

166 FERC ¶ 61,150
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Footprint Power LLC
Footprint Power Salem Harbor Operations LLC

Docket No. IN18-7-000

ORDER TERMINATING ORDER TO SHOW CAUSE PROCEEDING

(Issued February 25, 2019)

1. On June 18, 2018, the Commission ordered Footprint Power LLC and Footprint Power Salem Harbor Operations LLC (collectively, Footprint) to show cause why it should not be found to have violated ISO New England Inc.'s (ISO-NE) Transmission, Markets and Services Tariff (Tariff) and Commission regulations.¹ On August 2, 2018, as amended on August 3, 2018, Footprint filed an answer to the Order to Show Cause (Answer). On September 19, 2018, the Office of Enforcement's litigation staff (OE Litigation Staff)² filed a reply to Footprint's Answer (OE Litigation Staff Reply), stating that it recommends vacating the Order to Show Cause. In this order, we terminate this proceeding.

I. Order to Show Cause

2. The Order to Show Cause ordered Footprint to show cause why it should not be found to have violated ISO-NE Tariff, Market Rule 1, §§ III.1.7.20(b) and (f), III.1.10.1A(d), and III.13.6.1.1.2 by submitting false and misleading supply offers for Unit 4 of Footprint's multi-unit Salem Harbor Power Plant in Salem, Massachusetts and by failing to report the fuel status and related operational status of Unit 4 to ISO-NE from June 26, 2013 through July 25, 2013 (Relevant Period). The Commission also ordered Footprint to show cause why it should not be found to have violated 18 C.F.R.

¹ *Footprint Power LLC*, 163 FERC ¶ 61,198 (2018) (Order to Show Cause).

² On June 20, 2018, the Commission issued a notice designating the staff of the Office of Enforcement as non-decisional litigation staff in deliberations in this proceeding, with a list of named exceptions who would be decisional staff. *See* Notice of Designation of Commission Staff as Non-Decisional, 83 Fed. Reg. 29,781 (2018). The non-decisional litigation staff is referred to throughout this order as OE Litigation Staff.

§§ 35.41(a) and (b) (2018) by submitting false and misleading supply offers in violation of a Commission-approved Tariff and by submitting false or misleading information and/or omitting material information regarding Unit 4 in its communications with ISO-NE. The Commission further directed Footprint to show cause why it should not disgorge \$2,049,571 in Capacity Supply Obligation payments it received during the Relevant Period and why it should not be assessed a civil penalty in the amount of \$4,200,000.

3. The Order to Show Cause stated that Footprint could, within 30 days, elect to proceed pursuant to section 31(d)(3) of the Federal Power Act (FPA).³ In the case of a civil penalty where a respondent has elected to proceed under FPA section 31(d)(3), the Commission shall promptly assess such penalty, and, if the penalty is not paid within 60 days of the assessment, the Commission shall institute an action in the United States district court for an order affirming the assessment. The Order to Show Cause allowed OE Litigation Staff to file a reply within 30 days of Footprint's Answer.

II. Responsive Pleadings

4. On July 13, 2018, Footprint submitted a notice of its election under FPA section 31(d)(3) and the Order to Show Cause electing a penalty assessment in the event the Commission found a violation. On August 2, 2018, as amended on August 3, 2018, Footprint filed its Answer.

5. The Answer argues, *inter alia*, that OE Litigation Staff ignored Unit 4's start-up and ramp time and the related impact on fuel consumption.⁴ Footprint states that, on any day that Unit 4 had not recently run, it would require 16 hours to start and reach its EcoMin level of 160 MW, during which it would consume only 745 barrels of oil.⁵ Footprint states that Unit 4 would require an additional 90 minutes to ramp to its EcoMax level, during which oil consumption would continue to remain below the rate it would attain during full, EcoMax generation.⁶ Footprint argues that, given the 17.5-hour start-up and ramping period, even if ISO-NE directed Unit 4 to begin the start-up process immediately at 1:00 p.m., the earliest that the unit could be expected to be up and running at EcoMax would be 6:30 a.m. the next day. Therefore, even if the unit ran at full-load for the remainder of the day, it still would only run at EcoMax for 17.5 hours, not the full

³ Order to Show Cause, 63 FERC ¶ 61,198 at P 5.

⁴ Answer at 51.

⁵ *Id.*

⁶ *Id.* at 51-52.

24 hours that OE Litigation Staff assumed.⁷ Footprint states that OE Litigation Staff failed to take account of these lower consumption levels and instead double-counted the oil consumption during start-up by adding a quantity representing consumption for 16 hours of generation at the EcoMax level to the 745 barrels that would actually be consumed.⁸ Footprint claims that, using OE Litigation Staff's own math, Unit 4 was unavailable to run at EcoMax for only 1.79 to 5.18 hours per day from June 26, 2013 through July 15, 2013.⁹ However, Footprint asserts, if notification, start-up and ramp time, as well as ISO-NE's actual market schedule, is properly taken into account, Unit 4 would require 6.5 hours just to reach EcoMax.¹⁰ Therefore, Footprint argues that correcting for these purported OE Litigation Staff errors reduces the unit's fuel requirements to a level that renders the available supply sufficient to meet the offers submitted in the ISO-NE market.¹¹

6. On September 19, 2018, OE Litigation Staff filed the OE Litigation Staff Reply, which states that Footprint's Answer presented a new defense relating to the start-up requirements of Unit 4 that Footprint had not fully raised either in its response to preliminary findings or in its section 1b.19 response.¹² OE Litigation Staff now agrees with Footprint that Footprint's conduct from June 27 through July 17, 2013 does not violate the Tariff provisions and Commission regulations at issue here.¹³

7. OE Litigation Staff explains that, "when qualified by the start-up requirements, the overall offer submitted each day by Footprint from June 27 through July 17, 2013 (the Cold Start Period) was achievable and thus was not inaccurate."¹⁴ OE Litigation Staff states that it reaches a similar conclusion regarding the potential violations of 18 C.F.R.

⁷ *Id.*

⁸ *Id.* at 52.

⁹ *Id.* at 53 & n.155.

¹⁰ *Id.* at 53.

¹¹ *Id.* at 53-54.

¹² OE Litigation Staff Reply at 1.

¹³ *Id.*

¹⁴ *Id.* at 11.

§§ 35.41(a) and (b) during the Cold Start Period.¹⁵ OE Litigation Staff explains that, because of the cold start-up requirements, Unit 4 would have had just enough fuel to run the remaining hours of the 24-hour Operating Day at EcoMax because it only needed to run the remaining 17.5 hours of the day and, per OE Litigation Staff's calculations, it had sufficient fuel to run between 18.82 hours and 22.21 hours.¹⁶ In light of the now more limited scope and nature of the alleged violations, OE Litigation Staff recommends that the Commission vacate the Order to Show Cause and assess no penalty.¹⁷

8. On September 26, 2018, Footprint filed a reply stating that it has no objection to vacating the Order to Show Cause. Footprint states it would also support issuing a brief order summarily finding, in light of the submissions made by Footprint and OE Litigation Staff, that Footprint has in fact made the requisite showing that no further action should be taken and the proceeding is terminated.¹⁸ Substantively, in its reply, Footprint continues to contest OE Litigation Staff's remaining alleged violations that Footprint violated the Tariff and Commission regulations for the period July 18 to July 25, 2013.¹⁹

III. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Footprint's September 26, 2018 reply because it provided information that assisted us in our decision-making process.

IV. Commission Determination

10. In light of the submissions made by Footprint and OE Litigation Staff, as well as OE Litigation Staff's recommendation not to pursue the remaining alleged violations, we terminate the proceeding in this docket. In doing so, the Commission makes no findings of fact or conclusions of law concerning the merits of any issues in the proceeding, either procedural or substantive.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13.

¹⁷ *Id.* at 14, 24.

¹⁸ Footprint September 26, 2018 Reply at 2.

¹⁹ *Id.* at 2-3.

The Commission orders:

The proceeding initiated by the Order to Show Cause in this docket is hereby terminated and this proceeding is closed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.