

174 FERC ¶ 61,120
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. ER18-619-002

ORDER REJECTING REHEARING REQUEST

(Issued February 18, 2021)

1. On December 21, 2020, pursuant to section 313 of the Federal Power Act (FPA)¹ and Rule 713 of the Commission's Rules of Practice and Procedure,² Conservation Law Foundation, Natural Resources Defense Council, and Sierra Club (together, Clean Energy Advocates) sought rehearing of the Commission's Order Addressing Arguments Raised On Rehearing³ of the Commission's order accepting ISO New England Inc.'s (ISO-NE) proposed revisions to the ISO-NE Transmission, Markets and Services Tariff (57.0) to implement Competitive Auctions with Sponsored Policy Resources (CASPR).⁴
2. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, in this order, we reject the rehearing request as procedurally barred.
3. Clean Energy Advocates contend that, in the Rehearing Order, the Commission ignored the substitution auction's "real-world performance" in FCAs 13 and 14 and that

¹ 16 U.S.C. § 8251(a).

² 18 C.F.R. § 385.713 (2020).

³ *ISO New England Inc.*, 173 FERC ¶ 61,161 (2020) (Rehearing Order).

⁴ *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018) (CASPR Order). CASPR is a market-based mechanism to accommodate the entry of certain state-supported resources (Sponsored Policy Resources) into the forward capacity market over time, while maintaining competitive pricing for capacity. CASPR adds a second auction, the substitution auction, which runs immediately after the primary auction (the Forward Capacity Auction (FCA)). *Id.* P 6.

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

it was arbitrary and capricious for the Commission not to consider this evidence of CASPR's efficacy, raised in Commissioner Glick's dissent.⁶ Specifically, Clean Energy Advocates argue that the Commission "selectively cites FCAs 13 and 14 to support its conclusions," but "ignores the results of the substitution auction for those years."⁷ Alternatively, Clean Energy Advocates ask the Commission to remove all references to "extra-record" facts regarding recent capacity auctions.⁸

4. We reject Clean Energy Advocates' rehearing request because it seeks rehearing of the Rehearing Order, which addressed the requests for rehearing of the March 9, 2018 CASPR Order, including Clean Energy Advocates' rehearing request, but did not set aside the CASPR Order in response to the arguments raised on rehearing.⁹ Section 313(a) of the Federal Power Act provides that a party aggrieved by an order issued by the Commission "may apply for a rehearing within thirty days after the issuance of such order."¹⁰ An aggrieved party is entitled to one opportunity to ask the Commission to reconsider a decision.¹¹ Rehearing of an order on rehearing is only proper when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.¹² Rehearing of an order on rehearing "does not lie" when a party simply seeks to revisit the Commission's rationale for reaching an unfavorable determination in an order denying rehearing.¹³ A new or

⁶ Request for Rehearing of Clean Energy Advocates, Docket No. ER18-619-002, at 4 (filed Dec. 21, 2020) (Second Rehearing Request).

⁷ *Id.* at 7 & n.17 (citing Rehearing Order, 173 FERC ¶ 61,161 at P 67 n.181, P 124 n.340).

⁸ *Id.* at 1.

⁹ *See, e.g.*, Rehearing Order, 173 FERC ¶ 61,161 at P 2 & n.7 (citations omitted) and ordering para. *See generally San Diego Gas and Elec. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,251 at P 9 & n.28 (2009) (*SDG&E*) (citing *Midwest Independent Sys. Op. Corp.*, 122 FERC ¶ 61,127, at P 27 & n.34 (2008)); *see also S. Natural Gas Co. v. FERC*, 877 F.2d 1066, 1173 (D.C. Cir. 1999).

¹⁰ 16 U.S.C. § 825l(a).

¹¹ *Appalachian Power Co.*, 149 FERC ¶ 61,137 at P 8 (2014).

¹² *See id.* P 8 & n.15; *accord SDG&E*, 127 FERC ¶ 61,251 at P 9 & n.28 (citing *Midwest ISO*, 122 FERC ¶ 61,127 at P 27 & n.34); *Union Elec. Co. d/b/a AmerenUE*, 114 FERC ¶ 61,230, at 61,745-46 (2006).

¹³ *See SDG&E*, 127 FERC ¶ 61,251 at P 9 & n.29 (citing *Midwest ISO*, 122 FERC ¶ 61,127 at P 27 & n.34); *see also S. Natural Gas Co. v. FERC*, 877 F.2d at 1173.

different rationale presented in a rehearing order does not justify a second rehearing request.¹⁴

5. In the Rehearing Order, the Commission stated that “as permitted by section 313(a) of the FPA,¹⁵ we are modifying the discussion in the CASPR Order and reach the same result in this proceeding[.]”¹⁶ The Rehearing Order expressly stated that “the Commission is not changing the outcome of the CASPR Order.”¹⁷ Accordingly, consistent with precedent, rehearing does not lie and we reject Clean Energy Advocates’ rehearing request.¹⁸

6. We are not persuaded by Clean Energy Advocates’ arguments to the contrary. Clean Energy Advocates cite *Smith Lake* for the proposition that “a second request for rehearing may contain a new consideration that would influence the Commission and

¹⁴ See *Appalachian*, 149 FERC ¶ 61,137 at P 10 n.18 (“An ‘improved rationale’ for the Commission’s underlying decision . . . does not support a second request for rehearing.”) (citing *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,196, at P 8 (2007)); see also *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 58 (D.C. Cir. 2015) (*Smith Lake*) (“when a party seeks judicial review following a rehearing order that changes the reasoning without altering the result, ‘it may have a ‘reasonable ground’ for not having earlier raised its objections to the rationale underpinning the rehearing order’ and therefore be entitled to consideration of those arguments”) (citing *Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 741-42 (D.C. Cir. 2007) (quoting 15 U.S.C. § 717r(b), the Natural Gas Act’s parallel provision to FPA section 313(b), 16 U.S.C. § 825l(b))).

¹⁵ 16 U.S.C. § 825l(a).

¹⁶ See Rehearing Order, 173 FERC ¶ 61,161 at P 2 & n.7 (citing *Allegheny*, 964 F.3d at 16-17).

¹⁷ Rehearing Order, 173 FERC ¶ 61,161 at P 2 n.7 (citing *Smith Lake*, 809 F.3d at 56-57); see also *id.* ordering para (“In response to the rehearing requests filed by Clean Energy Advocates, Consumer-Owned Systems, NextEra-NRG, and Public Citizen, the CASPR Order is hereby modified and the result sustained, as discussed in the body of this order.”).

¹⁸ See, e.g., *SDG&E*, 127 FERC ¶ 61,251 at P 9; *Southern Company Servs.*, 111 FERC ¶ 61,329, at P 1 (2005); *Pacific Gas & Elec. Co.*, 102 FERC ¶ 61,009, at P 1 (2003); see also *Londonderry Neighborhood Coal. v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001); *S. Natural Gas*, 877 F.2d at 1073.

modify the result.”¹⁹ As relevant here, however, the court in *Smith Lake* explained that “a second rehearing petition must be filed if—and only if—the first rehearing order ‘modifie[d] the results of the earlier one in a significant way.’”²⁰ In any event, we disagree with their characterization that the Commission “modif[ied] its CASPR Order in part based on considerations of the policy’s performance in recent capacity auctions.”²¹ The Commission stated in the Rehearing Order that “we do not rely on the results of post-filing auctions to support the Commission’s acceptance of CASPR.”²²

7. Alternatively, Clean Energy Advocates request the Commission modify the Rehearing Order to remove all references to facts regarding recent capacity auctions.²³ We conclude this is unnecessary because, as noted above, the Commission did not rely on the results of subsequent FCAs 13 and 14 to support its acceptance of CASPR.

The Commission orders:

Clean Energy Advocates’ request for rehearing is hereby rejected and their alternative request to modify the Rehearing Order is denied, as discussed in the body of this order.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁹ See Second Rehearing Request at 8 & n.20 (quoting *Smith Lake*, 809 F.3d at 57).

²⁰ *Smith Lake*, 809 F.3d at 56-57 (citing *Town of Norwood v. FERC*, 906 F.2d 772, 775 (D.C. Cir. 1990)).

²¹ Second Rehearing Request at 8.

²² Rehearing Order, 173 FERC ¶ 61,161 at P 124 n.340.

²³ Second Rehearing Request at 7 & n.17 (citing Rehearing Order, 173 FERC ¶ 61,161 at P 67 n.181, P 124 n.340).

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GLICK, Chairman, *concurring*:

1. I concur in the determination in today's order that a second rehearing request is not permitted. That conclusion does not, however, prevent Clean Energy Advocates from pursuing on appeal any of their arguments regarding the efficacy of the Competitive Auctions with Sponsored Policy Resources (CASPR) construct, which they have contested from the outset of this proceeding,¹ or the Commission's justification of its conclusions on that score.

2. In addition, I feel compelled to explain why the Commission's conclusion in today's order—namely, that the November Rehearing Order did not consider or rely on data regarding the two Forward Capacity Auctions conducted after the Commission accepted CASPR²—only underscores my concerns regarding the November Rehearing Order. As I explained in dissenting from that order, because the Commission failed to act on the rehearing requests for nearly three years after accepting CASPR, we had before us ample evidence that CASPR was failing to adequately accommodate state public policies.³ I continue to believe that this real-world experience supported a grant of rehearing and that the Commission erred in failing to adequately consider that evidence.⁴

¹ See, e.g., *ISO New England Inc.*, 173 FERC ¶ 61,161, at PP 61-64 (2020) (Rehearing Order) (summarizing Clean Energy Advocates' rehearing request); *ISO New England Inc.*, 162 FERC ¶ 61,205, at PP 91-92, 95 (2018) (summarizing Clean Energy Advocates' comments).

² *ISO New England Inc.*, 174 FERC ¶ 61,120, at P 6 (2021).

³ Rehearing Order, 173 FERC ¶ 61,161 (Glick, Comm'r, dissenting at PP 1, 10-12).

⁴ *Id.* (Glick, Comm'r, dissenting at P 11).

For these reasons, I respectfully concur.

Richard Glick
Chairman

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CLEMENTS, Commissioner, *concurring*:

1. I agree with today's order rejecting Clean Energy Advocates' second request for rehearing as impermissible. I write separately, however, to highlight what I see as a fundamental flaw in ISO-NE's minimum offer price rule (MOPR) and in the CASPR design the Commission accepted in this proceeding. I have previously expressed my disagreement with similarly intentioned rules in PJM's capacity market.¹ These rules serve as impediments to lawful state public policies in the name of "protecting" ISO New England's markets—an outcome that leads to unjust and unreasonable wholesale rates for New England consumers.
2. ISO New England's MOPR imposes an offer floor on all new resources entering the capacity market. Where a state's load-serving utility has contracted for the development of a new resource in accordance with the laws and regulations of that state, the contractual payments to the resource are deemed to be illicit "out-of-market" revenues and are excluded from the offer floor calculation.² This requires the resource to offer into the market at a higher price, which reduces the likelihood it will be selected to provide capacity. If the resource is developed but is not selected within the capacity market, ISO New England purchases capacity on behalf of the region's customers as if capacity contributions from the state-sponsored resource do not exist.
3. In 2018, as several New England states implemented increasingly ambitious policies to move toward a cleaner resource mix, ISO New England proposed CASPR as a purported balance between what it saw as competing objectives—facilitating the entry of new resources developed pursuant to state public policies, and maintaining competitive capacity market pricing. ISO New England presented CASPR as a means to

¹ *Calpine Corp. v. PJM Interconnection L.L.C.*, 174 FERC ¶ 61,036 (2021) (Clements, Comm'r, concurring). I am also concurring in an order issued today to express similar concerns with regard to the MOPR in NYISO. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 174 FERC ¶ 61,110 (2021) (Clements, Comm'r, concurring).

² ISO New England Inc., Transmission, Markets and Services Tariff, Appendix A, Appendix A Market Monitoring, Reporting and Market Power Mit, III.A.21.1, 54.0.0.

offer state-sponsored resources the *possibility* of being recognized within the capacity market, but ISO New England was plain about its design choice: where these competing objectives were in conflict, the preservation of capacity market pricing would be prioritized.³

4. I do not believe CASPR is a sound approach to reflecting states' public policy choices within ISO New England's markets because it does not address the underlying problem created by the MOPR. States' exercise of their authority under the Federal Power Act to shape the resource mix for their citizens is not an exercise of market power, and applying mitigation to such state actions is harmful to customers. FERC-jurisdictional markets operate as a means to harness competition toward the end of greater efficiency in the provision of electric service—a benefit that can lower costs for customers. ISO New England's markets cannot succeed in achieving this end by operating in a vacuum that fails to embrace the reality of state policy choices. Any resource developed in accordance with a New England state's public policy that is ignored by ISO New England's capacity market contributes to over-procurement of capacity and ultimately additional costs borne by customers. The capacity market must instead acknowledge New England states' exercise of legitimate authority and should respect their resource mix choices within the wholesale market framework.

5. My concerns about the CASPR design are now validated by the three years of experience since its implementation. In three capacity auctions, only 54 megawatts of state-sponsored resources have cleared CASPR's substitution auction, all of them in the first year.⁴ For the last two years CASPR has not facilitated the entry of any state-sponsored resources into the capacity market.⁵ I do not believe this is a just and reasonable—or sustainable—market design.

6. I look forward to engaging with my colleagues to work with the New England states, ISO New England, and the stakeholder community to re-examine the current

³ ISO New England January 8, 2018 Filing at 1, 5.

⁴ ISO New England Inc., *New England's Forward Capacity Auction Closes with Adequate Power System Resources for 2022-2023* (Feb. 2019), https://www.iso-ne.com/static-assets/documents/2019/02/20190206_pr_fca13_initial_results.pdf.

⁵ ISO New England Inc., Filing, Docket No. ER20-1025-000, at 4 n.3 (filed February 18, 2020); ISO New England Inc., *New England's Forward Capacity Auction Closes with Adequate Power System Resources for 2024-2025* (Feb. 2021), https://www.iso-ne.com/static-assets/documents/2021/02/20210211_pr_fca15_initial_results.pdf.

capacity market construct to find a durable solution that yields just and reasonable rates for ISO New England customers.

For these reasons, I respectfully concur.

Allison Clements
Commissioner