

178 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

ISO New England Inc.

Docket No. ER22-355-001

ORDER DENYING STAY

(Issued January 28, 2022)

1. On January 11, 2022, pursuant to Rule 212 of the Commission’s Rules of Practice and Procedure,¹ NTE Connecticut, LLC (NTE) filed a motion for stay of the Commission’s January 3, 2022 order² accepting ISO New England Inc.’s (ISO-NE) resource termination filing (Motion).³ For the reasons discussed below, we deny NTE’s motion for stay.

I. Background and Motion for Stay

2. On November 4, 2021, pursuant to section 205 of the Federal Power Act (FPA),⁴ ISO-NE submitted privileged and public (i.e., redacted) versions of a filing to terminate the Capacity Supply Obligation (CSO) for Resource No. 38663/Project 12280, also known as Killingly Energy Center (Killingly). The Project Sponsor⁵ is NTE. ISO-NE

¹ 18 C.F.R. § 385.212 (2021).

² *ISO New England Inc.*, 178 FERC ¶ 61,001 (2022) (January 3 Order).

³ NTE also filed a request for rehearing pursuant to 18 C.F.R. § 385.713 (2021). We do not here consider the merits of the request for rehearing. NTE filed privileged and public versions of its Motion. This order cites to the public version.

⁴ 16 U.S.C. § 824d.

⁵ Capitalized terms not defined herein are used consistent with the definitions in the Transmission, Markets and Services Tariff (Tariff or ISO-NE Tariff). *See* ISO-NE, Transmission, Markets and Services Tariff, § I.2 (Rules of Construction; Definitions) (139.0.0) (ISO-NE Tariff); *see also id.* (defining “Project Sponsor” as “an entity seeking to have a New Generating Capacity Resource, New Import Capacity Resource or New Demand Capacity Resource participate in the Forward Capacity Market”).

contended that NTE revised Killingly's critical path schedule milestone dates such that Killingly will achieve all its critical path schedule milestones (including commercial operation) more than two years after the beginning of the 2022-2023 Capacity Commitment Period, the Capacity Commitment Period for which Killingly first received a CSO.⁶ Accordingly, under section III.13.3.4.A of the Tariff, ISO-NE exercised its right to seek an order from the Commission terminating Killingly's CSO.

3. On January 3, 2022, the Commission accepted ISO-NE's request to terminate Killingly's CSO, beginning with the 2022-2023 Capacity Commitment Period, to become effective January 4, 2022. The Commission found, based on a review of the record, including the confidential information provided by ISO-NE and NTE, that the relevant condition for termination set forth in Tariff section III.13.3.4A had been met.⁷

4. On January 11, 2022, NTE filed its Motion requesting stay of the Commission's January 3 Order. NTE requests a stay for 120 days from the date of the Commission's ruling on the Motion.⁸ NTE states that, during the stay, it will demonstrate that the commitments it made to ISO-NE in November 2021 remain viable and that NTE can continue on the path for timely completion of Killingly. NTE avers that, if NTE is unable to show within this period that it has made meaningful and adequate progress toward completion, the stay may expire. Additionally, NTE requests an expedited ruling on this Motion so that it may participate in the upcoming Forward Capacity Auction scheduled to commence on February 7, 2022 (FCA 16) and, if necessary, so that NTE may seek an emergency stay from the U.S. Court of Appeals for the D.C. Circuit.

5. NTE argues that it meets the Commission's standard for a stay of the January 3 Order. First, NTE contends that it will suffer irreparable harm from the January 3 Order, which cannot be undone even if the Commission grants its request for rehearing. NTE explains that ISO-NE's termination means that Killingly is disqualified from the revenues it would have earned from the CSO it won in the thirteenth Forward Capacity Auction (FCA 13), loses its status as an existing resource and is foreclosed from participating in future ISO-NE capacity auctions, including the auction scheduled for February 7, 2022. NTE argues that, because the Commission does not rerun auctions, once capacity

⁶ ISO-NE Answer at 2.

⁷ January 3 Order, 178 FERC ¶ 61,001 at P 25.

⁸ Motion at 4.

revenues are lost, they cannot be returned should NTE later prevail. NTE maintains that the project is “effectively killed” and lost to the market, after millions of dollars have been spent on its development.⁹

6. Second, NTE argues that granting its motion will not substantially harm other parties. NTE states that Killingly secured a CSO in FCA 13 and is cleared as a qualifying resource for FCA 16, and because it could have been built within its commercial operation deadline, other market participants do not have a legitimate interest in keeping Killingly out of the market.¹⁰

7. Third, NTE argues that issuing a stay is in the public interest. NTE contends that Killingly will be built, absent the termination, and will provide reliability benefits for the New England region. NTE states that issuing a stay will preserve the status quo ante while its rehearing request and possible appeal are resolved.¹¹

II. Responsive Pleadings

8. On January 18, 2022, ISO-NE and New England Power Generators Association, Inc. (NEPGA) each filed answers. ISO-NE argues that the Commission should deny the Motion because NTE fails to satisfy the standard for such extraordinary relief. ISO-NE states that the resource termination filing provided NTE with a full and fair opportunity to demonstrate that it could complete the Killingly project within the time prescribed by the Tariff, that NTE failed to do so, and that NTE is seeking a “second bite at the apple.”¹²

9. ISO-NE argues that NTE has not demonstrated the irreparable harm required for a stay. ISO-NE states that losses of financial assurance, capacity revenues and dollars spent on unsuccessful development of a project are inherently losses of an economic nature that do not amount to irreparable harm.¹³ ISO-NE also states that NTE’s claim that it is disqualified from participating in future FCAs is erroneous because NTE may submit a Show of Interest Form to seek qualification of the project for participation in future FCAs. Moreover, ISO-NE states that the purpose of participating in a capacity

⁹ Motion at 8-9.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 10.

¹² ISO-NE Answer at 4.

¹³ *Id.* at 5.

auction is not merely ceremonial; participation in auctions is for resources that can and will in fact deliver capacity to the market at the due time because they are operational or demonstrably likely to be, and Killingly is not.¹⁴

10. NEPGA requests that the Commission deny NTE's Motion because issuing a stay would cause substantial harm to existing and new capacity resources. NEPGA explains that allowing Killingly to offer as a price-taker in FCA 16 would cause significant harm to other capacity resources participating in the FCA, including other resources that would not clear the FCA because Killingly would occupy over 600 MW of capacity at the bottom of the supply stack. NEPGA further argues that permitting resources that are unlikely to enter commercial operation to offer as price-takers interferes with the orderly competition among capacity resources and would cause the FCA to clear at a price reflecting a zero-priced offer from a phantom capacity resource.¹⁵ NEPGA therefore disagrees with NTE's assertion that no other market participants would be harmed.¹⁶

11. NEPGA disputes NTE's claim that granting the Motion would be in the public interest because it "will enhance reliability in the New England region, and help to lower capacity prices."¹⁷ NEPGA argues that Killingly serves no reliability purpose, explaining that ISO-NE relies on a resource that clears the FCA to actually deliver on that capacity; therefore, when a resource does not deliver, especially a resource offering a large quantity of capacity like Killingly, it interferes with the balance between peak load and resources procured to provide capacity.¹⁸ Lastly, NEPGA argues that granting NTE's

¹⁴ *Id.*

¹⁵ NEPGA Answer at 4.

¹⁶ NEPGA also disputes NTE's claim that Killingly is cleared as a qualifying resource for the upcoming FCA 16. NEPGA states that ISO-NE explained in an informational filing to the Commission regarding FCA 16 that, if Killingly's CSO is terminated, Killingly will not be able to participate in FCA 16. NEPGA states that, with the Commission's issuance of the January 3 Order, ISO-NE has now taken the necessary steps and Killingly is thus not "cleared as a qualifying resource." NEPGA Answer at 3 (citing ISO New England Inc., Informational Filing for Qualification in the Forward Capacity Market, Docket No. ER22-391-000 (filed Nov. 9, 2021)).

¹⁷ NEPGA Answer at 4 (citing Motion at 9).

¹⁸ *Id.* at 4-5.

Motion would run contrary to well-established Commission principles of finality and decisiveness of Commission orders.¹⁹

III. Discussion

12. We find that NTE has failed to meet the standard applied by the Commission for granting a request for stay.

13. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act, and grants a stay when “justice so requires.”²⁰ In assessing a request for stay, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.²¹ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.²² As a general matter, we do not favor stays, which can result in regulatory uncertainty.²³

14. The U.S. Court of Appeals for the District of Columbia Circuit has recognized that, although the concept of irreparable harm does not readily lend itself to definition, courts have developed well-known principles to guide a determination, which include that the injury must be both certain and great, it must be actual and not theoretical; and injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time.²⁴ Implicit in these principles is the further requirement that

¹⁹ *Id.* at 5 (citing *Enable Gas Transmission, LLC*, 153 FERC ¶61,055, at P 118 (2015); *see also Millennium Pipeline Co., LLC*, 141 FERC ¶61,022, at P 13 (2012)).

²⁰ *Tennessee Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055 at P 118; *Transcontinental Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015).

²¹ *See Enable Gas Transmission*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022 at P 13.

²² *See, e.g., Algonquin Gas Transmission*, 156 FERC ¶ 61,111 at P 9.

²³ *See, e.g., Millennium Pipeline Co., LLC*, 141 FERC ¶ 61,022 at P 22.

²⁴ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

the movant substantiate the claim that irreparable injury is “likely” to occur.²⁵ Bare allegations of what is likely to occur are insufficient.²⁶ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.²⁷ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.²⁸ The standard for showing irreparable harm is strict, and economic loss does not constitute irreparable harm.²⁹

15. We find that NTE has not demonstrated that a stay is necessary to avoid irreparable injury. NTE’s alleged irreparable harm is that Killingly is disqualified from the revenues it would have earned from its CSO, loses its status as an existing resource, and is foreclosed from participating in future ISO-NE FCAs, which NTE maintains will result in the project not moving forward and the loss of millions of dollars spent to develop Killingly.³⁰

16. We find that NTE’s alleged economic harm is insufficient to warrant a stay. Loss of potential capacity market revenues as either a new or existing resource and potential lost development dollars are an insufficient basis to show irreparable harm. Moreover, we disagree with NTE’s claim that it is foreclosed from participating in future FCAs or that Killingly is “lost to the market.”³¹ While Killingly may not participate in FCA 16, which, under the filed rate reflected in ISO-NE’s Tariff, is a direct consequence of Killingly not progressing sufficiently on its critical path milestones to demonstrate that it

²⁵ See *Transcontinental Gas*, 150 FERC ¶ 61,183 at P 10 (citing *Wis. Gas Co.*, 758 F.2d at 674).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Wis. Gas Co.*, 758 F.2d at 674 (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility of adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.”) (citing *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

³⁰ Motion at 8-9.

³¹ *Id.*

will be in commercial operation by June 1, 2024,³² NTE may still seek to participate in future FCAs, as ISO-NE explains.³³ NTE has not provided any evidence that Killingly could not progress on construction milestones,³⁴ become commercially operable, or not have the opportunity to earn capacity revenue in future FCAs to recover the money spent on Killingly's development. NTE's speculation on these matters falls far short of the substantiation needed to show irreparable harm absent a stay.³⁵

17. Because NTE is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.³⁶ Nonetheless, we address the other factors and find that issuing the stay would substantially harm other market participants and is not in the public interest. NTE contends that other market participants do not have a legitimate interest in denying NTE's requested stay because Killingly secured a CSO in

³² See ISO-NE, Tariff, § III.13.3.4A (17.0.0).

³³ ISO-NE Answer at 6 (refuting NTE's claim that disqualification from FCAs constitutes irreparable harm because NTE is "at liberty of submitting Show of Interest Forms to seek qualification of the project for participation in future FCAs").

³⁴ NTE asserts, for example, that if a stay is denied, Killingly effectively is lost to the market even if NTE later prevails on rehearing or appeal, arguing that without the prospect of capacity revenues or participation in FCA 16, the project cannot progress. See Motion at 4. However, NTE provides no evidence on these claims. As explained in this order, NTE is not precluded from moving forward with Killingly and seeking to enter future FCAs. And, even if Killingly's CSO is restored due to success on rehearing or appeal, NTE has not shown it is irreparably harmed by not participating in FCA 16 as NTE does not show, for example, that it would not be entitled to receive what it secured through its CSO from FCA 13, which includes revenue from future capacity auctions after FCA 16.

³⁵ *Wis. Gas Co.*, 758 F.2d at 674 (explaining that the harm must be both certain and great, and actual and not theoretical).

³⁶ See *supra* note 21.

FCA 13, is cleared as a qualifying resource for FCA 16,³⁷ and because it could have been built within its commercial operation deadline.³⁸

18. We are not persuaded by these claims and find that issuing the stay has the potential to interfere with important elements of the Forward Capacity Market's design and operation. When a resource secures a CSO, it is supposed to be available to supply capacity for the corresponding Capacity Commitment Period, which is approximately three years later.³⁹ The Forward Capacity Market permits resources that have not yet achieved commercial operation to participate and secure a CSO on the understanding that they can be developed in time for the relevant Capacity Commitment Period.⁴⁰ And while ISO-NE's Tariff provides some flexibility to account for unforeseen delays—including the possibility of purchasing capacity through the reconfiguration auctions or Capacity Supply Obligation Bilaterals when a resource will not be operational in time for the Capacity Commitment Period⁴¹—significant and persistent delays on the part of a particular resource can undermine the basic functioning of a multi-year forward market, including its ability to send accurate price signals to guide entry and exit. To address that concern, section III.13.3.4A of the Tariff provides that ISO-NE may seek to terminate a resource's CSO if the resource revises its critical path milestones such that it will not achieve commercial operation until more than two years after the beginning of the relevant Capacity Commitment Period.⁴² That provision allows ISO-NE to ensure that resources that are not making sufficient progress towards operation are not relied upon to provide capacity while also providing an incentive for resources to be timely developed.⁴³

³⁷ On January 21, 2022, the Commission issued an order accepting ISO-NE's informational filing related to resource qualification for FCA 16. In so doing, Killingly is no longer a qualifying resource for FCA 16. *ISO New England Inc.*, 178 FERC ¶ 61,050, at P 17, n.21 (2022).

³⁸ Motion at 9.

³⁹ Tariff, § III.13.1.10(f) (67.0.0) and III.13.1.1.2.2.2. (67.0.0).

⁴⁰ Tariff, § III.13.1.10(c) (67.0.0) and III.13.1.1.2. (67.0.0).

⁴¹ Tariff, § III.13.3.4 (17.0.0).

⁴² Tariff, § III.13.3.4A (17.0.0).

⁴³ See, e.g., *ISO New England Inc.*, 162 FERC ¶ 61,265 at PP 2-3 (2018) (explaining that through its FCA, ISO-NE procures the capacity resources that it needs to ensure resource adequacy within its footprint. A resource that is under construction may

19. That is what happened here. As noted, pursuant to section III.13.3.4A ISO-NE filed to terminate Killingly's CSO and the Commission accepted the termination filing, finding that ISO-NE had met its burden under section 205 of the FPA.⁴⁴ Granting a stay, and thereby allowing Killingly to participate as an existing resource notwithstanding the Commission's acceptance of the termination filing, would undermine the role played by section III.13.3.4A in ISO-NE's capacity market. In addition, as NTE notes, the Commission generally does not order a remedy that requires re-running markets.⁴⁵ Under these circumstances, granting a stay here on FCA 16 would be contrary to the public interest.

The Commission orders:

The motion for stay filed by NTE is hereby denied.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

obtain a CSO, so long as both the Project Sponsor and ISO-NE expect that the resource will be operational prior to the beginning of the relevant Capacity Commitment Period).

⁴⁴ January 3 Order, 178 FERC ¶ 61,001 at PP 5, 25-27.

⁴⁵ See Motion at 9; see also, e.g., *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 55 (2017) ("The Commission generally does not order a remedy that requires rerunning a market because market participants participate in the market with the expectation that the rules in place and the outcomes will not change after the results are set.").