

Lessons From FERC New England Capacity Market Settlement

By **Ruta Skučas, Kimberly Frank and Jennifer Mersing** (July 29, 2022)

On June 28, the Federal Energy Regulatory Commission issued an order approving a stipulation and consent agreement stemming from an enforcement investigation concerning Salem Harbor Power Development LP.[1]

Around a week prior to FERC issuing its order, grid operator ISO New England Inc. issued a notice to the market regarding the anticipated settlement,[2] then issued a second statement shortly thereafter.[3]

FERC's order, and any related forthcoming settlements, illustrate the consequence of failing to exercise the diligence necessary to ensure the accuracy of information reported by a market participant to an independent system operator, or ISO, or a regional transmission organization, or RTO.

The order sends a strong signal regarding the amount of discretion that ISO and RTO staff may exercise in implementing the market rules of its organization's tariff.

Background

In 2016 and 2017, Salem Harbor was developing a 674 megawatt natural gas-fired power plant in Massachusetts. The project acquired a capacity supply obligation, or CSO, in the ISO-NE forward capacity market for the June 2017-May 2018 capacity commitment period during the eighth forward capacity auction, held in February 2014.

The project's expected commercial operation date was May 31, 2017, one day before the start of the 2017/2018 capacity commitment period.

New England CSOs are reliability and performance products that keep the lights on, and the FERC-approved market rules in the tariff require generators like Salem Harbor to commit capacity supplies three years ahead.

Under ISO-NE's capacity market rules, a project developer must provide updates to ISO-NE on the facility's development and progress until the facility reaches commercial operation. If the project will not be operational when the relevant capacity commitment period starts, it must cover its CSO for the time that its commercial operation is delayed by submitting a demand bid to purchase replacement capacity in an annual reconfiguration auction.[4]

If the developer does not submit a demand bid in the reconfiguration auction, the market rules provide that ISO-NE will submit a demand bid to cover the project's CSO for the entire yearlong capacity commitment period.

FERC's Decision

FERC's Office of Enforcement found that Salem Harbor "made false claims regarding the Project's schedule trajectory and omitted numerous important and relevant details



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regarding the status of the Project and ... delays."[5] The project did not reach commercial operation until after the 2017/2018 capacity commitment period ended.

Salem Harbor did not buy out its CSO, resulting in Salem Harbor collecting millions in capacity payments during the time that it was not running. In total, the project collected nearly \$105 million in capacity payments for the year. FERC alleged that Salem Harbor routinely provided inaccurate updates to ISO-NE regarding the project's development.

FERC found that Salem Harbor violated its obligations under FERC's duty of candor, which requires entities with market-based rate authority to "provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with ... Commission-approved independent system operators ... unless Seller exercises due diligence to prevent such occurrences."[6]

When Salem Harbor did disclose that the project might miss its commercial operation date, FERC further implies that ISO-NE staff allegedly discouraged Salem Harbor from submitting a demand bid in the reconfiguration auction.[7] The settlement discloses that, since 2010, ISO-NE routinely "exercised its judgment" by not requiring a project to bid into the reconfiguration auction if such project was only going to be a few months late in their development.[8]

The FERC order discusses the roles that Salem Harbor, its FERC regulatory attorney and ISO-NE staff played in Salem Harbor's failure to participate in the reconfiguration auction and its collection of capacity payments while the project was not operational.

The settlement provides for a \$17 million civil penalty, and disgorgement of about \$26.6 million in profits received from capacity sales, subject to Salem Harbor's pending bankruptcy proceeding. In the settlement and accompanying order, FERC states:

In recommending the appropriate remedy, Enforcement considered the roles that multiple individuals and entities played in ISO-NE not submitting a demand bid on DevCo's behalf into ARA3 [the last reconfiguration auction]. Neither the Agreement nor this Order asserts violations by any individual or any entity other than DevCo. However, the Commission reserves its right to make a determination as to the facts or issues of law that might give rise to any violation by any other such individual or entity.[9]

Lessons Learned

This matter raises several significant issues that power project developers must bear in mind. First, and most significantly, FERC's Office of Enforcement takes seriously a supplier's representations as to its ability to supply capacity products.

A project that is not able to meet its CSO for any reason, including project delays, must follow appropriate tariff pathways to remove those obligations. As discussed below, this is not the first FERC Office of Enforcement settlement involving ISO-NE CSOs.

Second, projects with market-based rate authorization — even if they are not yet operational — may be subject to regulatory obligations, including FERC's duty of candor rule. Project developers must be mindful of the point in time when regulatory compliance obligations become effective, including when they file for market-based rate authority or seek a CSO in an ISO or RTO market.

Third, ISO and RTO staff do not have boundless discretion in the exercise of their judgment,

and must follow the terms of the applicable tariff. Developers may be more reluctant to rely on informal comfort provided by ISO or RTO staff if that guidance appears contrary to the tariff, or involves potential tariff interpretations that could be construed in more than one way.

Fourth, attorneys representing developers must be mindful of their ethical obligations, particularly when serving as conduit for tariff-mandated information to ISOs and RTOs. Similarly, developers themselves must be aware of, and abide by, FERC's duty of candor.

FERC's Office of Enforcement highlights that Salem Harbor's equipment testing, commissioning and commercial operation date milestones submitted to ISO-NE were neither fulsome nor forthcoming. Updates were allegedly inaccurate or misleading, or omitted material information.

Similar Settlements

In the last few years, FERC's Office of Enforcement has signaled that it will take capacity market obligations seriously, and will investigate entities that are suspected of potentially violating market rules associated with their CSO. FERC recently issued three public settlements with entities holding ISO-NE CSOs.

On Sept. 28, 2018, FERC announced a settlement with Wheelabrator Claremont Co. LP, resolving assertions that WCC permanently closed its facility as of Sept. 30, 2013, but did not shed its CSO, and continued to receive payments through October 2014. FERC found this to be a violation of ISO-NE market rules.

On Jan. 5, 2021, FERC announced a settlement with Algonquin Power Windsor Locks LLC, resolving allegations that Windsor Locks did not fully comply with its ISO-NE CSO — which required it to offer its full output to the day-ahead and real-time energy markets — because it did not offer the entirety of its output each day, and the offers did not reflect the units' unit-specific operating characteristics.

A few days later, on Jan. 8, 2021, FERC announced a settlement with NRG Power Marketing LLC, resolving allegations that NRG submitted inaccurate static delist bids for two resources during the 11th forward capacity auction in 2017 for the 2020-21 capacity commitment period.

Market participants in ISO-NE with existing CSOs are permitted to submit static delist bids for resources for a year if they do not wish to offer them into the forward capacity market for a given year, but must provide accurate cost information for the facility. FERC's Office of Enforcement asserted that NRG provided inaccurate information in such static delist bids.

Conclusion

The Salem Harbor settlement highlights the importance of timely and accurate communications with an ISO or RTO — particularly when a resource holds a capacity supply obligation in a given market. Developers must remain mindful of compliance obligations throughout a project's lifecycle.

Given that capacity markets themselves have been a high priority to FERC, we expect that compliance with capacity market obligations will remain a high priority for FERC's Office of Enforcement.

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[1] Salem Harbor Power Development LP, 179 FERC ¶ 61,228 (2022) (Order).

[2] ISO New England Issues Statement Regarding FERC Office of Enforcement Investigation (June 23, 2022), available at https://www.iso-ne.com/static-assets/documents/2022/06/20220623_pr_ferc_oe_statement_final.pdf.

[3] ISO New England Issues Further Statement Regarding FERC Office of Enforcement Investigation (June 29, 2022), available at https://www.iso-ne.com/static-assets/documents/2022/06/20220629_pr_ferc_oe_further_statement_final.pdf.

[4] ISO-NE Tariff § III.13.3.4.

[5] Order at P 49.

[6] 18 C.F.R § 35.41(b).

[7] Order at PP 68, 70.

[8] Order at P 68.

[9] Order at P 91.