LESSONS TO BE LEARNED FROM FERC'S INVESTIGATION OF A NEW POWER PROJECT'S PARTICIPATION IN THE NEW ENGLAND CAPACITY MARKET

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On 28 June 2022, the Federal Energy Regulatory Commission (FERC) issued an order approving a Stipulation and Consent Agreement stemming from an enforcement investigation with Salem Harbor Power Development, LP (Salem Harbor or DevCo) in Docket No. IN18-18.[1] Around a week prior to FERC issuing its Order, grid operator ISO New England, Inc. (ISO-NE) issued a notice to the market regarding the forthcoming 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/regional transmission organization (ISO/RTO). The Order sends a strong signal regarding the amount of discretion that ISO/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 MW natural gas-fired power plant in Massachusetts. It acquired a capacity supply obligation (CSO) in the ISO-NE Forward Capacity Market for the June 2017 – May 2018 capacity commitment period during the eighth Forward Capacity Auction (DY17/18), held in February 2014. 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.

Salem Harbor's expected commercial operation date was 31 May 2017, one day before the start of the capacity commitment period. 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 that commercial operation. If the project will not be operational when the 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.

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FERC'S DECISION

FERC Enforcement found that Salem Harbor "made false claims regarding the Project's schedule trajectory and omitted numerous important and relevant details regarding the status of the Project and … delays."[5] The project did not reach commercial operation until after the DY17/18 CSO 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 US$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. When Salem Harbor did disclose that it 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.[6] The settlement discloses that, since 2010, ISO-NE staff 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.[7] The 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 not operational. The settlement provides for a US$17 million civil penalty and disgorgement of about US$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. 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.[8]

LESSONS LEARNED

This matter raises several significant issues that power project developers must bear in mind. *First*, FERC 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.

Second, if FERC takes the position that projects with market-based rate authorization that are not operating are nonetheless public utilities, such projects may be subject to regulatory obligations, including FERC's duty of candor rule.

FERC 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, misleading, or omitted material information.

Third, ISO/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/RTO staff.

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Fourth, attorneys representing developers must be mindful of their ethical obligations, particularly when serving as conduit for tariff-mandated information to ISO/RTOs.

FOOTNOTES

[1] *Salem Harbor Power Development.,* LP, 179 FERC ¶ 61,228 (2022) (stipulation attached) (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] Order at P 68, 70.

[7] Order at P 68.

[8] Order at P 91.

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