

174 FERC ¶ 61,252
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

ISO New England Inc.

Docket No. ER21-943-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued March 31, 2021)

1. On January 26, 2021, pursuant to section 205 of the Federal Power Act (FPA),¹ ISO New England Inc. (ISO-NE) proposed revisions to its Transmission, Markets and Services Tariff (Tariff)² to modify the treatment of Demand Capacity Resources composed of Energy Efficiency measures (energy efficiency resources) during capacity scarcity conditions (Tariff revisions). ISO-NE's Tariff revisions also modify the Financial Assurance Policy to exclude capacity supply obligations associated with energy efficiency measures from the calculation of Forward Capacity Market (FCM) Delivery Financial Assurance³ requirements.⁴ As discussed below, we accept ISO-NE's proposed Tariff revisions, effective April 1, 2021, as requested.

I. Background

2. ISO-NE operates the FCM through which it procures capacity on a forward basis. As part of its FCM, ISO-NE conducts an annual Forward Capacity Auction (FCA) in which it procures capacity that will be delivered approximately three years in the future.

¹ 16 U.S.C. § 824d.

² ISO New England Inc., ISO New England Inc. Transmission, Markets and Services Tariff, ISO New England Inc., ISO New England Inc. Transmission, Markets and Services Tariff, Exhibit IA, Exhibit IA ISO-NE Financial Assurance Policy (52.0.0); Exhibit IA, Exhibit IA ISO-NE Financial Assurance Policy (53.0.0); III.13.7, III.13.7 Performance, Payments and Charges in the FCM (65.0.0); III.13.7, III.13.7 Performance, Payments and Charges in the FCM (66.0.0).

³ Unless otherwise stated in this order, capitalized terms take on the meaning given in ISO-NE's Tariff.

⁴ The Financial Assurance Policy is Exhibit IA to section I of the Tariff.

Capacity suppliers make offers into the FCA and, if selected in the auction, take on a capacity supply obligation that obligates them to provide that capacity during the associated one-year delivery period. Capacity suppliers with a capacity supply obligation are compensated via monthly payments during the delivery period, which are often referred to as capacity base payments.

3. In 2014, ISO-NE proposed the pay-for-performance market design. Through pay-for-performance, ISO-NE sought to link capacity revenues to resource performance during real-time reserve deficiencies, or capacity scarcity conditions.⁵ The pay-for-performance design introduced a capacity performance incentive for capacity suppliers based on their performance during capacity scarcity conditions. A resource providing more than its energy and ancillary service award during a capacity scarcity condition would receive a positive capacity performance payment (a reward), and if it underperformed, it would receive a negative capacity performance payment (a penalty).⁶ These rewards or penalties would be added to or subtracted from a capacity supplier's monthly capacity base payment.⁷

4. When the Commission accepted the pay-for-performance construct in 2014, it found that ISO-NE's proposed revisions had an unduly discriminatory impact on energy efficiency resources, based on the fact that these resources do not produce energy or provide reserves in real-time. Rather, energy efficiency resources "represent a pre-

⁵ See Tariff § III.13.7.2.1. A capacity scarcity condition "shall exist in a Capacity Zone for any five-minute interval in which the Real-Time Reserve Clearing Price for that entire Capacity Zone is set based on the Reserve Constraint Penalty Factor pricing for: (i) the Minimum Total Reserve Requirement; (ii) the Ten-Minute Reserve Requirement; or (iii) the Zonal Reserve Requirement, each as described in Section III.2.7A(c); provided, however, that a Capacity Scarcity Condition shall not exist if the Reserve Constraint Penalty Factor pricing results only because of resource ramping limitations that are not binding on the energy dispatch." *Id.*

⁶ For example, during an hour-long capacity scarcity condition, if the Capacity Balancing Ratio is 70% and a resource with a 10 MW capacity supply obligation delivers 7 MWh of energy and/or reserves during the capacity scarcity condition, then that resource has delivered its Capacity Balancing Ratio-adjusted capacity supply obligation and it is neither rewarded or penalized via capacity performance payments. If it delivered less than 7 MWh, it would be penalized. If it delivered greater than 7 MWh, it would be rewarded. See ISO-NE, Filing, Docket No. ER20-1967-000, at 7 (filed June 2, 2020); ISO-NE, Filing, Docket No. ER20-1967-000, attach. (Testimony of Ryan McCarthy), at 5-6 (filed June 2, 2020) (2020 McCarthy Test.).

⁷ 2020 McCarthy Test. 4.

determined level of load reduction that is constant as a percentage of that resource's load—and are therefore unable to respond to ISO-NE's proposal's performance incentive.”⁸ Therefore, the Commission directed tariff revisions ensuring that “energy efficiency resources' [c]apacity [p]erformance [p]ayments are calculated only for [c]apacity [s]carcity [c]onditions during hours in which demand reduction values are calculated under the Tariff for that particular type of resource.”⁹ This approach was subsequently adopted by ISO-NE and accepted by the Commission in the 2014 Order on Compliance;¹⁰ such hours, referred to as “energy efficiency measure hours” currently account for approximately four percent of the total performance assessment hours.¹¹ However, despite only being eligible for capacity performance treatment during capacity scarcity conditions during energy efficiency measure hours, energy efficiency resources were still included in the resource pool to which any excess or deficiency in total capacity performance payments were allocated.¹²

5. In 2020, after a September 2018 capacity scarcity condition led to a pay-for-performance settlement imbalance, ISO-NE filed Tariff revisions to address an implementation issue regarding the treatment of energy efficiency resources during

⁸ *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 89 (2014) (2014 Pay-for-Performance Order), *denying reh'g*, 153 FERC ¶ 61,223 (2015) (Pay-for-Performance Rehearing Order).

⁹ 2014 Pay-for-Performance Order, 147 FERC ¶ 61,172 at P 89.

¹⁰ *ISO New England Inc.*, 149 FERC ¶ 61,009 (2014), *denying reh'g*, 153 FERC ¶ 61,224 (2015).

¹¹ ISO-NE Filing at 5. These hours are referred to in the Tariff as Demand Resource On-Peak Hours and Demand Resource Seasonal Peak Hours. Tariff section I.2.2 defines Demand Resource On-Peak Hours “as hours ending 1400 through 1700, Monday through Friday on non-Demand Response Holidays during the months of June, July, and August and hours ending 1800 through 1900, Monday through Friday on non-Demand Response Holidays during the months of December and January.” The Tariff defines Demand Resource Seasonal Peak Hours “as those hours in which the actual, real-time hourly load, as measured using real-time telemetry (adjusted for transmission and distribution losses, and excluding load associated with Exports and Storage Dispatchable Asset Related Demand Resources) for Monday through Friday on non-Demand Response Holidays, during the months of June, July, August, December, and January, as determined by the ISO, is equal to or greater than 90% of the most recent 50/50 system peak load forecast, as determined by the ISO, for the applicable summer or winter season.” Tariff § I.2.2.

¹² ISO-NE Filing, attach. (Testimony of Ryan McCarthy), at 5.

capacity scarcity conditions.¹³ In July 2020, the Commission accepted ISO-NE's proposed revisions to remove energy efficiency resources' pay-for-performance obligations and settlement *outside* of energy efficiency measure hours.¹⁴ Therefore, under the currently effective Tariff, outside of measure hours, energy efficiency resources receive no capacity performance payments and are also not allocated any excess or deficiency in total capacity performance payments.¹⁵

II. Summary of Filing

6. ISO-NE indicates that the proposed revisions mirror the Commission's previous recognition that energy efficiency resources differ fundamentally from other resource types because they do not produce energy or provide reserves in real-time and therefore are not able to respond to real-time performance incentives.¹⁶ ISO-NE states that the Commission's prior finding applies equally to both measure hours and non-measure hours. Thus, ISO-NE states that the instant rule changes exclude energy efficiency resources from pay-for-performance obligations and pay-for-performance settlement in the energy efficiency measure hours—the remaining four percent of hours—such that these resources will now be entirely excluded from pay-for-performance.¹⁷ Specifically, energy efficiency resources will no longer be subject to pay-for-performance obligations; will not receive or incur capacity performance payments in any hour of the year; will not be allocated capacity performance payment excess or deficiency in any hour of the delivery year; and will not be required to post FCM Delivery Financial Assurance.¹⁸ ISO-NE states that the proposed revisions do not alter the capacity base payments energy efficiency resources receive, only their capacity performance payments, to result in “a treatment of energy efficiency resources that is consistent with their system benefits.”¹⁹

¹³ ISO-NE, Filing, Docket No. ER20-1967-000, at 8 (filed June 2, 2020).

¹⁴ *ISO New England Inc.*, Docket No. ER20-1967-000 (July 21, 2020) (delegated order).

¹⁵ 2020 McCarthy Test. 5-6.

¹⁶ ISO-NE Filing at 6 (citing Pay-for-Performance Rehearing Order, 153 FERC ¶ 61,223 at P 48).

¹⁷ *Id.* at 1, 6.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 1, 6.

7. ISO-NE argues that the instant revisions limit pay-for-performance obligations and settlement to those resources whose real-time performance is uncertain.²⁰ ISO-NE proposes corresponding revisions to Market Rule 1 that will remove tariff language currently establishing Actual Capacity Provided for energy efficiency resources,²¹ such that Actual Capacity Provided for energy efficiency resources will be zero across all hours. ISO-NE further states that it is proposing revisions to the calculations of the Capacity Balancing Ratio,²² deleting all references to energy efficiency measure hours in the Capacity Balancing Ratio calculation.

8. Lastly, ISO-NE proposes to remove from its Financial Assurance Policy the requirement that energy efficiency resources provide collateral to address potential negative capacity payments. Because the instant proposal would exclude energy efficiency resources from the pay-for-performance construct, ISO-NE indicates that Financial Assurance from these resources is no longer necessary.²³

9. ISO-NE requests that the Commission accept the Tariff revisions effective April 1, 2021. In the event the Commission does not accept the requested effective date, ISO-NE requests an alternative effective date of June 1, 2025.²⁴

²⁰ *Id.* at 6.

²¹ *See* Tariff § III.13.7.2.2. A resource's performance during a capacity scarcity condition is based upon the total quantity of energy and reserves it provides in each interval of the capacity scarcity condition. The total amount of real-time energy and reserves a resource provides during a capacity scarcity condition is referred to as the resource's Actual Capacity Provided. *Id.*

²² *See Id.* § III.13.7.2.3. The Capacity Balancing Ratio determines the share of total system requirements each capacity resource is obligated to cover in a capacity scarcity condition; it is equal to the system's total load and reserve requirement at the time of a capacity scarcity condition divided by the total capacity supply obligation MWs of all capacity suppliers, with load represented by the total Actual Capacity Provided by all resources. *Id.*

²³ ISO-NE Filing at 8 (citing Tariff, Exhibit IA ISO-NE Financial Assurance Policy (52.0.0), § VII.A, FCM Delivery Financial Assurance).

²⁴ *Id.* at 9. ISO-NE notes that June 1, 2025 is the start of the FCM Capacity Commitment Period associated with FCA 16. *Id.* at 11.

III. Notice of Filing and Responsive Pleadings

10. Notice of ISO-NE's Filing was published in the *Federal Register*, 86 Fed. Reg. 7723 (Feb. 1, 2021), with interventions and protests due on or before February 16, 2021. Timely motions to intervene were filed by Advanced Energy Economy (AEE), Calpine Corporation, Dominion Energy Services, Eversource Energy Service Company, LS Power Development, LLC Helix Maine Wind Development, LLC, Ocean State Power LLC, and Wallingford Energy LLC (collectively, LS Power), Massachusetts Attorney General Maura Healey, National Grid, New England Power Generators Association Inc. (NEPGA), New England Power Pool Participants Committee (NEPOOL), New England States Committee on Electricity, NRG Power Marketing LLC, and Vistra Corp. Massachusetts Department of Public Utilities and Exelon Corporation filed motions to intervene out-of-time.

11. Comments were filed by Internal Market Monitor (IMM), LS Power, NEPGA, and NEPOOL. AEE filed a protest. ISO-NE filed an answer to AEE's protest.

A. Comments in Support

12. LS Power, NEPGA, and the IMM support the proposed Tariff revisions to remove energy efficiency resources from pay-for-performance obligations and settlement during the energy efficiency measure hours.²⁵ LS Power states that the Commission has previously found that disparate treatment between resource classes is acceptable when the discrimination is not undue.²⁶ LS Power states that energy efficiency resources are not similarly situated to other capacity resource types, and their innate nature does not yield to direct measurement. These parties agree that energy efficiency resources do not produce energy or provide reserves in real-time.²⁷ Both LS Power and the IMM note that under ISO-NE's proposed revisions, energy efficiency resources will continue to receive base capacity payments commensurate with their capacity supply obligations.²⁸

13. LS Power states that because capacity scarcity conditions are short, transient events, energy efficiency resources' role in eliminating or mitigating them is unclear. LS

²⁵ IMM Comments at 1; LS Power at 1; NEPGA Comments at 1.

²⁶ LS Power Comments at 8 (citing *Arkansas Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000); *ISO New England Inc.*, 150 FERC ¶ 61,065, at P 26 (2015)).

²⁷ AEE Protest at 4; IMM Comments at 1; LS Power Comments at 6-7; NEPGA Comments at 2.

²⁸ IMM Comments at 2; LS Power Comments at 8.

Power argues that pay-for-performance was designed to address system reliability during system contingencies by incenting performance of capacity resources during capacity scarcity conditions. LS Power states that once energy efficiency resources are successfully installed, they do not respond in any operational way to any real-time events on the system.²⁹

14. The IMM states that energy efficiency resources lack both the ability and incentive to maximize performance in real-time, unlike other resources such as gas-fired generators and renewable-type capacity resources, which can take action to take advantage of real-time performance-based incentives. The IMM states that, for example, a gas-fired generator is incented to buy and schedule natural gas to meet its share of the system load and reserve requirement during times of system stress. The IMM provides additional examples that it states show that renewable-type capacity resources, which tend to have less control over their fuel availability, are still incented to take some actions to maximize real-time performance, such as efficient outage scheduling or taking advantage of technology improvements (*e.g.*, installing electric storage or making adjustments to turbine blades).³⁰ In contrast, the IMM states that energy efficiency resources cannot respond to short-term system issues; they do not have the ability to produce energy and, therefore, cannot actively alleviate capacity scarcity conditions in real-time.³¹

15. LS Power supports ISO-NE's proposed changes on the basis that the role played by energy efficiency resources in eliminating or mitigating capacity scarcity conditions is unclear because energy efficiency resources' statistical models fail to provide a meaningful performance score during an actual capacity scarcity condition. LS Power states that energy efficiency resources lack the metering that other resources have to adequately measure response, with the consequence that energy efficiency resources specific load reduction contribution is unknowable in any given instant. For this reason, LS Power argues that it is impossible to construct a performance incentive for a resource that is not directly measured. The IMM similarly contends that the capacity provided by

²⁹ LS Power Comments at 1, 5-7.

³⁰ IMM Comments at 2-3.

³¹ The IMM also states that, in the FCM, energy efficiency resource capacity is accounted for on the supply side of the market and clears, along with other supply-side resources, against a demand curve and Net Installed Capacity Requirement based on a reconstituted (grossed up) load forecast that adds back energy efficiency supply capacity. In contrast, the accounting logic for energy efficiency resources flips solely to the demand side in the real-time and day-ahead energy markets. In real-time, the benefits of energy efficiency resources are reflected in lower wholesale load, to which the ISO-NE operates the system and economically clears the market. *Id.* at 3 n. 4.

energy efficiency resources is not directly measured during a scarcity event but is set in advance of the delivery month based on measurement and verification studies, these marginal performance incentives are not applicable to energy efficiency resources in such circumstances.³²

B. Protest and Answer

16. AEE argues that ISO-NE's proposal results in unjust and unreasonable and unduly discriminatory treatment of energy efficiency resources and is contrary to the Commission's approach of ensuring just and reasonable rates through technology-neutral competition. AEE states that energy efficiency is a proven, reliable resource type that has reliability advantages over many other resource types. According to AEE, energy efficiency resources consistently out-perform their capacity supply obligation because energy efficiency aggregators are generally conservative in their offers and install more measures than are needed to meet their capacity supply obligation. AEE argues that as small, distributed resources, energy efficiency resources offer reliability and resilience benefits because they are not binary (i.e. even if a small number of measures fail to perform as expected, the entire resource will not fail to deliver) and because they do not have a single point of failure or hold the potential to cause grid stability issues.³³

17. AEE states that energy efficiency resources deliver services that satisfy the conditions that ISO-NE sets forth in its description of pay-for-performance, but the proposed Tariff revisions fail to recognize and compensate energy efficiency resources for doing so. First, AEE argues that energy efficiency resources fulfill the end goal of pay-for-performance, which is to decrease or avoid capacity scarcity condition events. Second, AEE argues that, while they do not participate in the real-time energy market, they do provide energy (in the form of avoided energy use) in real-time. AEE argues that energy efficiency resources could be equated to any other self-scheduled unit operating apart from dispatch. For example, AEE cites to the example of nuclear units whose value during capacity scarcity conditions is not disputed, noting that these resources would not change their output due to prices during capacity scarcity conditions. Third, AEE argues that the fact that energy efficiency resources are not at risk of triggering a capacity scarcity condition should not disqualify these resources from being eligible to be compensated for benefits delivered during a capacity scarcity condition. According to AEE, excluding energy efficiency resources from pay-for-performance based on the

³² *Id.* at 2, 6-8.

³³ AEE Protest 1, 3.

manner in which these services are delivered and measured would be unduly discriminatory.³⁴

18. AEE states that the existing rules give energy efficiency resources an additional incentive to ensure that they meet or exceed their capacity supply obligations. AEE states that, while this incentive comes into play well in advance of a capacity scarcity condition, it nevertheless has the effect of ensuring that energy efficiency resources are performing in real-time when needed during a capacity scarcity condition—not dissimilar to the incentive for the operator of a gas-fired generator to secure fuel supplies or undergo maintenance to ensure the unit is online when needed. AEE also explains that pay-for-performance revenues will allow energy efficiency resources to install more energy efficiency measures that will reduce the likelihood of future capacity scarcity conditions.³⁵

19. AEE states that, in 2014, the Commission directed ISO-NE to “ensur[e] that energy efficiency resources’ capacity performance payments are calculated only for capacity scarcity conditions during hours in which demand reduction values are calculated under the Tariff for that particular type of resource.”³⁶ AEE states that the Commission notably did *not* conclude that energy efficiency resources should be excluded from pay-for-performance, but rather that they should be prevented from being evaluated during hours in which their performance is not measured. According to AEE, ISO-NE’s suggestion that the instant filing is directly aligned with the Commission’s prior orders implies that the Commission intended to go farther than it did with respect to its recommendations.³⁷

20. AEE argues that ISO-NE’s proposed revisions to remove energy efficiency resources from pay-for-performance obligations and settlement were not supported by New England stakeholders. AEE and NEPOOL note that, during the NEPOOL process, the NEPOOL Participants Committee did not support approving these aspects of the proposal, which only received 58.35% support.³⁸ As to the proposed Financial Assurance

³⁴ *Id.* at 1, 5-6.

³⁵ *Id.* at 7.

³⁶ *Id.* at 8 (quoting 2014 Pay-for-Performance Order, 147 FERC ¶ 61,172 at P 89).

³⁷ *Id.* at 8.

³⁸ *Id.* at 9; NEPOOL Comments at 7. The motion required 60% vote in favor to pass. ISO-NE Filing at 9 nn. 38-40 (detailing the vote).

Policy revisions, both NEPGA and NEPOOL support them.³⁹ NEPGA states that the changes to the Financial Assurance Policy are just and reasonable because, once energy efficiency resources are exempt from pay-for-performance rewards and penalties, energy efficiency resources should not be subject to the financial assurance requirements.⁴⁰ With the understanding that ISO-NE would only implement the Financial Assurance Policy changes if the Tariff revisions became effective, NEPOOL notes that the motion to approve the changes to the Financial Assurance Policy passed with 79.47% in favor.⁴¹

21. In its answer, ISO-NE asserts that the Tariff revisions are not unduly discriminatory. ISO-NE asserts that a difference in treatment is not unduly discriminatory when the difference is justified, or where it can be demonstrated that the resource is not similarly situated to other resources.⁴² ISO-NE reiterates that pay-for-performance is intended to link capacity revenues to resource performance during capacity scarcity conditions by providing an incentive to resources to produce energy or provide reserves in real-time, which decreases the severity of capacity scarcity conditions or avoids them altogether. In response to AEE's assertion that energy efficiency resources "provide energy (in the form of avoided energy use) in real time" ISO-NE states that energy efficiency resources do not provide real-time energy or reserves and therefore cannot reduce the likelihood or severity of a capacity scarcity condition.⁴³

22. ISO-NE explains that the system load that would have existed in the absence of the installation of energy efficiency resources is referred to as "gross load" and the actual system load after the installation of energy efficiency is referred to as "net load." ISO-NE explains that energy efficiency shifts load from a gross to net state, and the FCM procures non-energy efficiency resources to meet net load. ISO-NE argues that once an energy efficiency resource has reduced gross load to net load, it cannot provide anything beyond the amount by which it has already reduced demand and cannot meet the net load that appears in real-time. ISO-NE states that the ability of the electric system to meet real-time energy and reserve requirements falls exclusively to non-energy efficiency resources. ISO-NE concludes that by virtue of their unique features, energy efficiency

³⁹ NEPGA Comments at 2, 5; NEPOOL Comments at 1, 8.

⁴⁰ NEPGA Comments at 2.

⁴¹ NEPOOL Comments at 8.

⁴² ISO-NE Answer at 3-4 (citing *Sw. Elec. Co-op., Inc. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003); *Michigan Consol. Gas Co. v. Fed. Power Comm'n*, 203 F.2d 895, 901 (3d Cir. 1953); *Complex Consol. Edison Co. of New York v. FERC*, 165 F.3d 992, 1012 (D.C. Cir. 1999)).

⁴³ *Id.* at 6 (citing AEE Protest at 2).

resources cannot provide real-time energy or reserves and face no real-time performance risk, and therefore, continuing to provide real-time performance incentives to them is antithetical to proper market design.⁴⁴

IV. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

24. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant Massachusetts Department of Public Utilities' and Exelon Corporation's late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept ISO-NE's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

26. As discussed below, we find ISO-NE's proposal to exclude energy efficiency resources from pay-for-performance obligations and settlement to be just and reasonable and not unduly discriminatory or preferential. Accordingly, we accept the Tariff revisions effective April 1, 2021, as requested.

27. We disagree with AEE that ISO-NE's proposal results in unjust and unreasonable and unduly discriminatory treatment of energy efficiency resources. The FPA does not prohibit all discrimination, only undue discrimination.⁴⁵ The determination as to whether a Commission-regulated rate or practice that provides different treatment to different

⁴⁴ *Id.* at 6-7.

⁴⁵ 16 U.S.C. § 824d, 824e (2000). *See Communication of Operational Information Between Natural Gas Pipelines and Elec. Transmission Operators*, Order No. 787, 145 FERC ¶ 61,134, at P 13 (2013) (stating that the FPA does not forbid preferences, advantages, and prejudices per se; rather, FPA section 205(b) prohibits "undue" preferences, advantages and prejudices.).

classes of entities is unduly discriminatory is fact-based, and turns on whether those classes of entities are similarly situated.⁴⁶

28. ISO-NE explains that pay-for-performance is intended to link capacity revenues to resource performance during real-time operating reserve deficiencies, by providing incentives to resources to provide energy or reserves in real-time, which decreases the severity of capacity scarcity condition or avoids them altogether. All parties, including AEE,⁴⁷ recognize that energy efficiency resources do not provide real-time energy or reserves. AEE argues that energy efficiency resources “provide energy (in the form of avoided energy use) in real time,” which in turn reduces the occurrence and severity of capacity scarcity conditions.⁴⁸ However, as ISO-NE explains, once an energy efficiency resource has reduced gross load to net load, it cannot provide anything beyond the amount by which it has already reduced demand, and it cannot help meet real-time net load. We agree with ISO-NE that energy efficiency resources are not similarly situated to other capacity resources in that they are not able to respond to pay-for-performance incentives during capacity scarcity conditions. The Commission has previously stated that “[e]nergy efficiency resources are not similarly situated to other capacity resources because they do not actively perform in real-time . . . and therefore are not able to respond to the ISO-NE proposal’s performance incentive.”⁴⁹

29. While the Commission recognizes the value of energy efficiency resources, we disagree with AEE’s contention that energy efficiency resources are similarly situated to nuclear and natural gas resources such that the Commission should reject ISO-NE’s

⁴⁶ *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 44 (2018). *See Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at 61,598 (2007) (“In general, discrimination is ‘undue’ when there is a difference of rates, terms or conditions among similarly situated customers.”). *See also Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C.Cir.2002) (“A rate is not unduly preferential or unreasonably discriminatory if the utility can justify the disparate effect” (internal quotation marks omitted)); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000) (“[D]ifferential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts.)”); *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 (2018) (“To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences that are material to the inquiry at hand.”).

⁴⁷ AEE Protest at 4.

⁴⁸ *Id.* at 5.

⁴⁹ 2014 Pay for Performance Order, 147 FERC ¶ 61,172 at P 89. *See also* Pay-for-Performance Rehearing Order, 153 FERC ¶ 61,223 at 48.

proposal.⁵⁰ We find that energy efficiency resources are not comparable to other resources in that energy efficiency resources are not able to provide real-time energy or reserves during capacity scarcity conditions. A nuclear generator, for example, could adjust its maintenance schedule to increase the likelihood that it will be online and providing its full capability of energy or reserves during expected capacity scarcity conditions and faces the risks associated with non-performance for failing to be available in such circumstances.⁵¹

30. We are also not persuaded by AEE's argument that energy efficiency resources currently are incented to meet or exceed their capacity supply obligations and that accepting ISO-NE's proposal would remove that incentive.⁵² We find that AEE's arguments misconstrue the intent of ISO-NE's performance payments, which is to incent the real-time provision of energy or reserves during capacity scarcity conditions. In contrast, compensation for installed capacity, across all resource types, is made by the FCM's monthly base payments, which energy efficiency resources will continue to receive. As such, we do not agree with AEE that energy efficiency resources exceeding their capacity supply obligations should warrant continued receipt of performance payments during energy efficiency measure hours. ISO-NE has shown that energy efficiency resources do not over-perform or under-perform during a real-time capacity scarcity condition; thus, we accept ISO-NE's Tariff revisions to remove energy efficiency resources from the performance obligations and associated settlement requirements.

31. Regarding measurement of energy efficiency resources, both LS Power and AEE acknowledge that energy efficiency resources differ from other resource types in that they are measured and evaluated based on statistical studies, rather than by direct metering.⁵³ In this respect as well, energy efficiency resources are not similarly situated to other capacity resources and arguments about other potential methods to measure energy efficiency are beyond the scope of this proceeding.

⁵⁰ See AEE Protest at 6-7.

⁵¹ As other examples of actions that can be taken by non-energy efficiency resources, gas-fired resources can buy secure fuel arrangements, and renewable resources can adjust turbine blades or schedule outages efficiently. IMM Comments at 2-3.

⁵² See AEE Protest at 7.

⁵³ *Id.* at 4; LS Power Comments at 6-8.

32. With regard to AEE's argument that the Tariff revisions are not consistent with prior Commission orders,⁵⁴ the Commission found in the 2014 Pay-for-Performance Order that to the extent resources have different capabilities to provide energy and reserves during a capacity scarcity condition, those resources are not similarly situated, and therefore it is not unduly discriminatory to compensate those resources differently based on their respective capabilities.⁵⁵ Here, all parties, including AEE,⁵⁶ recognize that energy efficiency resources do not provide real-time energy or reserves, regardless of whether a capacity scarcity condition occurs during measure hours or non-measure hours. We thus find that it is not unduly discriminatory to exclude energy efficiency resources from pay-for-performance rewards or penalties during energy efficiency measure hours, as reflected by ISO-NE's Tariff revisions.

33. Having accepted the Tariff revisions to remove energy efficiency resources from any pay-for-performance obligations and settlement, we also find appropriate the changes to the Financial Assurance Policy that exclude capacity supply obligations associated with energy efficiency measures from the calculation of FCM Delivery Financial Assurance requirements. Therefore, we accept the Financial Assurance Policy revisions as just and reasonable.⁵⁷

The Commission orders:

ISO-NE's Tariff revisions are hereby accepted, effective April 1, 2021 as discussed in the body of this order.

By the Commission. Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁴ AEE Protest at 8 (citing 2014 Pay-for-Performance Order, 147 FERC ¶ 61,172 at P 89).

⁵⁵ 2014 Pay-for-Performance Order, 147 FERC ¶ 61,172 at P 86.

⁵⁶ AEE Protest at 4.

⁵⁷ The NEPOOL Participants Committee approved the Financial Assurance Policy revisions with 79.47% in favor. NEPOOL Comments at 8.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket No. ER21-943-000

(Issued March 31, 2021)

CLEMENTS, Commissioner, *concurring*:

1. I concur in today's order but write separately to note that as energy efficiency programs continue to evolve and innovate, we may have reason to revisit their eligibility for pay-for-performance penalties and bonuses in the future.

2. When the Commission directed ISO New England to adopt the pay-for-performance market reforms in 2014, it rejected ISO New England's proposal to require energy efficiency resources (EERs) to either install metering on constituent assets, which requires material investment, or face guaranteed pay-for-performance penalties if a reserve deficiency occurs outside of the EER's measured hours (i.e., the hours in which demand reduction values are calculated under the tariff for that type of EER).¹ Instead, the Commission directed that ISO New England assess EERs' performance only in reserve deficiencies that occur during an EER's measured hours.²

3. I agree that in the instant filing ISO New England has made an adequate demonstration that it is just and reasonable to fully exclude EERs from pay-for-performance because EERs are not required to demonstrate their real-time performance in reducing load off of a baseline, including during measured hours. I note, however, that the revisions we accept today leave EERs without an avenue to participate in pay-for-performance even if they do install the necessary metering to assess their performance, as ISO New England originally proposed in 2014.

4. Energy efficiency programs continue to innovate, and it is possible we see deployment of energy efficiency measures that can and do measure real-time performance. Imagine a scenario where an installation of metered energy efficiency measures is permitted to offer 10 MW of load reduction into the Forward Capacity Market based on their studied load reduction versus a control group without those

¹ *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 89 (2014).

² *Id.* On compliance, the Commission accepted ISO New England's proposal to set an EER's Capacity Performance Score to zero during any reserve deficiency that occurs outside of the resource's measured hours. *ISO New England Inc.*, 149 FERC ¶ 61,009, at P 33 (2014).

measures. Then, during a reserve deficiency, the metered load shows an actual load reduction of 12 MW versus the control group. Such demonstrated performance may well merit pay-for-performance bonuses for the 2 MW of over-performance.³

5. Should programs that explicitly measure meter-based energy savings develop in New England, EER participation rules may warrant a fresh look. Pay-for-performance is focused on avoiding and shortening reserve deficiencies through short-term incentives to perform in real-time and long-term incentives to invest in steps to improve the probability of performance in real-time.⁴ To the extent that in the future an EER makes investments to deliver value and can demonstrate through metering data that it has over-performed the load reduction it sold into the capacity market during a reserve deficiency event, I see no reason why it should not be eligible for pay-for-performance bonuses (or, on the flip side, bear the risk of penalties if it under-performs). If such changes come to pass, we may wish to revisit the changes today's order accepts.

For these reasons, I respectfully concur.

Allison Clements
Commissioner

³ I recognize that, in any metered design, creating an appropriate baseline from which to measure performance is complicated. I do not seek to downplay that challenge, but instead highlight that thoughtful design may be able to overcome it.

⁴ ISO New England, Filing, Docket No. ER14-1050-000, at 6 (filed Jan. 17, 2014) (“If the Pay for Performance mechanism is implemented, it will provide numerous important benefits . . . includ[ing] [o]perational-related investment. Strong performance incentives provide suppliers with the economic motivation, and the financial capability, for operational-related investments that ensure resources are available when needed to maintain reliability. This might include dual-fuel capability, short-notice or more reliable fuel supply arrangements, continuous staffing at resources, improved operating practices, more robust maintenance arrangements, shorter planned outages, incremental capital investments that shorten start times or increase ramp rates, rapid price-responsive demand behavior, and other improvements to similar effect.”).