

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket No. ER19-1428-001

STATEMENT OF COMMISSIONER GLICK

(Issued August 8, 2019)

1. ISO New England Inc.'s proposed tariff change in this docket went into effect by operation of law because the Commission lacked a quorum. That means that the Commission did not determine whether the proposed change is just and reasonable and not unduly discriminatory or preferential. When this happens, section 205(g) of the Federal Power Act¹ (FPA) requires each Commissioner to issue a "written statement explaining the views of the Commissioner with respect to the change."²

2. In my view, ISO New England's Inventoried Energy program is patently unjust and unreasonable. The program will cost New England consumers as much as \$300 million without any evidence to suggest that it will actually improve the region's fuel security or that any improvement is likely to be worth the cost. Indeed, the program goes so far as to hand out substantial payments³ to nuclear, coal, and hydropower generators with no indication that these payments will change their behavior in the slightest. That is a windfall, not a just and reasonable rate. But without a quorum there is nothing the Commission could do to prevent this program from taking effect.

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3. I agree that New England has a fuel security issue. During a handful of especially cold winter days, the region's natural gas transportation capacity can become constrained, creating a risk that there may not be enough natural gas available to supply the natural gas-fired power plants that would otherwise help power the grid. On these days, the region tends to substitute oil and natural gas delivered via liquefied natural gas (LNG)

¹ Congress recently enacted this requirement as part of the America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3006. This provision was originally known as the Fair Rates Act.

² 16 U.S.C. § 824d(g).

³ The record suggests that at least \$40 million a year would go to resources that will not change their behavior in response to those payments. See New Hampshire Public Utilities Commission and New Hampshire Office of Consumer Advocate Protest at 11 (New Hampshire Entities Protest).

terminals for gas that would otherwise be shipped through the constrained pipelines.⁴ But because oil and LNG are expensive and rarely relied upon during normal conditions, there is a concern that resources may not always have enough of these fuels on hand to sustain the grid over a long period of time. Although the number of these cold winter days has historically been low—and the region has never actually run out of oil and natural gas—the consequences of not being able to generate enough electricity could be catastrophic, making the region’s fuel security an issue we must take seriously.

4. But that does not mean that every proposal that purports to address fuel security is a good idea. To the contrary, taking fuel security seriously means that ISO New England, stakeholders, and the Commission itself must ensure that efforts to address this issue actually help the region procure the services needed to operate the grid reliably. It also means that we must not waste consumers’ money on poorly designed solutions that do little, if anything, to improve the region’s fuel security.

5. Unfortunately, wasting consumers’ money is exactly what the Inventoried Energy program does. Understanding why requires a brief overview of the program. ISO New England proposes to pay certain types of resources⁵ for maintaining “inventoried energy”—which is, essentially, onsite fuel that the resource can convert into electricity⁶—during two winters: 2023-2024 and 2024-2025. A resource is eligible to participate in one of two ways: either by entering a forward contract, which requires the resource to have a certain amount of “inventoried energy” onsite whenever the ISO declares a cold weather event,⁷ or through the spot market, which allows the resource to be paid for whatever “inventoried energy” it happens to have onsite during a cold weather event.

4 This fuel substitution is the result of least-cost dispatch: As natural gas prices rise, oil units become more competitive, making them more likely to be dispatched by the ISO. Additionally, dual-fuel units—units that can generate electricity by burning either oil or natural gas—will generate electricity from oil rather than natural gas when it becomes less costly to do so.

5 ISO New England explains that this includes all oil, coal, nuclear, biomass, and refuse generators as well as some hydroelectric and pumped storage facilities, some battery storage facilities, and demand response resources that contain behind-the-meter fossil-fuel generators. ISO New England Transmittal Letter at 15-16.

6 *Id.* at 8. In the case of a hydroelectric facility, pumped storage facility, or electric battery, the “fuel” in question is the resource’s potential energy, rather than “fuel” as we typically understand that term. *Id.*

7 A cold weather event for the purposes of this program occurs on any day between December and February when the temperature at Bradley International Airport outside Hartford, Connecticut, is 17 degrees Fahrenheit or below. *Id.* at 13.

The bottom line under either option is that the program pays participating resources for having up to three days'-worth of "inventoried energy" onsite during certain conditions.

6. Although the simplicity of ISO New England's proposal may, at first, seem appealing, it contains a number of fatal flaws. Most importantly, ISO New England does not point to any evidence that there is a near-term operational problem that cannot be adequately addressed by its existing rules or any evidence that the Inventoried Energy program would address any such problem by making the region more fuel secure.⁸ Without such analysis, there is no foundation to evaluate whether the program will achieve its intended purpose or do so in a manner that is just and reasonable.

7. Nevertheless, ISO New England identifies two pathways in which the proposal *might* theoretically improve fuel security: By incentivizing resources to keep fuel on hand or by creating an additional revenue stream that will prevent certain resources from retiring. The record, however, contains compelling evidence that neither pathway is likely to make much of a contribution, if any, to the region's fuel security. I will discuss the two pathways in turn.

8. As an initial matter, at least a third of the capacity eligible to receive payments through the Inventoried Energy program is from resources that will not change their behavior in response to these payments because they already maintain considerably more than three days'-worth of fuel onsite (which, as noted, is the cap on payments for "inventoried energy").⁹ That means that at least \$40 million dollars a year is likely to be spent on resources, such as coal and nuclear generators, that will not change their behavior in response to those payments. That is an utter waste of ratepayers' money. Based on the record here, one cannot help but wonder whether burning that money¹⁰ might contribute as much to fuel security as wasting it on entities that we know will not do anything differently.

9. ISO New England responds that it is appropriate to pay all resources that provide "inventoried energy" regardless of whether the payments will affect their behavior

⁸ On December 3, 2018, the Commission accepted ISO New England's proposed interim solution to address fuel security from 2022-2023 to 2024-2025. *ISO New England Inc.*, 165 FERC ¶ 61,202 (2018). ISO New England is currently required to submit a long-term solution to fuel security in October, 2019.

⁹ New Hampshire Entities Protest at 11. That figure assumes that natural gas-only resources participate in the program. *Id.* As explained below, *infra* P 10, it is unlikely that there will be much participation by those resources and it is possible there will not be any participation at all.

¹⁰ After all, a refuse generator, which burns waste to produce electricity, is eligible to participate in the Inventoried Energy program. *See supra* note 5.

because doing so makes the program “technology-neutral.”¹¹ But the Commission has rejected that argument in previous orders that addressed a similar ISO New England proposal regarding fuel security.¹² The Commission explained that resources that would not take any action in response to fuel security payments were not similarly situated to resources that might take such actions¹³—a statement that strongly suggests the former category of resources should not be receiving the same payments as the latter. The Commission went on to explain that, where “the purpose of [a p]rogram is to ensure reliability during the winter, we do not find it necessary to include resources that do not provide any additional benefit to winter reliability for the sake of fuel neutrality alone.”¹⁴

11 ISO New England Transmittal Letter at 5-7.

12 These orders addressed the Winter Reliability Program, which is discussed in greater detail below. *See infra* P 19.

13 *ISO New England Inc.*, 154 FERC ¶ 61,133, at P 13 (2016) (“Coal, nuclear, and hydro resources are not similarly situated [to resources such as oil, LNG, etc.] . . . as the record reflects that including such resources in the Program would not provide any additional winter reliability benefit to the region.”). This order involved a “jump ball” filing, which is a procedurally complicated mechanism of ISO New England’s tariff that, under certain circumstances, allows the ISO to submit two proposals and permits the Commission to choose between them or take the best of both worlds. *See ISO New England Inc. & New England Power Pool*, 130 FERC ¶ 61,105, at P 3 n.4 (2010) (describing the “jump ball” provision). What is relevant here is that, because it was a “jump ball” filing, the Commission did not have to find that ISO New England’s proposal had not been shown to be just and reasonable to reject it. Nevertheless, the Commission’s statement that these resources are not similarly situated strongly suggests that they should not be receiving the same payment.

14 *ISO New England Inc.*, 154 FERC ¶ 61,133 at P 13. In its answer, the ISO attempts to distinguish these precedents on the basis that “fuel neutrality” was not an “explicit design goal” of the Winter Reliability Program, but is a goal of the Inventoried Energy program. ISO New England April 30th, 2019 Answer at 15-16. As relevant here, that is a distinction without a difference. As noted, the programs’ purposes are essentially the same: the Winter Reliability Program was intended to “ensure reliability during the winter,” *see ISO New England*, 154 FERC ¶ 61,133 at P 13, and the Inventoried Energy program is intended to address “winter energy security,” ISO New England Transmittal at 5. Accordingly, the Commission’s basic insight in the earlier order—that resources that do not meaningfully contribute to that goal are not similarly situated as those that do—applies equally to this filing. And because ISO New England has not shown that resources that will do nothing in response to Inventoried Energy payments are similarly situated to those that will change their behavior in response to such payments, the Commission’s previous conclusions apply equally here.

Accordingly, the Commission's own precedent weighs against any conclusion that fuel neutrality justifies paying money for nothing.

10. In addition, the record suggests that the Inventoried Energy program's poor design will dissuade other types of resources from participating. For example, ISO New England explains that its proposed forward rate is based on the fair market value of a fuel contract between a natural gas-only generator and an LNG storage terminal. This suggests that the program is intended to incentivize resources to enter into backup LNG contracts. But ISO New England itself describes this forward rate as representing the "break even" payment associated with a backup LNG contract, meaning that, at that price, resources will be economically indifferent about whether to enter such a contract.¹⁵ In other words, if ISO New England's modeling assumptions are correct, gas-only generators that enter into such a contract will not expect to make any money participating in the Inventoried Energy program. It is hard to imagine many resources freely taking on risk for no expected profit. As a result, there is little reason to think that the program will do anything to change the behavior of natural gas-only units, which, as noted, are the primary concern when it comes to fuel security in New England.¹⁶ And while the proposal may potentially incentivize some resources (i.e., oil-fired generators) to keep more fuel onsite, the program is unlikely to result in any additional investment in fuel infrastructure because many, and perhaps most, eligible resources do not need to make any infrastructure investments to participate in the program.

11. ISO New England also suggests that the Inventoried Energy program is just and reasonable because it might forestall the retirement of otherwise uneconomic resources, which might then benefit the region's fuel security.¹⁷ For one thing, creating a program to funnel money to uneconomic resources in order to prevent their retirement would seem to undermine a key element of the balancing act that the Commission relied upon when it found the Capacity Auctions with Sponsored Policy Resources (CASPR) program just and reasonable.¹⁸ But, even putting that fundamental concern aside, the ISO again does

15 ISO New England Transmittal Letter at 11.

16 *See supra* P 3.

17 ISO New England Transmittal Letter at 8.

18 In brief, CASPR created a secondary element as part of ISO New England's capacity market that allows state-sponsored resources, such as wind and solar resources, to "buy" a capacity commitment from a resource that clears the capacity auction, but is nevertheless willing to permanently retire in exchange for a payment from a state-sponsored resource. *See ISO New England Inc.*, 162 FERC ¶ 61,205, at P 7 (2018). If the Inventoried Energy program were to "succeed" in reducing the number of resources willing to retire, it would lessen the number of resources willing to sell its capacity obligation and retire through CASPR. In addition, Inventoried Energy payments will

not point to any record evidence suggesting that the Inventoried Energy program will make a difference in any resource's retirement decision. On the other hand, several commenters introduced persuasive evidence that those payments would not materially affect retirement decisions.¹⁹

12. But even if we assume, for the sake of argument, that the Inventoried Energy program will make an incremental contribution to fuel security, ISO New England has not shown that this contribution is likely to be worth the program's considerable price tag. As noted, the ISO estimates that the Inventoried Energy program will cost New England ratepayers between \$200 and \$300 million over just two years.²⁰ But the record is insufficient to determine whether that is just and reasonable. For one thing, there is no evidence of how much incremental "inventoried energy" the ISO might get in response to those payments—i.e., we do not know what New England consumers will be paying for. In addition, because the ISO did not perform any analysis of how much "inventoried energy" it needs, we have no way of knowing whether the program will satisfy any need for "inventoried energy" that New England may or may not have. And without that information, we simply cannot assess what benefit, if any, New England customers will receive from the program, and therefore whether it is just and reasonable.

13. Making matters worse, the Inventoried Energy program does not possess even the basic principles of an effective market-based solution, which the Commission has repeatedly instructed ISO New England to make the foundation of its approach to fuel security.²¹ Those principles—which, according to the ISO, include (1) specifying a

increase the cost that a state-sponsored resource must incur to buy a capacity commitment from an existing resource. Both effects will stymie the New England states' clean energy goals.

19 See New Hampshire Entities Protest at 5, 8-9; NRG Protest at 8; New England Power Generators Association Protest at 6-7.

20 This estimate may understate the actual cost because it does not include the impact to energy market offers. As the ISO explained in its response to Commission Staff's request for additional information, it did not conduct an analysis to determine the expected impact on total system costs that may result from the inclusion of opportunity costs from the Inventoried Energy program in energy market offers. ISO New England Deficiency Letter Response at 7-8.

21 See, e.g., *ISO New England Inc.*, 164 FERC ¶ 61,003, at P 53 (2018) ("We reaffirm our support for market solutions as the most efficient means to provide reliable electric service to New England consumers at just and reasonable rates."); see also *ISO New England Inc.*, 165 FERC ¶ 61,202, at P 96 (2018) (explaining that "[m]oving to a market-based approach as soon as possible is the best way to achieve th[e] objective" of fully valuing resources' contribution to fuel security).

clearly defined product, (2) transparently pricing the product, (3) incentivizing market participants to deliver the product in a cost-effective manner, and (4) settling any forward sale of the product against its spot delivery within a framework that is technology-neutral²²—help to ensure that the approach is effective, both in delivering the product in question and in ensuring that customers get what they pay for.

14. Evaluated against those principles, the Inventoried Energy program gets a failing grade. Although ISO New England defines what resources are eligible to provide “inventoried energy,” it evaluates neither the specific need for inventoried fuel nor the quantity demanded. As a result, there is no market competition for this product because every resource with the necessary attributes receives the same price. But without competition, the price-setting mechanism is untethered from market fundamentals and may produce an extremely inefficient outcome. And that is precisely what has happened here. ISO New England established a fixed price, \$82.49 per megawatt-hour, without making any attempt to evaluate how much “inventoried energy” it should buy at the price or how much resources might supply at that price.

15. In fairness, the Commission’s responsibility is to ensure that rates are just and reasonable and not unduly discriminatory or preferential²³—a standard that does not necessarily require an effective market-based solution. The main alternative to a market-based approach, especially in exigent circumstances, has generally been a cost-of-service approach. Regulating via cost-of-service sacrifices the efficiency and innovation created by the market, but it theoretically ensures that customers are getting what they pay for by permitting the seller to recover only what is needed to serve those customers. The Inventoried Energy program, however, does not provide any such protections for consumers.

16. Instead, by compromising market principles without creating any corresponding protections for consumers, the Inventoried Energy program lacks the benefits of either a market-based or cost-of-service ratemaking methodology. Such a muddled approach, especially in the absence of any clear benefits, is a recipe for unjust and unreasonable rates, not a serious approach to addressing fuel security.

17. ISO New England suggests that the program is just and reasonable notwithstanding these shortcomings because a sound market design would take too long to develop and the Inventoried Energy program would last only two years: 2023-2024 and 2024-2025.²⁴ The ISO nevertheless justifies rushing ahead with this operational

22 ISO New England Transmittal Letter at 5.

23 16 U.S.C. § 824d(a).

24 ISO New England Transmittal Letter at 4; ISO New England April 30, 2019

solution, which will not take effect for another four years, because it expects the program will potentially forestall the retirement of otherwise uneconomic generators in the upcoming capacity auction, which will take place next year. As noted, however, there is no evidence in the record indicating that the payments under the Inventoried Energy program are likely to have any effect on retirements, much less an effect that could conceivably be worth consumers paying an additional several hundred million dollars. Without such evidence, there is simply no excuse for pursuing a half-baked operational solution that will not take effect until the middle of the next decade.

18. In addition, the Inventoried Energy program may interfere with other initiatives that address reliability, including ISO New England's existing market-based approach to reliability, the Pay For Performance program (PFP).²⁵ PFP was designed to improve reliability, including fuel security, by creating an incentive for resources to be available when called upon—that is, it rewards resources for the services that they actually provide, instead of their attributes. But rather than waiting to gather evidence on how PFP works in practice²⁶ or seeking to further tailor the PFP parameters to address fuel security, ISO New England is now proposing a whole new program that will interfere with PFP's objectives if it succeeds by retaining resources that can store fuel, but cannot reliably perform when needed during a PFP event.²⁷ Although Commission Staff raised this concern in seeking additional information from ISO New England,²⁸ the ISO did not directly respond, instead insisting that the Inventoried Energy program and PFP address different issues and could potentially work together.²⁹ But the *potential* for the two

Answer at 2 (recognizing that, in the interest of timing and simplicity, the program is “not a perfect, fully market-based solution to the region’s energy security issues”). In any case, these interim programs have a history of sticking around longer than initially contemplated. The Winter Reliability Program, which is discussed further below, was originally proposed to last one year and ended up being in place in one form or another for four years.

25 PFP rewards resources that perform during an ISO New England-declared PFP event (essentially a potential resource shortage that meets certain conditions) and penalizes those that do not. PFP was intended to incentivize resources to take steps to ensure that they are capable of producing electricity whenever a PFP event occurs. See generally *ISO New England Inc. & New England Power Pool*, 147 FERC ¶ 61,172, at PP 36-40, 63-64 (2014).

26 The Commission approved a phased-in approach to the PFP rewards and penalties that does not fully take effect until 2024. *Id.* P 6 n.8.

27 See, e.g., Maine Public Utility Commission Protest at 6-7

28 Commission Staff Deficiency Letter at 9.

programs to work together is no answer to the concern that, in practice, they will interfere with each other—a result which several commenters suggested is a likely outcome.³⁰

19. ISO New England’s decision to pursue such an ill-conceived approach is all-the-more disappointing because the ISO has better options than the Inventoried Energy program to address any short-term need that might exist.³¹ These other options illustrate how ISO New England could more effectively address the region’s needs while also better protecting its ratepayers. For example, consider the Winter Reliability Program, which lapsed following the 2017-2018 winter.³² In general, by taking away the downside risk of having excess fuel at the end of the winter, the Winter Reliability Program provided a proven method for incentivizing resources to procure fuel while targeting payments at resources that might actually respond to those payments. A modified version of the Winter Reliability Program might have helped to address any short-term need while providing at least some evidentiary basis, in the form of real-world experience, for the Commission to evaluate whether the proposal might be effective and worth the cost—in other words, whether it is just and reasonable.

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29 ISO New England Deficiency Letter Response at 11-12.

30 See Massachusetts Attorney General Protest at 13-14; Maine Public Utility Commission Protest at 6-7.

31 This is a section 205 filing, meaning that ISO New England does not have to show that its proposal is the best option, only that it is a just and reasonable one (although, as should be clear by now, I do not believe it has met even that more lenient standard). See *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 181 (D.C. Cir. 2013) (“Under FPA § 205(e), the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility. The Commission, however, must approve the increase as long as the new rates are just and reasonable.” (internal citations and quotation marks omitted)); *Exxon Corp. v. FERC*, 206 F.3d 47, 51 (D.C. Cir. 2000) (explaining that, under the analogous “§ 4 of the Natural Gas Act[,] a pipeline proposing a rate change has the burden of showing that the proposed rate is just and reasonable. If it meets that burden, FERC approves the rate regardless of whether there may be other rates that would also be just and reasonable.”).

32 The last three years of the Winter Reliability Program had an average annual cost of roughly \$30 million dollars, New Hampshire Entities Protest at 11 (citing ISO New England Winter Reliability Program data for 2015/16 thru 2017/18, available at <https://www.iso-ne.com/markets-operations/markets/winter-program-payment-rate>—less than one third of ISO New England’s lower bound estimate for the cost of the Inventoried Energy program, ISO New England Transmittal Letter at 19.

20. New England’s fuel security is an important issue that deserves a serious solution. But the Inventoried Energy program is not that. I believe that any order accepting ISO New England’s proposed tariff changes would have violated the Administrative Procedure Act’s basic requirement that agency actions be the product of reasoned decisionmaking and be based on substantial evidence in the record.³³

Richard Glick
Commissioner

³³ The Commission has ample authority to correct this situation in the event of a remand and could potentially act before the payments begin in the 2023-2024 winter. See 16 U.S.C. § 825h (providing the Commission with the authority “to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of [the FPA]”); *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 361 (D.C. Cir. 2017) (“FERC enjoys broad authority when its past actions are determined to be wrong.”); *Xcel Energy Servs., Inc. v. FERC*, 815 F.3d 947, 954-55 (D.C. Cir. 2016) (“[I]n examining the parallel provision [to FPA section 825h] in the Natural Gas Act, the court concluded that provision ‘unquestionably gives [the Commission] the authority, in fashioning remedies, to consider equitable principles, one of which is to regard as being done that which should have been done.’”) (quoting *N. Natural Gas Co. v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986)). Indeed, if the Commission lacked such authority, it would be unable to effectuate the judicial review pathway created by section 205(g), which would be a bizarre outcome to say the least. Cf. *TNA*, 857 F.3d at 361 (finding that the Commission has authority to remedy its errors in part, because “[w]ithout such corrective power, regulated parties would be substantially and irreparably injured by FERC errors, and judicial review would be powerless to protect them from much of the losses so incurred”).