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Federal Energy Regulatory Commission Settles with Bankrupt Massachusetts Generator, While Investigation into ISO-New England Remains Ongoing

By Norman C. Bay, Paul J. Pantano, Jr., and Alexandra K. Calabro*

The authors of this article discuss a Federal Energy Regulatory Commission settlement agreement with a generator company in bankruptcy.

The Federal Energy Regulatory Commission ("FERC" or the "Commission") has approved a Stipulation and Consent Agreement ("Consent Agreement") between the Office of Enforcement ("OE") and Salem Harbor Power Development LP ("DevCo").[1]

The Consent Agreement resolves OE's investigation into whether DevCo violated the ISO-New England Inc. ("ISO-NE") Tariff and the Commission's Duty of Candor Rule,[2] when it failed to fully disclose the extent of construction delays its New Salem Harbor Generating Station project ("Project") was experiencing, which resulted in DevCo's receipt of capacity payments from ISO-NE during the 2017–2018 Capacity Commitment Period ("CCP") even though the Project had not yet reached commercial operation. DevCo agreed to pay a civil penalty of $17.1 million and to disgorge $26,693,237.67, subject to the treatment afforded Allowed General Unsecured Claims.[3]

In addition, DevCo agreed to compliance monitoring for a period of two years following the execution date of the Consent Agreement. DevCo stipulated to the facts set forth in Section II of the Consent Agreement, but neither admitted nor denied the alleged violations set forth in Section III.

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

[2] 18 C.F.R. § 35.41(b).

[3] On March 23, 2022, DevCo and five affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

BACKGROUND ON THE REPORTING AND MONITORING OBLIGATIONS OF DEVCO AND ISO-NE

DevCo was created by the initial developers of the Project to construct and own the Project in Salem, MA. DevCo applied for, and received, Market Based Rate Authority ("MBRA") from the Commission in February 2017. The Project, a 674 MW combined-cycle natural gas generating facility, was a new supply resource in ISO-NE, with a Capacity Supply Obligation ("CSO") for the CCP.[4]

As a capacity project with a CSO obligation, ISO-NE's Tariff required ISO-NE to monitor construction of the Project by, in part, reviewing reports of the Project's Critical Path Schedule ("CPS") submitted by DevCo that provided the ISO with updates on the Project's construction.[5] ISO-NE's Director of System Planning ("System Planning Director") was charged with overseeing the progress of the Project from April 2016 through March 2017 ("Relevant Period").[6] ISO-NE's Tariff required DevCo to include in its reports to ISO-NE complete updated versions of the CPS, including specific milestone dates, as well as any information that may be relevant to the ISO's evaluation of the feasibility that the Project would be built in accordance with the CPS and achieve timely commercial operation.[7]

As part of its CPS reporting, DevCo had to submit proposed milestone dates and schedules in ISO-NE's web-based reporting tool called the Forward Capacity Tracking System ("FCTS"). On the FCTS, DevCo entered specific milestone dates for the Project, as well as provided narrative responses to explain the schedules and describe other information relevant to construction progress.[8]

Importantly, in order for DevCo to change any milestone date, it was required to consult with ISO-NE, and if it was determined that the commercial operation date ("COD") would fall on a date later than the start of the CCP, then:

(1) DevCo had to "cover (i.e., buy out of) its CSO for the portion of the CCP for which it [would] be delayed," or

(2) if DevCo did not cover, ISO-NE was required to "submit an ISO

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[4] Consent Agreement at PP 2, 5, 15.

[5] *Id.* at P 6.

[6] *Id.* at P 7.

[7] *Id.* at PP 8–9.

[8] *Id.* at P 10.

> demand bid (mandatory demand bid) into the third and final annual reconfiguration auction ("ARA3") on [DevCo's] behalf to buy out the CSO for the full year of the [P]roject's CSO."[9]

PROJECT DELAYS, DEVCO'S INCOMPLETE CPS REPORTING, AND THE "FCTS WORKAROUND"

DevCo engaged Iberdrola Energy Projects, Inc. ("Iberdrola") to design and build the Project. Iberdrola provided DevCo regular construction updates. In April 2016, about one year before the Project's COD of May 31, 2017 Iberdrola replaced its engineering subcontractor, which led to a series of substantial delays in the Project's construction. Throughout the spring and summer of 2016, Iberdrola continued to experience construction delays, and it became clear to DevCo that the COD of May 31, 2017 was increasingly unrealistic.[10] However, in its CPS reporting to ISO-NE, DevCo maintained that the Project continued to "track on time" and did not mention any details regarding the various construction delays the Project was experiencing.[11]

In the fall of 2016, after the Project continued to experience delays that Iberdrola concluded would push the COD back many months, DevCo disclosed the construction delays to ISO-NE in its CPS report for the first time. However, while DevCo described the delays in its narrative description of the CPS report, it maintained May 31, 2017, as the COD in the FCTS form submitted to ISO-NE.[12]

The DevCo representative who submitted the CPS report appeared to maintain the May 31, 2017, date in the FCTS form based on the advice of the System Planning Director at ISO-NE. The System Planning Director explained that she had developed an "FCTS workaround" that her group had utilized since around 2010, wherein she advised projects that were a "few months late" in reaching commercial operation to keep the original COD in the FCTS form, "as long as the COD was not impossible," so as to not trigger ISO-NE to automatically submit a demand bid into ARA3.[13] The System Planning Director advised DevCo to identify the new COD in the narrative description of its CPS report—and to even use the word "potential" in describing the delays so they would not appear to be "a foregone conclusion"—but keep the May 31,

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[9] *Id.* at P 12.

[10] *Id.* at PP 27–33.

[11] *Id.* at P 34.

[12] *Id.* at PP at 38, 41.

[13] *Id.* at PP 42–44, 47, 68.

2017 COD in FCTS until March 2017 (when demand bids were due for ARA3). The System Planning Director further advised DevCo to "try" to cover its CSO in late spring 2017 for the portion of the year for which it would be late.[14]

Throughout the fall and winter of 2016 and into early 2017, DevCo continued this format of CPS reporting (noting the ongoing construction delays in its narrative but maintaining May 31, 2017 as a COD in FCTS) despite receiving updated schedules from Iberdrola that contained later projected COD dates. Internally, DevCo characterized COD dates as late as October 2017 as "not even close to being realistic," yet still maintained in its narrative CPS reporting to ISO-NE that the delays could be mitigated.[15] Throughout this time, the System Planning Director continued to recommend this "FCTS workaround," and discussed the strategy with ISO-NE Senior Management. ISO-NE's General Counsel at the time agreed with the System Planning Director's recommendation so as to avoid automatically submitting an ISO demand bid.[16]

DEVCO AND THE SYSTEM PLANNING DIRECTOR COORDINATE TO AVOID AN ISO DEMAND BID

Facts presented in the Consent Agreement suggest that the System Planning Director and DevCo coordinated to prevent an ISO demand bid into ARA3 on DevCo's behalf. As well as maintaining a May 31, 2017 COD in FCTS to avoid triggering an automatic ISO demand bid, this coordinated activity appeared to also include concealing the full extent of DevCo's delays from others at ISO-NE outside of System Planning so that other ISO-NE employees did not recommend submitting a demand bid into ARA3 when it was clear that the Project would not be operational by the start of the CCP and DevCo had not covered its CSO.

For example, in early 2017, an employee of the System Planning Director emailed ISO-NE Senior Management claiming that DevCo had "reached out" to the group and notified them that they were "back on track to meet the May

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[14] *Id.* at PP 42–44, 47. As a reminder, and as described above, the ISO-NE Tariff requires project sponsors that will not reach their COD by the start of the CCP to either cover their CSO for the portion it will be delayed, or ISO-NE must submit a demand bid into ARA3.

[15] *Id.* at PP 51, 61.

[16] *Id.* at PP 52–54. The ISO-NE General Counsel as well as the ISO-NE Vice President of System Planning later testified that they did not understand the mechanics of the "FCTS workaround" at the time. *Id.* at P 54.

31, 2017 COD."[17] However, this employee later testified that the System Planning Director had instructed her to send this email, and she had no memory of any such conversation with DevCo.[18] Meanwhile, Iberdrola's most recent estimated COD was October 14, 2017, which DevCo internally assessed as unrealistic given the substantial delays.[19] Nevertheless, members of the ISO-NE Senior Management later testified that the unsubstantiated email led them to believe that DevCo would likely meet its COD (despite its narratives continuing to disclose the Project's ongoing delays).[20]

During this time period, the System Planning Director acknowledged in conversations with representatives at DevCo that she was "endeavoring to prevent others at ISO-NE from 'sniffing around' and trying to force ISO-NE to submit an ISO demand bid on DevCo's behalf into ARA3."[21]

In another instance, the System Planning Director disclosed to DevCo's representatives that ISO-NE's System Planning Department "internally 'finished' its ARA3 qualification process on February 16, 2017."[22]

Accordingly, DevCo moved a planned conversation with ISO-NE's New Generation Group from February 8 to February 17, 2017, seemingly to avoid disclosing updated milestones that included a delayed COD of October 2017 and that might trigger the submission of a demand bid on its behalf into ARA3.[23] A DevCo representative later testified that the System Planning Director had discussed rescheduling the New Generation Group call so that "other ISO-NE staff outside of System Planning . . . would not get involved in the ARA3 issue."[24]

Still relying upon the advice of the System Planning Director, in its February CPS report to ISO-NE, DevCo maintained May 31, 2017 as the COD—despite DevCo's consultants acknowledging during the same time period that a May 31, 2017 COD was "impossible."[25] Not until March 7, 2017, after demand bids were due for ARA3, did DevCo update the FCTS form to disclose

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[17] *Id.* at P 58.

[18] *Id.*

[19] *Id.* at P 61.

[20] *Id.* at P 59.

[21] *Id.* at P 63.

[22] *Id.* at P 57.

[23] *Id.* at P 62.

[24] *Id.*

[25] *Id.* at P 65.

to ISO-NE that the COD would be delayed until October 14, 2017.[26] DevCo's representative later testified that the System Planning Director specifically instructed him to not update the COD in the FCTS form until after demand bids were due to avoid triggering an ISO demand bid for the Project.[27]

Importantly, DevCo never covered any portion of its 674 MW CSO for the CPP.[28] Consequently, and as a result of ISO-NE never submitting a demand bid for the Project into ARA3, ISO-NE ultimately paid DevCo over $100 million in capacity payments for the 2017–2018 CCP even though the Project was not yet operational.[29]

INDEPENDENT MARKET MONITOR INVESTIGATION AND REFERRAL

In the summer of 2017, ISO-NE's Independent Market Monitor ("IMM") conducted an internal and external inquiry into DevCo's receipt of capacity payments during the 2017–2018 CCP. The IMM referred the matter to OE in the fall of 2017.[30]

OE'S ALLEGED VIOLATIONS, REMEDIES, AND SANCTIONS

OE concluded that during the Relevant Period DevCo's conduct violated ISO-NE's Tariff as well as the Commission's Duty of Candor Rule.

First, DevCo allegedly violated ISO-NE's Tariff when it failed to update FCTS with the updated schedules and projected COD dates it received from Iberdrola, and when its narrative CPS reports misleadingly suggested the delays the Project was experiencing were less certain than they were. The ISO-NE Tariff requires project sponsors to submit "*complete* updated version[s] of the [CPS]."[31]

Interestingly, OE acknowledged that DevCo's actions "could be characterized as a consequence of DevCo following the advice of an ISO-NE employee," noting however that "such an explanation cannot excuse DevCo's violations."[32]

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[26] *Id.* at P 70.

[27] *Id.*

[28] *Id.* at P 69.

[29] *Id.* at P 72. The Project ultimately was not operational until June 2018. *Id.* at P 71.

[30] *Id.* at P 77.

[31] *Id.* at P 80 (emphasis added). Specifically, OE alleged DevCo violated Sections III.13.3.2 and III.13.3.2.1 of the ISO-NE Tariff. *Id.* at P 79.

[32] *Id.* at P 81.

OE emphasized that DevCo's consultants and lawyers were sophisticated and experienced, and "knew or should have known that they were not complying with [DevCo's] Tariff obligations when they acted upon [the System Planning Director's] advice."[33] Moreover, OE stated that "notwithstanding any advice that may have been given by an ISO employee, market participants always have an obligation to make independent assessments of tariff and other regulatory requirements and must ensure that they comply with those requirements."[34]

Second, OE alleged that DevCo violated ISO-NE's Tariff requirement to include in CPS narratives any information relevant to evaluating the feasibility of the project "being built in accordance with the [CPS] or the feasibility that the project will meet the requirement that the project achieve Commercial Operation no later than the start of the relevant [CCP]."[35] OE alleged that DevCo violated this requirement by submitting false claims in its CPS narratives regarding the Project's construction schedule (e.g., that it continued to "track on time") and omitting important information regarding the Project's delays (e.g., failing to disclose the termination of the Project's engineering subcontractor) that would have helped ISO-NE assess the effect such delays may have had on reaching commercial operation by the CCP.[36]

Third, OE alleged that DevCo violated the Commission's Duty of Candor Rule in section 35.41(b) of the Commission's regulations, which requires Sellers 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, or jurisdictional transmission providers, unless Seller exercises due diligence to prevent such occurrences."[37] By virtue of DevCo's MBRA, it was a "Seller" subject to the Duty of Candor Rule. OE alleged that in submitting CPS reports to ISO-NE that were inaccurate, misleading, or omitted material information, DevCo violated the Duty of Candor Rule.[38] OE explained that DevCo's CPS reporting was "not fulsome or forthcoming," and DevCo "failed to exercise due diligence to ensure the accuracy of the information contained in those submissions."[39]

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[33] *Id.*

[34] *Id.*

[35] *Id.* at P 82. Specifically, OE alleged DevCo violated Section III.13.3.2.3 of the ISO-NE Tariff. *Id.*

[36] *Id.* at PP 82–88.

[37] *Id.* at P 89.

[38] *Id.*

[39] *Id.*

Pursuant to the Consent Agreement, DevCo agreed that the Commission has an Allowed General Unsecured Claim against DevCo's Chapter 11 estate in the amounts of $17.1 million (as a civil penalty) and $26,693,237.67 (as disgorgement).[40] Additionally, DevCo agreed to submit annual compliance monitoring reports to OE for two years following the effective date of the Consent Agreement. The reports must identify any violations of the Federal Power Act ("FPA") or Commission regulations, describe all compliance measures and procedures related to the FPA and Commission's regulations, and describe all Commission-related compliance training administered.[41]

As part of the Consent Agreement, DevCo also agreed to cooperate with any enforcement action or proceeding concerning any other individuals or entities related to OE's investigation into this matter.[42] This particular stipulation in the Consent Agreement may be important because, as described below, it appears that OE is also investigating ISO-NE. The Order is unusual in the level of detail that it provides with respect to DevCo's discussions with ISO-NE staff and, in turn, internal communications among ISO-NE officials. ISO-NE, after all, was not a party to the settlement. In its Order, the Commission acknowledged that in recommending its remedy, OE had "considered the roles that multiple individuals and entities played in ISO-NE not submitting a demand bid," and it reserved 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."[43]

ISO-NE UNDER INVESTIGATION BY OE

In a press release on June 23, 2022, ISO-NE disclosed it is currently under investigation by OE regarding its role in the events described above.[44] ISO-NE decided to make its involvement in the investigation public after DevCo recently disclosed the matter in a bankruptcy filing. According to ISO-NE, based on the information provided in the bankruptcy filing, OE not only alleges that DevCo withheld information in its CPS reporting, but also alleges the existence of a fraudulent scheme to deceive the ISO to ensure the Project

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[40] *Id.* at PP 92–93.

[41] *Id.* at PP 95–98.

[42] *Id.* at P 111.

[43] Order at P 58.

[44] Press Release, ISO-New England, ISO New England Issues Statement Regarding FERC Office of Enforcement Investigation (June 23, 2022), https://www.iso-ne.com/static-assets/documents/2022/06/20220623_pr_ferc.

would receive capacity payments. According to ISO-NE, OE alleges this scheme is in violation of the Commission's Anti-Manipulation Rule, 18 C.F.R. § 1c.

The Order and Consent Agreement, however, do not allege a fraudulent scheme in violation of the Commission's Anti-Manipulation Rule. The violations alleged by OE against DevCo are limited to violations of the ISO-NE Tariff and a violation of the Commission's Duty of Candor Rule.

ISO-NE claims OE is alleging that "the ISO should have discerned that [DevCo] would be late, that it gave the developer advice that assisted the project in avoiding the consequences of failing to meet its commercial operation date, and that it should have forced [DevCo] to sell its capacity supply obligation."[45] ISO-NE denies these allegations. It is unusual for an RTO/ISO to be investigated for a violation of its own tariff, and ISO-NE may have disclosed the existence of the investigation in order to get ahead of the questions that would have resulted from the Order and Consent Agreement.

CONCLUSION

The Order and Consent Agreement make clear that market participants cannot solely rely on the advice of staff of RTOs/ISOs. In this instance, DevCo appeared to directly follow the advice and instructions of an experienced ISO-NE employee when it engaged in the alleged misconduct. This also serves as a reminder to market participants that the Commission expects "fulsome" and "forthcoming" communications with RTOs/ISOs and others, and does not look kindly on misrepresentations or material omissions of information.

Despite the advice of an RTO/ISO employee, the Commission will expect representations to the RTO/ISO to be reasonable and accurate. Here, the Commission was clearly troubled by DevCo's repeated assertion of a COD that became increasingly unrealistic but that DevCo attempted to qualify in an accompanying narrative. In addition, the Order illustrates the reach of Section 35.41: even when the Commission does not allege market manipulation, which requires a showing of scienter, it may be able to allege misrepresentations or material omissions. Whereas in the past the Commission would often concurrently allege market manipulation and a violation of Section 35.41, Section 35.41 is now increasingly alleged as a standalone violation.

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[45] *Id.*

Finally, ISO-NE paid DevCo almost $105 million in capacity payments, which resulted in a net financial benefit of $80 million.[46] The disgorgement, however, is only about $27 million. The Commission does not explain the discrepancy between net financial benefit and disgorgement, but the answer probably lies in the fact that DevCo is in Chapter 11, and the Commission's claim is an unsecured one. Under its Penalty Guidelines, the Commission can take into account the financial status of the subject of an investigation. This is not the first, nor will it be the last, enforcement action involving a bankrupt party.

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[46] Consent Agreement at P 72.