

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.)	
)	Docket No. ER23-1588
)	

REQUEST FOR REHEARING OF PUBLIC INTEREST ORGANIZATIONS

The Sierra Club, Union of Concerned Scientists and Conservation Law Foundation (collectively, “Public Interest Organizations”) respectfully request rehearing of the Commission’s August 4, 2023 Order Accepting Tariff Revisions.¹ The Public Interest Organizations submit this Request for Rehearing under Section 313(a) of the Federal Power Act² and Rule 713 of the Commission’s Rules of Practice and Procedure.³

The August 4 Order errs in failing to examine whether tripling the costs of the Inventoried Energy Program (IEP) is just and reasonable in light of the lack of evidence that IEP payments would incent oil and gas generators to procure more fuel than they would otherwise. The Order also errs in failing to consider new information about winter energy adequacy that is relevant to the need for the IEP, and thus to whether consumers would receive benefits proportionate to the enormous additional cost proposed by ISO New England (ISO-NE).

I. STATEMENT OF ISSUES

Pursuant to Rules 203(a)(7) and 713,⁴ Public Interest Organizations present the following identification of errors and statement of issues. The Order violated the Federal Power Act and

¹ *ISO New England Inc.*, 184 FERC ¶ 61,082 (Aug. 4, 2023).

² 16 U.S.C. § 825l(a).

³ 18 C.F.R. § 385.713.

⁴ *Id.* §§ 385.203(a)(7) and 385.713 (2018).

Administrative Procedures Act in finding that ISO-NE's revisions to the Inventoried Energy Program were just and reasonable. In particular:

1. The Order approves significantly increased incentive payments to oil and gas generators with no assurance that these incentives will change those generators' behavior in ways that improve reliability, contrary to the D.C. Circuit's order in *Belmont Mun. Light Dep't v. FERC* and to the Commission's own prior orders regarding the proper role of incentives.⁵
2. The Order's conclusion that the revised Inventoried Energy Program is just and reasonable was arbitrary and capricious, and not supported by substantial evidence, because the Commission failed to assess whether the benefits to consumers justified the costs, and failed to address arguments that the Inventoried Energy Program offered minimal benefits given new information regarding winter energy adequacy in the region.⁶

II. BACKGROUND

A. Inventoried Energy Program initial proposal

ISO-NE proposed the IEP in March 2019, asserting that an interim program was needed to ensure winter reliability while ISO-NE and its stakeholders worked on a longer-term solution.⁷ The purported need for measures to improve winter reliability rested primarily on ISO-NE's findings in the 2018 *Operational Fuel Security Analysis* that the region might have winter energy shortfalls under specific contingencies of unstated probability.⁸

⁵ *Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 186-87 (D.C. Cir. 2022); *ISO-NE and New England Power Pool Participants Committee*, 152 FERC ¶ 61,190, P 47 (Sept. 11, 2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁶ Administrative Procedures Act, 5 U.S.C. § 706(2); Federal Power Act, 16 U.S.C. § 824e; *Allegheny Power v. FERC*, 437 F.3d 1215, 1219 (D.C. Cir. 2006); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *Louisiana Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297 (D.C. Cir. 2014).

⁷ ISO-NE, Inventoried Energy Program, FERC Docket No. ER19-1428-000, at 4 (Mar. 25, 2019) ("IEP 2019 Filing").

⁸ *Id.* at 7.

The IEP was intended to incentivize “resources to take actions that increase their inventoried energy during periods of system stress,” under the theory that “these actions may improve the region’s winter energy security.”⁹ Under the IEP, any eligible resource that can show it has “inventoried energy”—in the form of on-site fuel or contracts for delivery of fuel—during defined extended cold snaps, would be compensated a set rate per MWh.¹⁰ Resource performance during cold snaps (i.e., the ability to generate electricity regardless of inventoried fuel) is not relevant to eligibility.

At the time of the 2019 filing, ISO-NE also conjectured that the program “might forestall the retirement (or out-of-market retention) of a resource that would be economic but for the absence of such compensation.”¹¹ However, ISO-NE acknowledged that it “[could not] guarantee . . . that the program will incent specific resources to take precise actions that improve winter energy security or deter any particular resource” from retiring.¹²

The Commission’s Office of Energy Market Regulation noted numerous defects in the IEP filing in a May 8, 2019 deficiency letter.¹³ Rather than cure any of these deficiencies, ISO-NE contended that it need not support its filing with detailed analysis because it considered the IEP a “directionally correct” interim measure.¹⁴ ISO-NE estimated that the program would cost

⁹ *Id.* (emphasis added).

¹⁰ *Id.* at 9-14.

¹¹ *Id.*, Testimony of Dr. Christopher Geissler at 5 (emphasis added).

¹² *Id.* at 7.

¹³ ISO New England Inc., Docket No. ER19-1428-000, Deficiency Letter from the Office of Energy Market Regulation to ISO New England, Inc., at 2 (May 8, 2019).

¹⁴ *See ISO New England Inc.*, ISO New England Response to Commission Request for Additional Information Regarding the Inventoried Energy Program, FERC Docket No. ER19-1428-000, at 1-2 (June 6, 2019).

as much as \$148 million annually, for the program winters of 2023-2024 and 2024-2025, for a total maximum cost of \$296 million.¹⁵

B. FERC approval and D.C. Circuit order

Due to a lack of quorum, the IEP filing went into effect by operation of law.¹⁶ While litigation over the IEP was pending, the Commission regained a quorum, and was able to issue an order on the filing in June 2020.¹⁷ After multiple requests for rehearing of the June 2020 order were denied by operation of law, four petitions for review were filed in the D.C. Circuit Court of Appeals.¹⁸ In June 2022, the court granted those petitions in part, and vacated that “portion of the Inventoried Energy Program that is arbitrary and capricious: the program’s inclusion of nuclear, biomass, coal, and hydroelectric generators”.¹⁹ The court concluded that “FERC’s approval of IEP’s inclusion of [these] resources thwarts the agency’s own ‘longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced.’”²⁰ The court went on to note its own long-held view that that “[a] reward for past behavior . . . does not induce future efficiency and benefit consumers.”²¹

¹⁵ IEP 2019 Filing at 19.

¹⁶ *ISO New England Inc.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER19-1428-001 (Aug. 6, 2019).

¹⁷ *ISO New England Inc.*, *Order Accepting Tariff Revisions*, 171 FERC ¶ 61,235 (June 18, 2020), *reh’g denied*, 172 FERC ¶ 62,095 (2020); *petition for review granted in part and denied in part sub nom, Belmont Mun. Light Dept. v. FERC*, 38 F.4th 173 (D.C. Cir. 2022).

¹⁸ *Belmont*, 38 F.4th at 177.

¹⁹ *Id.* at 179.

²⁰ *Id.* at 186.

²¹ *Id.* (quoting *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 138 (D.C. Cir. 2019)).

In short, the court found that the Commission had ignored prior administrative and judicial precedent establishing that incentives are just and reasonable only to the extent that they motivate conduct that would not otherwise occur. The court left the IEP program in place for oil and gas generators, having rejected petitioners' other arguments in the matter without providing any rationale.²² The Commission approved ISO-NE tariff revisions to effectuate the court's order on April 24, 2023.²³ The estimated IEP payments that would have gone to the generators whose eligibility was eliminated was \$40 million annually.²⁴

C. Recent ISO-NE analyses regarding need for winter reliability programs

In July 2022, ISO-NE presented its *Winter 2022/23 Analysis* and recommended that the region not pursue any supplemental fuel programs for winter 2022/23.²⁵ The basis for ISO-NE's recommendation was that existing market signals already sufficiently incentivized both oil-fired and gas-fired units to procure fuel ahead of the winter. For example, noting that "[t]he spread between forward electricity and fuel prices for winter 2022/23 is sufficiently high that oil-fired units could 'lock-in' winter margin by selling electricity forward and buying fuel for the winter now," ISO-NE concluded that "an out-of-market fuel program *may largely compensate resources for holding fuel that they will procure anyway.*"²⁶ ISO-NE also concluded that such a

²² *Id.* at 186-87.

²³ *ISO New England, Inc.*, 183 FERC ¶ 61,059 (Apr. 24, 2023).

²⁴ *Belmont*, 38 F.4th at 186 (noting \$40 million in anticipated payments annually to coal, biomass, hydropower, and nuclear resources).

²⁵ Chris Geissler, Stephen George, and Craig Martin, *Winter 2022/23 Analysis: Assessment and Recommendations* (July 14, 2022), available at https://www.iso-ne.com/static-assets/documents/2022/07/a09_mc_2022_07_12-14_winter_2022_2023_presentation.pptx, slide 5. Attached as Exhibit A to Public Interest Organizations' Protest.

²⁶ *Id.* at slide 16 (emphasis added); *see also id.* at slide 18 ("Strong market signals for generators to acquire fuel-oil ahead of winter even without an out-of-market winter program.").

program “may undermine the performance of the market and other resources’ performance incentives.”²⁷

On May 4, 2023—after its initial filing in this case—ISO-NE presented outlook scenarios for both winter 2023-2024 and winter 2024-2025—the two winters for which the IEP will be effective.²⁸ These outlooks summarize assumptions about peak load, available resources, and fuel procurement, and examines reliability across three weather scenarios. In the 2023-2024 outlook, ISO-NE found that even the most severe weather was not expected to cause any loss of load.²⁹ The outlook for winter 2024-2025 focuses on the regional energy picture with and without the Everett Marine Terminal – a liquified natural gas import facility. That outlook showed no risk of energy shortfall with the Everett facility in operation, and any potential shortfall “mostly mitigated with increased fuel oil inventory” if Everett were not operational.³⁰

D. ISO-NE Updates to the Inventoried Energy Program

On April 7, 2023, ISO-NE filed updates to the IEP “designed to align key parameters of the IEP rates, terms, and conditions with current market conditions and to make other improvements necessary to attract sufficient investment in incremental inventoried energy to support winter reliability, while at the same time leaving the Commission-accepted program structure in place.”³¹ In

²⁷ *Id.* at slide 5.

²⁸ ISO New England, *2023-2024 Winter Outlook Scenarios* (May 4, 2023), available at <https://www.iso-ne.com/static-assets/documents/2023/05/npc-2023-05-04-coo-rpt-2023-24-winter-outlook-scenarios.pdf>; ISO New England, *2024-2025 Winter Analysis; With and Without Everett Marine Terminal* (May 4, 2023), available at www.iso-ne.com/static-assets/documents/2023/05/npc-2023-05-04-coo-rpt-winter-2024-25-analysis-with-and-without-everett.pdf.

²⁹ *2023-2024 Winter Outlook Scenarios*, *supra*, at slide 6.

³⁰ *2024-2025 Winter Analysis*, *supra*, at slide 6.

³¹ *ISO New England Inc.*, Docket No. ER23-1588-000 at 4-5 (Apr. 7, 2023) (“IEP Update Filing”).

brief, ISO-NE sought to move from a fixed rate for inventoried energy to an indexed rate that could vary with the global price of liquified natural gas, to reflect “dramatic and unprecedented changes in pricing levels and volatility” in the market for that commodity.³² The IEP updates also included changes to the criteria for eligible forward fuel supply contracts to align with commercial practice and industry standards for New England.³³

ISO-NE submitted testimony in support of its proposal to update these program components, but no evidence regarding the ongoing need for the program. ISO-NE presented testimony that the potential cost of the IEP under the updated parameters could be as high as \$812 million dollars.³⁴ The approved maximum cost of the IEP prior to the Order had been only \$296 million,³⁵ but following the D.C. Circuit decision in *Belmont*, that cost would have been reduced by approximately \$80 million to \$216 million.³⁶ ISO-NE’s filing therefore presented the Commission with an increase to the cost of the program of between 2.75 and 3.75 times.

PIOs filed a protest of ISO-NE’s filing, as did a coalition of state consumer advocate offices.³⁷ The Commission issued a deficiency letter to ISO-NE on May 25, 2023.³⁸ On May 26, 2023, PIOs and the state consumer advocates separately filed motions for leave to answer to respond to answers submitted by ISO-NE and NEPOOL, as well as to draw the Commission’s

³² *Id.* at 4.

³³ *Id.* at 5.

³⁴ IEP Update Filing, Testimony of Todd Schatzki, at 24-25.

³⁵ June 2020 Order at P 17.

³⁶ *Belmont*, 38 F.4th at 186 (noting \$40 million in anticipated payments annually to coal, hydropower, and nuclear resources).

³⁷ Order P 18; Protest of Sierra Club, Conservation Law Foundation and Union of Concerned Scientists, Accession No. 20230428-5547 (Apr. 28, 2023); Joint Protest of the Massachusetts Attorney General, the Connecticut Office of Consumer Counsel, the New Hampshire Office of the Consumer Advocate, and the Maine Office of the Public Advocate, Accession No. 20230428-5485 (Apr. 28, 2023).

³⁸ Order PP 21-22.

attention to the winter reliability analyses ISO-NE had presented to the public on May 4, 2023.³⁹ The Commission issued its order in the matter on August 4, 2023.

III. REQUEST FOR REHEARING

A. The Commission erred in approving a near-tripling of incentive payments to generators with no assurance that these payments would change generators' behavior in ways that benefit reliability

In the August 4 Order, the Commission ignores precedent and excuses ISO-NE from its burden of proof by approving an enormous increase to the cost of an incentive program without a reasonable basis to believe these incentives would provide any benefit to reliability. In *Belmont*, the D.C. Circuit criticized the Commission's failure to explain why it was departing from long-standing precedent that incentives are appropriate only where they can induce a change in behavior—not where the desired behavior has already occurred, or would occur absent the incentive.⁴⁰ PIOs' protest noted that the Commission could not fully comply with *Belmont* by approving a compliance filing that stripped eligibility from coal, nuclear, and hydropower generators, but must also ensure that the IEP generally comported with this principle.⁴¹

To fulfill this responsibility, the Commission needed to undertake a close review of the record and hold ISO-NE to its burden of proof to establish that the incentive payments would

³⁹ Order P 20; Motion for Leave to Answer and Answer of Sierra Club, Conservation Law Foundation and Union of Concerned Scientists, Accession No. 20230526-5173 (May 26, 2023); Motion for Leave and Answer of the Massachusetts Attorney General, the Connecticut Office Of Consumer Counsel, the New Hampshire Office of the Consumer Advocate, and the Maine Office of the Public Advocate, Accession No. 20230526-5061 (May 26, 2023). The Commission accepted all answers filed in this proceeding. Order P 24.

⁴⁰ *Belmont*, 38 F.4th at 178-79.

⁴¹ PIOs Protest at 6-9.

change behavior. The Order does not reflect any assessment of this issue.⁴² Rather than engage in a careful review, the Commission attempts to hide behind the *Belmont* decision, asserting that certain arguments regarding the IEP have been fully litigated and affirmed by the D.C. Circuit.⁴³ This argument is unpersuasive for two reasons. First, *Belmont* provides no rationale whatsoever for its ruling in favor of the Commission on the broader justification for the IEP, and thus is of limited precedential value.⁴⁴ Second, the underlying facts have changed, as explained in the protests and answers filed, necessitating fresh, rather than rehashed, decisions from the Commission.

Most significantly, since the Commission's 2020 order and the *Belmont* decision, ISO-NE published an assessment of the likely impact of the IEP for winter 2022-23 that contains critical admissions regarding the conceptual basis underlying the program. In that analysis, ISO-NE recommended against implementing IEP for winter 2022/23, noting that such a program was not "expected to provide significant benefits under extreme weather conditions as [its] incremental reliability benefits are minimal given prevailing market conditions."⁴⁵ Those market conditions included a "spread between forward electricity and fuel prices" sufficient to incent

⁴² Neglecting to address a core issue presented renders FERC's decision arbitrary and capricious. *Pub. Serv. Comm'n of Kentucky v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43 (agency decision was arbitrary and capricious insofar as it "entirely failed to consider an important aspect of the problem").

⁴³ Order P 48.

⁴⁴ The totality of the *Belmont* court's statements regarding issues on which it rejected petitioners' arguments are: "We reject all of the challenges except one," *Belmont*, 38 F.4th at 186; and "[a]s noted above, however, we do not believe that the Commission acted arbitrarily or capriciously in approving other aspects of IEP." *Id.* at 187. The lack of explanation from the *Belmont* court would limit the ability of a subsequent court to ascertain its precedential value with respect to a heavily modified IEP program brought forward on a different record.

⁴⁵ ISO-NE, *Winter 2022/23 Analysis*, slide 16.

generators to procure fuel ahead of time, such that “an out-of-market fuel program may largely compensate resources for holding fuel that they will procure anyway.”⁴⁶

PIOs contended that these assertions by ISO-NE for the winter of 2022-23 demanded a similar assessment for the IEP program period.⁴⁷ In response, the Commission brushes off the overall significance of ISO-NE’s analysis, by pointing to ISO-NE’s observation in the same presentation that the “potential for incremental fuel incited by program may be limited by the short time available to secure ‘spot’ LNG cargoes from program approval and this winter.”⁴⁸ But this statement, which was a sub-bullet to the broader point that the IEP had “[s]peculative benefits, high costs,” does not negate or override the other observations made by ISO-NE regarding the effect of incentive payments for that winter. The fact remains that ISO-NE acknowledged that other market incentives for generators to procure fuel would render the IEP superfluous. Less than a year later, ISO-NE seemed to have forgotten this lesson, and presented no analysis of the need for the IEP when filing a request to potentially *triple* the overall costs of the program.

The Commission, in turn, failed to hold ISO-NE to its burden of proof, despite the ISO-NE’s own recent admission that the economic theory underlying the IEP’s claim of benefits strongly depends on other circumstances that the ISO had so recently demonstrated its ability to assess. Before approving significantly increased program costs, the Commission had an obligation to assess whether these rich incentives would actually change generator fuel

⁴⁶ *Id.*

⁴⁷ PIOs Protest at 6-7.

⁴⁸ Order P 53.

procurement behavior in ways that improve reliability, or merely pay generators for fuel procurement they would be doing anyway.⁴⁹

The Commission failed to address another argument made by PIOs about the value of IEP payments in incentivizing different behavior, which is that most, if not all, of the eligible generators have capacity obligations that already require them to produce electricity when called upon by ISO-NE. PIOs cited to Commission precedent that generators' strict capacity obligations are not excused "based on economic decisions not to procure fuel or transportation."⁵⁰ If generators already face strict obligations to perform, and performance requires fuel procurement, then the incremental value of paying those generators to procure fuel is dubious. More than that, it is a windfall payment that compensates only certain types of generators for a significant operating cost.

The Commission's response to this argument is that ISO-NE's capacity market tariff "does not require resources with Capacity Supply Obligations to maintain the inventoried energy during the winter months, i.e., the costs for which the voluntary participants in the Inventoried Energy Program are compensated."⁵¹ It is true that the capacity obligation does not require

⁴⁹ *Pub. Serv. Comm'n of Kentucky*, 397 F.3d at 1008 ("The Commission must also respond meaning-fully to the arguments raised before it." (citing *Canadian Ass'n of Petroleum Producers*, 254 F.3d 289, 299 (D.C. Cir. 2001))).

⁵⁰ PIOs Protest at 7 (citing *New England Power Generators Ass'n, Inc.*, 144 FERC ¶ 61,157, 61,901 (2013) ("The Commission agrees with ISO-NE that the Tariff imposes a strict performance obligation on capacity resources and that capacity resources may not take economic outages, including outages based on economic decisions not to procure fuel or transportation."); *affirmed and clarified on rehearing New England Power Generators Ass'n, Inc.*, 145 FERC ¶ 61,206, 62,138 (2013) ("[W]e reiterate that . . . a capacity resource has a strict Capacity Supply Obligation and failure to satisfy that obligation due to a lack of fuel is excused only in the narrow circumstances where a resource has satisfied its burden to prove that it is not physically available to run . . . due to an inability to procure fuel or transportation"))).

⁵¹ Order P 51.

exactly the same behavior that would trigger IEP payments. What the capacity obligation requires however, is something that eviscerates the value proposition for the IEP. If capacity resources have an obligation to generate electricity when called upon, then by implication that obligation requires generators that are fuel dependent to maintain sufficient fuel, or have access to it on short notice. Perhaps ISO-NE is failing to adequately enforce the capacity obligation, but that does not mean that consumers should have to pay for an additional incentive program, rather than getting the value of what they have already paid for. The layering of incentives clearly poses a risk of double-payment, and therefore must be supported by rigorous analysis of incremental benefit. Such analysis is absent here. The Commission has failed to engage in reasoned decision-making regarding the value of the IEP incentive in light of the existing obligations on generators that serve as capacity resources.⁵²

In sum, the Commission failed to offer a reasoned response to protestors' arguments that generators eligible for IEP payments were already likely to procure fuel as a result of either forward energy market prices or capacity supply obligations, and thus would not be incentivized to change their behavior through the IEP. The Commission's failure to do so is especially unacceptable in light of the court's recent reminder in *Belmont* of the Commission's long-standing practice of ensuring that incentives are paid only where they do not reward past behavior, or behavior that would occur absent the incentive program.

⁵² See *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017) (failing to "grapple with contrary evidence . . . disregard[s] entirely the need for reasoned decisionmaking"); *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 710 (D.C. Cir. 2014) (holding that leaving contrary evidence unaddressed renders agency decision arbitrary and capricious).

B. The Commission’s approval of the updated Inventoried Energy Program was arbitrary and capricious because the Commission failed to assess whether the benefits to consumers justified the costs

The Order authorizes an enormous potential increase in the costs of the IEP—from approximately \$216 million to as much as \$812 million. Such an increase in costs necessitates a hard look at the purported benefits to have any possibility of being deemed just and reasonable in a manner that comports with the Administrative Procedures Act. Instead, the Commission failed in its responsibility to protect consumers from excessive rates by overlooking significant questions about the need for, and benefits of, the IEP.

One component of this was noted in the prior section: the Commission failed to examine whether the IEP payments would induce eligible generators to do anything different than they were already likely, or obligated, to do. The other gap is that the Commission failed to grapple with new evidence that the original “need” for the IEP has diminished as a result of changes to the New England grid that have already occurred or are anticipated in time for the IEP program winters.

Without engaging with contrary evidence in the record, the Commission summarily concludes that “[t]he fuel security concerns identified in the initial proceeding continue today.”⁵³ In support, the Commission cites a June 9, 2023 statement from ISO-NE that “[w]inter energy concerns are highest in scenarios when stored fuels are rapidly depleted,”⁵⁴ without acknowledging that *immediately* following this statement, ISO-NE presented evidence that

⁵³ Order P 49.

⁵⁴ *Id.*

depletion of stored fuel would be significantly mitigated by the expected addition of 700 MW of solar photovoltaic resources in each of the winters covered by the program.⁵⁵

The Commission also stops short with its reasoning. The fact that *some* undefined level of winter energy concerns may still exist does not automatically mean that any solution that purports to address them—no matter how expensive—is just and reasonable. Specifically, the Commission did not identify what residual concern exists and whether it was reasonable to ask consumers to spend up to \$812 million to potentially address those concerns.

As both PIOs and state consumer advocates highlighted in answers filed in this proceeding, winter reliability analyses that ISO-NE published less than a month after it filed these changes with the Commission indicate that the winter reliability situation in New England will have improved considerably by the time of the IEP program period, compared to what was known at the time the Commission approved the IEP in 2020.

As detailed in PIOs Answer, the ISO's own studies show that even in a severe winter, there is negligible reliability risk, in part due to increased deployment of wind and solar resources, and in part due to its own improved methods of accounting for the supply of wind and solar energy during periods of extreme cold.⁵⁶

- For the 2023-24 Winter analysis, ISO-NE anticipated 2000 MW more behind-the-meter solar would be online as compared to the reference case in the Operational Fuel

⁵⁵ Stephen George, *Opening Presentation: Winters 2023/2024 and 2024/2025 in New England and the Role of Everett*, New England Winter Gas-Electric Forum, Docket No. AD22-9, Accession No. 20230609-5196, at slide 4. According to the ISO, the addition of 700 MW of solar PV resources in the first winter covered by the IEP program would provide roughly the equivalent of 7-10 million gallons of fuel oil, or 1-1.5 Bcf LNG, over the course of a typical winter. *Id.* ISO further noted that the addition of another 700 MW of solar PV resources in the second IEP winter (bringing the total incremental solar PV to 1400 MW over the Operational Fuel Security Analysis forecast), would provide the equivalent of 14-20 million gallons of fuel oil, or 2-3 Bcf LNG. *See id.*

⁵⁶ PIOs Answer at 3-9.

Security Analysis (which provided the basis for the initial IEP), with “loads and energy demand [will be] reduced accordingly.”⁵⁷

- For the 2024-25 Winter analysis, ISO-NE anticipated another 880 MW of solar, as well as between 300 and 800 MW of the Vineyard Wind offshore project, would be online, both of which would further limit any potential energy shortfall in the absence of the Everett LNG import terminal.⁵⁸
- In its 2022-23 analysis, ISO-NE presented data showing that the output from wind resources tended to spike concurrently with heating degree days, indicating that when the temperature plummeted, and gas supply became constrained by local distribution company demand for heating, increased production from wind resources helped to counteract the strain on the system and lower the risk of energy shortfalls. This data is consistent with a prior analysis by an ISO-NE consultant showing high correlation between wind output and cold temperatures that was not accounted for in the Operational Fuel Security Analysis that supported the 2019 IEP.⁵⁹

The Order fails to acknowledge the broader significance of ISO-NE’s Winter 2023/24 and 2024/25 analyses, instead focusing exclusively on the lone fact that these analyses assumed some impact from the IEP.⁶⁰ But those analyses do not show that any of the inventoried energy assumed to result from the IEP was *necessary* to the reliable outcomes observed in these studies. Furthermore, ISO-NE acknowledges that the incremental fuel assumed is on the low end of “expected incremental fuel,”⁶¹ raising serious questions as to whether additional incremental fuel beyond the low levels that ISO-NE assumed provides any marginal reliability benefit to consumers in exchange for those costs. In approving increased IEP rates that are intended to incentivize a higher level of fuel procurement than ISO’s reliability studies show could be part of a reliable solution (though not necessary), the Commission’s Order authorizes rates in excess of what is needed for reliability.

⁵⁷ *Id.* at 7 (quoting ISO New England, “2023-2024 Winter Outlook Scenarios,” slide 3.)

⁵⁸ *Id.* at 8 (citing ISO New England, *2024-2025 Winter Analysis*)

⁵⁹ *Id.* at 4-5 (documenting improved methods of modeling wind output developed by ISO-NE after the analysis underlying the IEP was performed in 2018).

⁶⁰ Order P 54 fn. 82.

⁶¹ *2024/2025 Winter Analysis, supra*, at slide 3.

In addition, as PIOs noted in their answer, ISO’s analysis also indicates that even without the Everett facility in operation, the “energy shortfall [is] fully mitigated with increased oil inventory.”⁶² PIOs further explained that “[w]ith oil contracts largely shielded from the impact of high global LNG prices, it is likely that increased oil inventories will continue to be incentivized by the current IEP rate, thereby providing the region with a bulwark against energy shortfalls, even during ‘severe’ winter seasons, and correspondingly reducing the need for increased inventories of LNG.”⁶³

The Commission failed to address any of these arguments in its order, thus failing to meet the reasoned decision-making standard.⁶⁴ A fundamental error in the Commission’s approach was to consider only the changed circumstances to which the filing utility drew its attention—the increased costs of importing LNG to the region—but not whether the need for the IEP had been altered by other circumstances, such as new resources coming onto the system, or the spread between forward fuel and energy prices. ISO-NE’s omission of any context for other changes on its system is all the more frustrating because ISO-NE was analyzing fuel procurement circumstances during the IEP program years at the very same time it filed the updated IEP.

In 2019, the Commission sent ISO-NE a deficiency letter asking for additional analysis regarding the possible need for inventoried energy and was told such analysis was unnecessary and impossible to produce in the available time. The Commission approved ISO-NE filing despite these glaring gaps. It is unacceptable that five years later, when the authorized costs of

⁶² PIOs Answer at 9 (quoting Winter 2024/25 analysis at slide 5).

⁶³ PIOs Answer at 10. State Consumer Advocates’ protest also highlighted evidence that oil is less expensive than LNG, citing the testimony of ISO-NE’s witness, Dr. Todd Schatzki, and ISO-NE’s consultant, the Analysis Group. Consumer Advocates Protest at 16 & n.71.

⁶⁴ See *Fred Meyer Stores, Inc.*, 865 F.3d at 638 (failing to “grapple with contrary evidence . . . disregard[s] entirely the need for reasoned decisionmaking”).

the program are proposed to be tripled, and ISO-NE has developed analytical tools to understand the impact of fuel inventories on winter reliability for its own use, it would not bother to produce those for the Commission's consideration. The Commission must not condone these kinds of omissions; it must hold utilities to their burden of proof.⁶⁵

Finally, the Commission ducks questions about whether the costs of the updated IEP are worth the reliability improvements by pointing out that it need not produce a detailed cost-benefit analysis.⁶⁶ This precedent does not relieve the Commission of all responsibility; while rates need not be supported by analysis of costs and benefits with exacting precision, a utility must show that costs will be commensurate with the benefits that ratepayers receive.⁶⁷ The Commission must have "articulable and plausible reason to believe" benefits are "at least roughly commensurate" with allocated costs.⁶⁸ In this matter, the Commission has looked away from serious questions regarding the existence of any benefits, and thus fallen far short of this standard.

IV. CONCLUSION

The Commission cannot rest on its 2020 order in this matter. A program that the Commission viewed as just and reasonable based on assumed benefits following loose economic principles at one cost level, must receive new scrutiny when those costs triple, and additional

⁶⁵ *Allegheny Power v. FERC*, 437 F.3d 1215, 1219 (D.C. Cir. 2006).

⁶⁶ Order P 49.

⁶⁷ *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1263 (D.C. Cir. 2018); *see also ISO New England Inc.*, 147 FERC ¶ 61,172 at P 23 (2014) (finding consumers cannot be forced "to pay for capacity without receiving commensurate reliability benefits).

⁶⁸ *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, at 477 (7th Cir. 2009).

evidence is adduced questioning the assumed benefits. We urge the Commission to grant rehearing in this matter.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served in accordance with 18 C.F.R. § 385.2010 upon each person designated on the official service list compiled by the Secretary for this proceeding, by email.

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