

171 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

ISO New England Inc.

Docket Nos. ER20-739-000
ER20-739-001

ORDER ACCEPTING PROPOSED RATE SCHEDULE

(Issued May 26, 2020)

1. On January 6, 2020, as amended on March 27, 2020, pursuant to section 205 of the Federal Power Act (FPA),¹ ISO New England Inc. (ISO-NE) submitted proposed Schedule 17 to its Open Access Transmission Tariff (OATT) that provides a cost recovery mechanism for critical infrastructure protection (CIP) costs incurred by facilities that ISO-NE identifies as critical to the derivation of Interconnection Reliability Operating Limits (IROL).² As discussed below, we accept the proposed rate schedule, to become effective March 6, 2020, as requested.³ As also discussed below, we find that Schedule 17 permits recovery only of CIP costs incurred on or after the effective date of a section 205 filing made by an IROL-Critical Facility Owner to recover such costs.

I. Background

2. On November 22, 2013, in Order No. 791, the Commission approved version 5 of the North American Electric Reliability Corporation (NERC) CIP Cyber Security

¹ 16 U.S.C. § 824d (2018).

² Capitalized terms not defined herein are used as they are defined in the ISO-NE Transmission, Markets and Services Tariff (ISO-NE Tariff). *See* ISO-NE Tariff, § I.2 Rules of Construction; Definitions, § I.2.2 (117.0.0) (defining IROL as defined in Glossary of Terms in NERC Reliability Standards); *see also* NERC, Glossary of Terms in NERC Reliability Standards (Jan. 2, 2020), https://www.nerc.com/pa/Stand/Glossary%20of%20Terms/Glossary_of_Terms.pdf.

³ ISO New England Inc., ISO New England Inc. Transmission, Markets and Services Tariff, [Schedule 17, Schedule 17 Recovery of CIP Costs \(2.0.0\)](#).

Standards, which included a revised methodology for categorizing Bulk Electric System Cyber Assets that incorporated mandatory protections for all high, medium, and low impact Bulk Electric System Cyber Assets (CIP Reliability Standards).⁴ Pursuant to the implementation plan approved in Order No. 791, responsible entities had to achieve compliance by April 1, 2016, for provisions pertaining to medium impact assets.⁵ As relevant here, the CIP Version 5 Standards require responsible entities to identify and categorize each of their Bulk Electric System Cyber Systems according to specific criteria (low, medium, high) set forth in Attachment 1 – Impact Rating Criteria of CIP-002-5.1.

3. As the regional transmission organization for New England, ISO-NE is responsible for protecting the short-term reliability of the New England Control Area and planning and operating the system pursuant to reliability standards established by the Northeast Power Coordinating Council, Inc. and NERC.⁶ ISO-NE is also the NERC Reliability Coordinator for the New England Reliability Coordinator Area/Balancing Authority Area.⁷

4. ISO-NE states that it designates certain generation and transmission facilities as IROL-Critical Facilities pursuant to applicable NERC Reliability Standards and system operating procedures.⁸ ISO-NE explains that, once ISO-NE gives them this designation, the IROL-Critical Facilities must comply with the NERC CIP Reliability Standards for the medium impact category. ISO-NE states that it has been identifying transmission facilities since 2013 and generation facilities since 2014 as IROL-Critical Facilities.⁹

5. ISO-NE states that, in most cases, the owners or operators of IROL-Critical Facilities incur significant incremental costs to achieve compliance as compared to other resources or facilities that are only required to meet the requirements of the low impact

⁴ *Version 5 Critical Infrastructure Protection Reliability Standards*, Order No. 791, 145 FERC ¶ 61,160, at PP 41, 87 (2013), *order on clarification and reh'g*, Order No. 791-A, 146 FERC ¶ 61,188 (2014).

⁵ *See* Order No. 791-A, 146 FERC ¶ 61,188 at PP 10-12.

⁶ ISO-NE Filing at 2-3.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ *Id.* at 5 (citing Testimony of Dean L. LaForest at 4-5).

standards.¹⁰ ISO-NE further states that those additional costs are not currently recoverable under the ISO-NE Tariff.

II. Proposed Schedule 17

6. In proposed Schedule 17, ISO-NE provides a mechanism for IROL-Critical Facility Owners to recover costs incurred to comply with IROL-CIP Reliability Standards following Commission acceptance of an owner's individual FPA section 205 filing to recover those costs.¹¹

7. ISO-NE explains that certain procedural and information requirements incorporated in proposed Schedule 17 are intentionally designed to provide structure for, and to facilitate and narrow the scope of, the IROL-CIP Facility Owners' FPA section 205 filings for recovery of such costs and thus reduce potential controversy regarding such filings.¹² ISO-NE explains that proposed Schedule 17 includes the following: (1) section 1, which discusses ISO-NE's process for designating and notifying IROL-Critical Facilities; (2) section 2, which discusses the eligibility requirements for cost recovery through Schedule 17, including pre-filing requirements and parameters for IROL-Critical Facility Owners' individual FPA section 205 filings; (3) section 3, which describes ISO-NE's authorization to charge and disburse Commission-accepted IROL-CIP costs and the allocation of those costs to Transmission Customers; and (4) Attachment A, which lists the cost categories associated with compliance with NERC CIP Reliability Standards applicable to medium impact Bulk Electric System Cyber Systems to standardize individual IROL-Critical Facility Owners' FPA section 205 filings.¹³

8. Section 2.2(A) of proposed Schedule 17 states, in relevant part, that "IROL-CIP Costs, including capital, operation and maintenance, and associated administrative and regulatory costs, are recoverable only to the extent they . . . are incurred by the IROL Critical Facility Owner *during the period in which the subject facility is designated as an IROL-Critical Facility.*"¹⁴ Proposed Schedule 17 does not explicitly state that only

¹⁰ *Id.* at 6 (citing Testimony of Jonathan B. Lowell at 7).

¹¹ ISO-NE Filing at 7-8.

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ ISO-NE Tariff, Schedule 17, § 2.2(A) (Recovery of CIP Costs) (2.0.0) (emphasis added).

prospective costs (i.e., costs occurring from the effective date of the individual FPA section 205 filings going forward) are eligible for recovery.

9. ISO-NE states that, under proposed Schedule 17, it will act as agent to bill, collect, and remit to designated IROL-Critical Facility Owners their Commission-accepted incremental costs for compliance with the NERC CIP Reliability Standards for medium impact assets. ISO-NE explains that, in turn, it will charge those costs to transmission customers receiving Regional Transmission Service after an IROL-Critical Facility owner notifies ISO-NE of a Commission order accepting the owner's requested IROL-CIP costs. ISO-NE states that proposed section 3.2 sets out a formula for calculating the charge to each transmission customer. Under the proposal, each transmission customer will pay a *pro rata* share of the total IROL-CIP costs in a month, based on the customer's monthly Regional Network Load or average monthly Through or Out Service reservation.¹⁵ ISO-NE requests a March 6, 2020 effective date.¹⁶

III. Notices of Filings and Responsive Pleadings

10. Notice of ISO-NE's filing was published in the *Federal Register*, 85 Fed. Reg. 1308 (Jan. 10, 2020), with interventions and protests due on or before January 27, 2020. Maine Public Utilities Commission and Massachusetts Department of Public Utilities filed notices of intervention. Brookfield Renewable Trading and Marketing LP; Calpine Corporation (Calpine); Cross-Sound Cable Company, LLC (Cross-Sound Cable); Dominion Energy Services, Inc.; Eversource Energy Service Company; Exelon Corporation; FirstLight Power Inc. (FirstLight Power); IROL-Critical Facility Owners;¹⁷ Massachusetts Attorney General Maura Healey; National Grid; New England Power Pool Participants Committee (NEPOOL); New England States Committee on Electricity (NESCOE); NRG; PSEG Companies;¹⁸ Public Citizen, Inc.; Retail Energy Supply Association; The United Illuminating Company; and Vistra Energy filed timely motions to intervene. NextEra filed a motion to intervene out of time. Calpine, Cross-Sound

¹⁵ ISO-NE Filing at 12.

¹⁶ *Id.* at 14.

¹⁷ IROL-Critical Facilities Owners consist of Cogentrix Energy Power Management, LLC; Cross-Sound Cable; FirstLight Power; NextEra Energy Resources, LLC (NextEra); NRG Power Marketing LLC (NRG); and Vistra Energy Corp. and Dynegy Marketing and Trade, LLC (Vistra Energy).

¹⁸ PSEG Companies consist of PSEG Power Connecticut LLC; PSEG Power LLC; and PSEG Energy Resources & Trade LLC.

Cable, IROL-Critical Facility Owners, NEPOOL, and NESCOE filed comments. On February 11, 2020, IROL-Critical Facility Owners, ISO-NE, and NESCOE filed answers.

11. On February 26, 2020, Commission staff issued a deficiency letter, requesting that ISO-NE explain whether it intends section 2.2(A)(i) of proposed Schedule 17 to allow the recovery of costs incurred prior to the requested effective date of March 6, 2020, and, if it did, to explain how this cost recovery would be consistent with the filed rate doctrine and the rule against retroactive ratemaking. On March 27, 2020, ISO-NE submitted its response.¹⁹ Notice of the deficiency response was published in the *Federal Register*, 85 Fed. Reg. 18,571 (Apr. 2, 2020), with interventions and protests due on or before April 17, 2020. IROL-Critical Facility Owners filed comments. NESCOE filed an answer.

IV. Comments and Answers

12. NEPOOL states that it does not support the filing because ISO-NE's proposed Schedule 17 garnered 63.84% of the eligible votes in favor, below the 66.67% threshold required for NEPOOL to formally support the filing.²⁰ However, NEPOOL notes that, over the past several years, some NEPOOL participants (primarily generators) have sought revisions to the OATT to allow cost recovery for certain CIP costs that these participants maintain are not recoverable in the markets. The other commenters²¹ generally support ISO-NE's proposal to provide cost recovery for the IROL-Critical Facility Owners.

13. Two commenters, IROL-Critical Facility Owners and NESCOE, seek clarification of the scope of the cost recovery. IROL-Critical Facility Owners contend that IROL-Critical Facilities are entitled to seek recovery of all historic costs since being designated

¹⁹ ISO-NE did not include the Associated Filing Identifier at the record level in its amended filing, which resulted in two versions of the tariff record remaining open. Thus, the tariff record filed in Docket No. ER20-739-000 is rejected as moot. *See FERC Staff's Responses to Discussion Questions, Tariff Record Related Codes*, Questions 28 at 29 for the need to provide a complete set of Associated tariff record information; and the *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* at 31, for the definitions of the Associated record data elements.

²⁰ NEPOOL Comments at 1-2.

²¹ These commenters are Calpine, Cross-Sound Cable, IROL-Critical Facility Owners, and NESCOE.

as IROL-Critical.²² IROL-Critical Facility Owners argue that the Energy Policy Act of 2005 (EPAct)²³ provided notice of the recovery of historic costs because it permits the recovery of all prudently incurred costs necessary to comply with the mandatory Reliability Standards issued pursuant to FPA section 215.²⁴ They assert that “all” costs include all historic costs, not only going-forward costs. IROL-Critical Facility Owners point out that, when the Commission implemented the statute in Order No. 672, the Commission stated that, “[p]ursuant to section 1241 of EPAct, the Commission will allow recovery of all costs prudently incurred to comply with the Reliability Standards.”²⁵ They observe that, in Order No. 679, the Commission noted a rebuttable “presumption in [an FPA] section 205 proceeding that costs are prudently incurred.”²⁶ IROL-Critical Facility Owners add that they should not be penalized for “the Commission’s deference to the NEPOOL review process,” which caused the delay in filing this proposal.²⁷

14. IROL-Critical Facility Owners state that the assurance of cost recovery to comply with Reliability Standards in Order No. 672 and the FPA section 205 rebuttal presumption of prudently incurred costs are important because the process and timeline for developing and changing Reliability Standards is different from a typical cost

²² IROL-Critical Facility Owners Comments at 10-14; IROL-Critical Facility Owners Answer at 1-8.

²³ Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594 (2005).

²⁴ IROL-Critical Facility Owners Answer at 3 (citing 16 U.S.C. § 824s(b)(4)), 7-8.

²⁵ IROL-Critical Facility Owners Comments at 13 (citing *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104, at P 259, *order on reh’g*, Order No. 672-A, 114 FERC ¶ 61,328 (2006)); *see also* IROL-Critical Facility Owners Answer at 4.

²⁶ IROL-Critical Facility Owners Answer at 4 (citing *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, at P 347, *order on reh’g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007)).

²⁷ IROL-Critical Facility Owners Comments at 13-14 (citing *New England Power Pool*, 92 FERC ¶ 61,020 (2000)).

recovery proceeding.²⁸ They argue that the structure of the FPA and the implementing orders provide certainty to customers that the public utilities that serve them will take necessary steps to provide reliable service in compliance with mandatory Reliability Standards, knowing that they will be able to subsequently recover costs incurred to do so.²⁹ IROL-Critical Facility Owners assert that this scenario exists because they have incurred CIP compliance costs as medium impact facilities since late 2014 and early 2015 when ISO-NE designated them as critical to determine IROL.

15. Finally, IROL-Critical Facility Owners assert that neither the filed rate doctrine nor the related rule against retroactive ratemaking is implicated by including costs incurred prior to the proposed Schedule 17 because: (1) the proposal does not seek to charge a rate for IROL-Critical Facilities service that differs from a rate that is already on file for that service; and (2) the Commission's acceptance of proposed Schedule 17 and the associated FPA section 205 filings to implement it will not alter a rate retroactively because there is no existing rate to alter.³⁰

16. Conversely, NESCOE conditionally supports proposed Schedule 17, subject to the Commission clarifying, among other things, that only going-forward costs are eligible for recovery under proposed Schedule 17.³¹ NESCOE argues that IROL-Critical Facility Owners should not be able to seek recovery of CIP costs incurred prior to their FPA section 205 filings, including sunk costs for investments made prior to their section 205 filings made in accordance with Schedule 17. NESCOE states that this is the first time that a proposal for the recovery of these costs has been filed with the Commission and to allow for recovery of past costs would violate the rule against retroactive ratemaking. NESCOE claims that neither exception to the rule against retroactively charging rates that differ from those that were on file during the relevant time period (i.e., (i) when a court invalidates the set rate as unlawful and (ii) when the filed rate is not a number but a formula that varies as the incorporated factors change over time) applies here.³²

²⁸ IROL-Critical Facility Owners Answer at 4.

²⁹ *Id.* at 4-5 (citing *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 690 (1923)).

³⁰ *Id.* at 6.

³¹ NESCOE Comments at 9-11; NESCOE Answer at 6-8.

³² NESCOE Comments at 10 n.31 (citing *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22-23 (D.C. Cir. 2014)).

17. In its answer, ISO-NE states that it does not take a position on the recovery of historic costs, noting that “the proposed rules intentionally avoid foreclosing the potential for IROL-Critical Facility Owners to address this issue in their individual filings.”³³ ISO-NE supports the Commission clarifying this issue, arguing that such clarification does not require modifications to proposed Schedule 17.³⁴ ISO-NE asks the Commission to accept its filing without suspension, hearing, or condition.

18. Commenters raise several other concerns. NESCOE asks the Commission to clarify that: (1) proposed Schedule 17 is limited in scope and does not set broad precedent; (2) IROL-Critical Facility Owners may not recover costs subject to recovery under another ISO-NE Tariff provision or any other mechanism; and (3) costs eligible under proposed Schedule 17 must be solely and directly related to ISO-NE’s designation.³⁵ Cross-Sound Cable asks the Commission to clarify that proposed Schedule 17 permits IROL-Critical Facility Owners to adopt a historic formula rate, which allows cost recovery without the calculation of a return or other various inputs and would provide sufficient transparency and would minimize the administrative burden.³⁶ IROL-Critical Facility Owners state that they also prefer formula rate treatment.³⁷ NESCOE states that, while it appreciates and generally shares the administrative and resource concerns expressed, it cautions the Commission against taking any action at this time that would modify the proposed Schedule 17 process.³⁸ NESCOE asks the Commission instead to encourage ISO-NE to evaluate its Schedule 17 construct *after* having the benefit of experience of implementing the process.³⁹ In its answer, ISO-NE asks the Commission to reject Cross-Sound Cable’s and IROL-Critical Facility Owners’ requests to establish a formula rate as a matter of law because they have not shown that proposed Schedule 17 is unjust and unreasonable.⁴⁰ ISO-NE notes that Cross-Sound Cable and IROL-Critical Facility Owners may use their preferred approach in their

³³ ISO-NE Answer at 8-9.

³⁴ *Id.* at 9.

³⁵ NESCOE Comments at 3-9.

³⁶ Cross-Sound Cable Comments at 6-7.

³⁷ IROL-Critical Facility Owners Comments at 6-10.

³⁸ NESCOE Answer at 5.

³⁹ *Id.*

⁴⁰ ISO-NE Answer at 5-7.

proposed FPA section 205 filings, even if the Commission accepts Schedule 17, as proposed.⁴¹

V. Deficiency Letter, Response, and Comments

19. In its deficiency letter, Commission staff requested that ISO-NE explain if it intends section 2.2(A)(i) of proposed Schedule 17 to allow the recovery of costs incurred prior to the requested effective date of March 6, 2020, and, if it did, to explain how this cost recovery would be consistent with the filed rate doctrine and the rule against retroactive ratemaking.

20. In its deficiency response, ISO-NE states that IROL-Critical Facility Owners must demonstrate that the costs proposed for recovery through Schedule 17 are just and reasonable and thus will have to establish that their proposals are consistent with the filed rate doctrine and the rule against retroactive ratemaking.⁴² ISO-NE further states that, to the extent any IROL-Critical Facility owner seeks to recover any costs incurred prior to the requested effective date of March 6, 2020, the IROL-Critical Facility owner bears the burden to demonstrate that such a request complies with the filed rate doctrine and the rule against retroactive ratemaking in its FPA section 205 filing.⁴³

21. In its comments to the deficiency response, IROL-Critical Facility Owners reiterate that there is no basis in law to reject recovery of historic compliance costs because, in FPA section 219, Congress directed the Commission to ensure that entities are able to recover all prudently incurred costs necessary to comply with mandatory Reliability Standards, there is no current rate on file, and all parties had sufficient notice that rates could be changed to allow for all prudently incurred IROL-Critical compliance costs.⁴⁴ They add that ISO-NE stakeholders also had notice because, starting in 2015, ISO-NE stakeholders engaged in years of public discussions focused on developing a cost recovery mechanism to enable IROL-Critical Facilities to recover prudently incurred costs necessary to meet their higher reliability requirements. They argue that the inability to recover historic costs will have a deleterious effect.⁴⁵ They state that, depending on the facility in question, IROL-Critical Facility Owners have incurred approximately \$300,000 to \$2.1 million in initial costs upon initial designation and approximately

⁴¹ *Id.* at 7-8.

⁴² ISO-NE Deficiency Response at 2.

⁴³ *Id.* at 3.

⁴⁴ IROL-Critical Facility Owners Deficiency Response Comments at 3-5.

⁴⁵ *Id.* at 6.

\$100,000 to \$800,000 in annual costs for ongoing compliance. Thus, they contend that, if such facilities were designated medium impact facilities in 2015 and remained so designated today, such facilities would have incurred approximately \$700,000 to \$5.3 million in compliance costs through 2019. IROL-Critical Facility Owners ask the Commission to make a generic finding on historic costs to avoid litigating this common issue in the individual dockets established for each facility seeking cost recovery. They add that, if these FPA section 205 filings are set for hearing like the reactive power rate filings, it could leave the determination of a legal doctrine to a settlement or multiple evidentiary hearings.

22. In its response to IROL-CIP Owners' comments, NESCOE argues that (1) Schedule 17 and the associated FPA section 205 filings are an existing rate on file that cannot be altered retroactively and (2) ISO-NE stakeholders were not on notice since 2015 that there would be such a cost recovery mechanism.⁴⁶

VI. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notices of intervention and 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 NextEra's late-filed motion to intervene given its interest in the proceeding, the early stage of this 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) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept IROL-Critical Facility Owners', ISO-NE's, and NESCOE's answers because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

26. We find that proposed Schedule 17 provides a just and reasonable cost recovery mechanism that will allow IROL-Critical Facility Owners to make FPA section 205

⁴⁶ NESCOE Answer to IROL-Critical Facility Owners Deficiency Response Answer at 2-4.

filings to recover costs incurred to comply with IROL-CIP Reliability Standards. Therefore, we accept the filing effective March 6, 2020, as requested.

27. We disagree with arguments that the proposed revisions would violate the filed rate doctrine or rule against retroactive ratemaking. Section 2.2(A) of proposed Schedule 17 would permit IROL-Critical Facility Owners to make FPA section 205 filings to recover costs incurred by the IROL Critical Facility Owner *during the period in which the subject facility is designated as an IROL-Critical Facility*. While the parties dispute the meaning of the italicized language, that language is appropriately read in conjunction with the requirement that IROL-Critical Facility Owners submit individual FPA section 205 filings to recover such costs. Under FPA section 205, rate changes may be prospective only, and, under the rule against retroactive ratemaking, the Commission is prohibited “from imposing a rate increase for [power] already sold”⁴⁷ or “adjusting current rates to make up for a utility’s over- or undercollection in prior periods.”⁴⁸ Thus, we find that, read in context with the remainder of section 2.2(A), the italicized language would allow IROL-Critical Facility Owners to recover only those costs incurred on or after the effective date of the relevant individual FPA section 205 filing.

28. Although Cross-Sound Cable and IROL-Critical Facility Owners state that they prefer formula rate treatment, they have not demonstrated that proposed Schedule 17 is unjust and unreasonable because it does not establish a formula rate. Therefore, we reject their requests. We note, however, that IROL-Critical Facility Owners may seek formula rate treatment in their proposed FPA section 205 filings, as ISO-NE has explained. In response to arguments that eligible costs under proposed Schedule 17 must be solely and directly related to ISO-NE’s designation and not recoverable under another ISO-NE Tariff provision or any other mechanism, we note that any such concerns will be considered in the individual FPA section 205 filings that come before the Commission.

⁴⁷ *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992).

⁴⁸ *Id.* at 71 n.2.

The Commission orders:

ISO-NE's proposed Schedule 17 is hereby accepted, effective March 6, 2020, as requested, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.