function as a true, market-based mechanism). Over time, the region's stakeholders will work together to determine whether a long-term solution is necessary.

II. Petitioners Misconstrue ISO-NE's Cost Estimate for the Inventoried Energy Program, and Disregard Potential Offsets to Such Costs.

Petitioners complain about the estimated cost of the Inventoried Energy Program, which ISO-NE provided with its filing of the program. *Id.* at 18-19 (R.2, JA___-JA___). They overlook, however, that the ISO based that estimate on the very conservative assumption of full participation in the program by all eligible

resources. A cost estimate based on such an assumption, while useful, clearly represents an unlikely outcome; in reality, costs may be much lower.¹

Petitioners also disregard the potential that lower prices in the ISO's forward capacity market will offset some of the cost of the Inventoried Energy Program. As ISO-NE explained in defending the Inventoried Energy Program, a resource that anticipates receiving revenues through the program will account for those revenues when it formulates its bid to sell other products for the same period, particularly in the region's capacity market. Motion for Leave to Answer and Answer of ISO New England Inc., Docket No. ER19-1428-000, at 8 (Apr. 30, 2019) (R.64, JA___).

Revenues from the Inventoried Energy Program will replace, in effect, some of the revenue a generating resource requires from the capacity market to recover its total costs of remaining in operation. As the ISO explained, a resource owner maximizing its profit and considering retirement submits "a retirement de-list bid at the price which represents the 'missing money' that it does not expect to

¹ The ISO's last temporary, winter program was in place for the winter of 2017-2018. The ISO estimated the cost of that program at more than \$66.3 million, if no oil or LNG was consumed, and approximately \$36.4 million, if usage for those fuel types was similar to previous years. *ISO New England Inc.*, 152 FERC ¶ 61,190, at P 15 (2015). The program's actual cost was even lower at roughly \$25 million. *See Winter Reliability Program Payment Rate*, ISO New England Inc., <https://www.iso-ne.com/markets-operations/markets/winter-program-payment-rate> (last visited Feb. 16, 2021). A similar result cannot be guaranteed for the Inventoried Energy Program, of course, but the conservative assumptions the ISO used to estimate its costs certainly makes such an outcome plausible.

receive . . . and must therefore recover in the capacity market in order to willingly take on a [capacity obligation] (instead of retiring).” *Id.* (R.64, JA___). In this scenario, that “missing money” is key. It is an amount based on “all expected costs and revenues from other markets and programs.” *Id.* (R.64, JA___). The ISO provided the Commission with an example: “[I]f a resource expects to earn an additional \$0.50 per [kilowatt-month (“kW-month”)] in net revenues by participating in the [I]nventoried [E]nergy [P]rogram, this is \$0.50 per kW-month less in missing money that it must recover via payments in the capacity market (which would be reflected in a commensurately reduced [capacity market] bid price).” *Id.* at 8-9 (R.64, JA___-JA___).

As the Commission recognized in the Tariff Order, such economically rational conduct will mean that a resource will be more likely to submit a bid that will clear in the capacity market; thus, the Inventoried Energy Program is “potentially helping to retain an additional fuel secure resource that would have otherwise retired.” Tariff Order at P 95 (R.110, JA___). Critically, this strategy may also *lower* the clearing price in the capacity market, as the lower-priced bids from resources that anticipate receiving revenues in the Inventoried Energy Program could cause the capacity market’s supply curve to meet the market’s demand curve at a lower price. *See* Resp’t Br. at 9 (defining “market clearing price”). In short, the real effect of the cost

of the Inventoried Energy Program on consumer costs depends on the program's interaction with the region's markets for other wholesale electricity products.

The Inventoried Energy Program will be in place for the 2023-2024 and 2024-2025 winters. The capacity auctions for the associated "Capacity Commitment Periods"² were held in February 2020 and 2021, respectively. The February 2020 auction for the 2023-2024 delivery period cleared at \$2.00/kW-month, a significant drop from the prior year's clearing price of \$3.80/kW-month for the 2022-2023 delivery period. *New England's Forward Capacity Auction Closes with Adequate Power System Resources for 2024-2025*, ISO New England Inc., 2 (Feb. 11, 2021) https://www.iso-ne.com/static-assets/documents/2021/02/20210211_pr_fca15_initial_results.pdf. The February 2021 auction for the 2024-2025 delivery period cleared at prices ranging from \$2.48/kW-month to \$3.98/kW-month. *Id.* at 1. While many factors may have contributed to the reduced clearing prices for 2023-2024 and 2024-2025, among the causes may be generators' reduced bids in the forward capacity auctions because of their anticipated revenues from the Inventoried Energy Program.

² A Capacity Commitment Period is a twelve-month period running from June 1 of a particular year through May 31 of the following year.

CONCLUSION

For the reasons presented here and in FERC's brief, the petitions for review should be denied.

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Respondent.)	
)	

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Rules 32(a)(7)(B) and 32(g)(1) of the Federal Rules of Appellate Procedure, the undersigned certifies that the foregoing brief complies with the applicable type-volume limitations. The brief was prepared using a proportionally spaced type (Times New Roman, 14 point) and contains 2,751 words, not including the cover page, corporate disclosure statement, tables of contents and authorities, the glossary, the certificates of counsel, the signature block, and proof of service. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2016) used to prepare the brief.

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)	
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_____)	

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. There are no other parties to be served.

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