

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket No. ER19-1428-003

(Issued June 18, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because ISO New England Inc. has failed to demonstrate that the Inventoried Energy program will actually improve the region's fuel security or that any improvement, if it occurs, is likely to be worth the up to \$300 million it will cost consumers. I am particularly troubled by the evidence in the record that the program will hand out tens of millions of dollars¹ to nuclear, coal, and hydropower generators without any indication that those payments will cause the slightest change in those generators' behavior. Handing out money for nothing is a windfall, not a just and reasonable rate.

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2. I agree that New England has a fuel security issue. During a handful of especially cold winter days when gas demand for residential and commercial heating peaks, the region's natural gas transportation capacity can become constrained, potentially limiting the natural gas supply available to the gas-fired power plants that would otherwise help power the grid. On those days, the region tends to substitute oil and natural gas from liquefied natural gas (LNG) import terminals for natural gas that is typically delivered through the constrained pipelines.² But because oil and LNG are expensive and rarely relied upon during normal conditions, 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

¹ 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); *infra* note 7.

² The fuel substitution we have observed in recent years has been the result of least-cost dispatch, not an inability to acquire natural gas. 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 cheaper to do so.

these cold winter days has historically been low—and the region has never actually run out of oil or natural gas—the consequences of not being able to generate enough electricity make the region’s fuel security an issue we must take seriously.

3. 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, its 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 fuel security.

4. 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 resources³ for maintaining “inventoried energy”—which is, essentially, onsite fuel that the resource can convert into electricity⁴—during two winters: 2023-2024 and 2024-2025. A resource is eligible to participate in the program 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,⁵ 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. The bottom line is that, under either option, the program pays participating resources for having up to three days’-worth of “inventoried energy” onsite during certain conditions.

5. Although the simplicity of ISO New England’s proposal may, at first, seem appealing, the program contains a number of what should be 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 such a problem by making the region more fuel secure. Without this analysis, there is no foundation to evaluate

³ 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.

⁴ *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.*

⁵ 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.

whether the program will achieve its intended purpose or do so in a manner and at a cost that is just and reasonable. The Commission addresses this concern only obliquely, asserting that it is not required to perform formal cost-benefit analysis.⁶ Even so, that does not excuse the Commission from making any effort to reckon with whether the benefits of the program come even remotely close to justifying its costs nor does it permit the Commission to authorize a multi-hundred million dollar rate increase without knowing whether it will meaningfully improve regional fuel security.

6. Short of evidence, 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.

7. Let's begin with the "incentive" to keep fuel onsite. As an initial matter, at least a third of the capacity eligible to receive payments through the Inventoried Energy program comes 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").⁷ That means that at least \$40 million dollars a year is likely to be spent on resources, such as nuclear, coal, and hydro generators, that will not change their behavior in response to those payments. That is an utter waste of consumers' money. Based on the record before us, it would seem that burning that money⁸ might contribute as much to fuel security as wasting it on entities that we know will not do anything differently.

8. 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 because doing so makes the program "technology-neutral."⁹ But the Commission has rejected that argument in previous orders addressing a similar ISO New England proposal

⁶ *ISO New England Inc.*, 171 FERC ¶ 61,235, at P 58 (2020) (Order).

⁷ New Hampshire Entities Protest at 11. That figure assumes that natural gas-only resources participate in the program. *Id.* As explained below, *infra* P 9, it is unlikely that there will be much participation by those resources and it is possible there will not be any. To the extent natural gas resources do not participate, or participate on only a small scale, an even larger percentage of the program's total cost would compensate resources that will not change their behavior.

⁸ After all, a refuse generator, which burns waste to produce electricity, is eligible to participate in the Inventoried Energy program. *See supra* note 3.

⁹ ISO New England Transmittal Letter at 5-7.

regarding fuel security.¹⁰ 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 actions¹¹—a statement that strongly suggests that the former category of resources should not be receiving the same payments as the latter (or any payments at all for that matter). 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.”¹² Accordingly, the Commission’s own precedent weighs against any conclusion that the pretense of fuel neutrality justifies paying money for nothing.

9. In addition, the record suggests that the Inventoried Energy program’s design will dissuade certain other resources from participating. 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.¹³ 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”

¹⁰ These orders addressed the Winter Reliability Program, which is discussed in greater detail below. *See infra* P 18.

¹¹ *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.”).

¹² *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. That is a distinction without a difference for our purposes. As noted, both the Winter Reliability Program and the Inventoried Energy program are meant to get at the same issue. 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 will not do anything differently in response to a particular payment are not similarly situated to those that will—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.

¹³ ISO New England Transmittal Letter at 11.

payment associated with a backup LNG contract, meaning that, at that price, resources will be economically indifferent about whether to enter such a contract.¹⁴ 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, however, 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.¹⁵ 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.

10. 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 benefit the region's fuel security.¹⁶ 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.¹⁷ ISO New England's willingness to propose a program that will so plainly work at cross-purposes with the CASPR's substitution auction raises serious questions about the durability of the CASPR construct. But, even putting that fundamental concern aside, the ISO again does not point to any record evidence suggesting that the Inventoried Energy program will make a difference in any resource's

¹⁴ *Id.*

¹⁵ *See supra* P 2.

¹⁶ ISO New England Transmittal Letter at 8.

¹⁷ 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 a capacity obligation and retire through CASPR. In addition, Inventoried Energy payments will 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.

retirement decision. On the other hand, several commenters introduced persuasive evidence that those payments would not materially affect those decisions.¹⁸

11. In any case, 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 program will cost New England customers between \$200 and \$300 million over just two years.¹⁹ But the record does not provide a basis for making a reasoned assessment of whether the cost of that purported contribution 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 "inventoried energy" it may procure will satisfy any need that New England may or may not have.²⁰ And without that information, we simply cannot assess what benefit, if any, New England customers will receive from the program or whether the cost for that benefit is just and reasonable.

12. 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

¹⁸ See New Hampshire Entities Protest at 5, 8-9; NRG Protest at 8; New England Power Generators Association Protest at 6-7.

¹⁹ This estimate may understate the actual cost because it does not include the impact to energy market offers of eligible resources increasing their bids to reflect the opportunity cost of consuming what could be "inventoried energy." See ISO New England Transmittal at 21. As the ISO explained in its response to Commission Staff's request for additional information, it did not analyze 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.

²⁰ See, *e.g.*, NRG Deficiency Letter Response Comments at 5 (observing that ISO New England did not even estimate how much incremental fuel supply would have been obtained had the program been in place in one or more previous winters).

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 a program is effective, both in delivering the product in question and in ensuring that customers get what they pay for.

13. 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 for a forward contract, 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.²³

14. In fairness, the Commission’s statutory responsibility is to ensure that rates are just and reasonable and not unduly discriminatory or preferential²⁴—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.

15. The Inventoried Energy program, however, does not provide any such protections for consumers. Instead, by compromising market principles without creating any corresponding protections, the Inventoried Energy program lacks the benefits of either a market-based or a cost-of-service ratemaking methodology. Such a worst-of-both-worlds approach, especially in the absence of any clear benefits, is a recipe for unjust and unreasonable rates, not an example of how to take fuel security seriously.

²² ISO New England Transmittal Letter at 5.

²³ The Commission’s suggestion that the Inventoried Energy program is market-like because ISO New England estimated what a contract for LNG would cost and then offered to purchase all “inventoried energy” at that price is borderline laughable. Order, 171 FERC ¶ 61,235 at P 63. An administratively determined single price that is available to an unlimited quantity of resources without any semblance of competition is not a market or anything even remotely close to it.

²⁴ 16 U.S.C. § 824d(a).

16. ISO New England suggests that the Inventoried Energy program is just and reasonable notwithstanding these shortcomings because a sound market design would take too long to develop and the program will last only two years: 2023-2024 and 2024-2025.²⁵ And it further suggests that it is justified in rushing to implement an operational solution that will not take effect for more than three years because it expects that the extra money associated with the program will potentially forestall the retirement of otherwise uneconomic generators in the capacity auctions associated with the 2023-2024 and 2024-2025 delivery years. 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 a few hundred million dollars. Without such evidence, there is simply no excuse for rushing a half-baked solution that will not take effect until the middle of the decade.

17. 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).²⁶ PFP was designed to improve reliability, including fuel security, by creating an incentive for resources to be available when called upon, meaning that it rewards resources for the services that they actually provide, instead of their attributes. We have heard a lot recently about the Commission's purported reverence for markets above all else.²⁷ And yet, rather than waiting to gather evidence on how PFP's market-based approach works in practice²⁸ or seeking to further tailor the PFP parameters to address fuel security, ISO New England is now proposing a

²⁵ ISO New England Transmittal Letter at 4; ISO New England April 30, 2019 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, for example, was originally proposed to last one year and ended up being in place in one form or another for four.

²⁶ 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) (discussing PFP).

²⁷ See, e.g., *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, at P 7 (2019), *reh'g denied* 171 FERC ¶ 61,035 (2020).

²⁸ The Commission approved a phased-in approach to the PFP rewards and penalties that does not fully take effect until 2024. *ISO New England Inc. & New England Power Pool*, 147 FERC ¶ 61,172 at P 6 n.8.

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.²⁹ Although Commission Staff raised this concern in seeking additional information from ISO New England,³⁰ the ISO did not directly respond, instead insisting that the Inventoried Energy program and PFP address different issues and could potentially work together.³¹ But the *potential* for the two 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 likely.³² Similarly, today's order lacks any response to the argument that the Inventoried Energy program will undermine PFP's market-based approach, tersely noting only that PFP may “not fully address concerns about adequately encouraging energy supply arrangements.”³³

18. 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. 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.³⁴ 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

²⁹ See, e.g., Maine Public Utility Commission Protest at 6-7.

³⁰ Commission Staff Deficiency Letter at 9.

³¹ ISO New England Deficiency Letter Response at 11-12.

³² See Massachusetts Attorney General Protest at 13-14; Maine Public Utility Commission Protest at 6-7.

³³ Order, 171 FERC ¶ 61,235 at P 119.

³⁴ 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.

Commission to evaluate whether the proposal might be effective and worth the cost—*i.e.*, whether it is just and reasonable.

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19. New England's fuel security is an important issue that deserves a serious solution. But the Inventoried Energy program is not that. Instead, it is an ill-conceived give away that acts as if throwing money at a problem is always just and reasonable. That willingness to spend customers' money without evidence of a commensurate benefit will make stakeholders, including both states and customers, suspicious of actions by the Commission and ISO New England that purport to address fuel security, potentially undermining more serious efforts to actually address the issue.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner