



November 20, 2018

**Via Federal Express/Electronic Mail**

Todd Anthony Bianco, PhD, EFSB Coordinator  
RI Energy Facility Siting Board  
89 Jefferson Blvd.  
Warwick, RI 02888

***Re: Invenergy Docket No. SB-2015-06***

Dear Dr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Center Project (“Invenergy”), attached please find an original and six (6) copies of the United States Federal Energy Regulatory Commission decision on ISO-NE’s termination request, issued November 19, 2018.

Very truly yours,

ALAN M. SHOER  
[ashoer@apslaw.com](mailto:ashoer@apslaw.com)

Enclosures

cc: Service List

165 FERC ¶ 61,137  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Cheryl A. LaFleur and Richard Glick.

ISO New England Inc.

Docket Nos. ER18-2457-000

Clear River Energy LLC

ER19-94-000

ORDER ACCEPTING TERMINATION FILING AND DENYING WAIVER

(Issued November 19, 2018)

1. On September 20, 2018, in Docket No. ER18-2457-000, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> ISO New England Inc. (ISO-NE) submitted a filing to terminate the capacity supply obligation (CSO) of Resource No. 38504, also known as Clear River Unit 1 (Clear River). The Project Sponsor<sup>2</sup> is Invenergy Energy Management LLC (Invenergy). In addition, on October 11, 2018, in Docket No. ER19-94-000, Invenergy submitted a request for waiver of certain provisions of ISO-NE's Tariff related to termination of Clear River's CSO. As discussed below, we accept ISO-NE's termination filing and deny Invenergy's waiver request.

**I. Background**

2. Through its Forward Capacity Auction (FCA), ISO-NE procures the capacity resources that it needs to ensure resource adequacy within its footprint. ISO-NE holds FCAs annually, three years in advance of the relevant delivery year (Capacity

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<sup>1</sup> 16 U.S.C. § 824d (2012).

<sup>2</sup> Capitalized terms not defined herein are used consistent with the definitions in the Transmission, Markets and Services Tariff (Tariff or ISO-NE Tariff). *See* ISO-NE Tariff, Rules of Construction; Definitions (113.0.0) § I.2; *see also id.* (defining "Project Sponsor" as "an entity seeking to have a New Generating Capacity Resource, New Import Capacity Resource or New Demand Capacity Resource participate in the Forward Capacity Market").

Commitment Period). Resources compete in the auctions to obtain a commitment to supply capacity, the CSO, in exchange for a market-priced capacity payment.

3. A resource that is planned or under construction may qualify to offer capacity into an FCA if the Project Sponsor provides the requisite information to allow ISO-NE to evaluate the feasibility of the resource's achieving commercial operation by the start of the associated Capacity Commitment Period. Among other things, the Project Sponsor must provide a critical path schedule that includes the dates by which a number of project development milestones are expected to occur.<sup>3</sup>

4. Under Tariff section III.13.3.4, if any development milestone date is revised such that the resource will not achieve commercial operation by the start of the Capacity Commitment Period for which it holds a CSO, the Project Sponsor must cover its entire CSO for the portion of the Capacity Commitment Period for which the resource will not be operational. A Project Sponsor may cover the CSO either by purchasing replacement capacity through a reconfiguration auction or by entering into one or more CSO bilateral transactions.<sup>4</sup>

5. Under Tariff section III.13.3.4(c), ISO-NE may seek to terminate a resource's CSO if one or more of several conditions are satisfied. Two of those conditions are applicable here: (1) if the Project Sponsor covers a CSO for two Capacity Commitment Periods, or (2) if as a result of a milestone date revision, the date by which a resource will have achieved commercial operation is more than two years after the beginning of the Capacity Commitment Period for which the resource first received a CSO. If either of these conditions is met, then, after consultation with the Project Sponsor, ISO-NE has the right, through a filing with the Commission, to terminate the resource's CSO for any future Capacity Commitment Periods.<sup>5</sup> Tariff section III.13.3.4(c) also states that ISO-NE has the right to terminate the resource's right to any payments associated with that CSO in the Capacity Commitment Period and to adjust the resource's qualified capacity for participation in the Forward Capacity Market. The Tariff further states that, upon Commission ruling, the Project Sponsor forfeits any financial assurance provided to ISO-NE with respect to that CSO.

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<sup>3</sup> See ISO Tariff § III.13.1.1.2.2.2, 56.0.0. The specified milestones involve major permits, project financing closing, major equipment orders, substantial site construction, major equipment delivery, major equipment testing, commissioning, and commercial operation.

<sup>4</sup> See ISO Tariff § III.13.3.4, 15.0.0.

<sup>5</sup> See ISO Tariff § III.13.3.4(c).

## **II. ISO-NE's Termination Filing**

6. ISO-NE seeks to terminate Clear River's CSO for the 2021-2022 Capacity Commitment Period because it contends that both conditions for termination in Tariff section III.13.3.4(c) have been met.<sup>6</sup> As detailed below, ISO-NE states that Invenergy has covered Clear River's CSO for two Capacity Commitment Periods and the current commercial operation date is more than two years beyond the start of the Capacity Commitment Period for which Clear River initially cleared an auction.<sup>7</sup>

## **III. Invenergy's Request for Waiver**

7. As detailed below, Invenergy requests waiver of any requirement in Tariff section III.13.3.4(c) or elsewhere in the Tariff that would otherwise permit the termination of Clear River's 2021-2022 CSO, the forfeiture of Clear River's financial assurance, and the prohibition of its participation in the thirteenth FCA (FCA 13) to be held in February 2019. In the alternative, if the Commission accepts ISO-NE's termination filing, Invenergy requests that the Commission waive any provision of Tariff section III.13.3.4(c) that would require immediate forfeiture of Clear River's financial assurance or prohibit Clear River from participating in FCA 13.<sup>8</sup>

## **IV. Notice of Filing and Responsive Pleadings**

8. Notice of ISO-NE's termination filing was published in the *Federal Register*, 83 Fed. Reg. 48,811 (2018), with interventions and protests due on or before October 11, 2018. Timely motions to intervene were filed by Energy New England, LLC; Calpine Corporation; Clear River Energy LLC and Invenergy; Cogentrix Energy Power Management, LLC (Cogentrix); Dominion Energy Services, Inc. (Dominion); National Grid; New England Power Pool Participants Committee (NEPOOL); NRG Power Marketing LLC; and Town of Burrillville, Rhode Island (Burrillville). Invenergy filed a protest, and Burrillville and Cogentrix filed comments. On October 25, 2018, ISO-NE filed an answer to Invenergy's protest.

9. Notice of Invenergy's waiver request was published in the *Federal Register*, 83 Fed. Reg. 52,826 (2018), with interventions and protests due on or before October 25,

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<sup>6</sup> ISO-NE September 20, 2018 Transmittal Letter at 1 (ISO-NE CSO Termination Transmittal).

<sup>7</sup> ISO-NE CSO Termination Transmittal at 2-3.

<sup>8</sup> Invenergy Waiver Request at 2.

2018. Burrillville, Dominion, ISO-NE, National Grid and NEPOOL filed timely motions to intervene. Burrillville and ISO-NE filed protests.

## **V. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the answers filed in these proceedings because they have provided information that assisted us in our decision-making process.

## **VI. Substantive Matters**

12. As discussed below, we accept ISO-NE's filing to terminate the Project's CSO and deny Invenergy's request for waiver.

### **A. ISO-NE's Termination Filing**

#### **1. Filing**

13. ISO-NE describes Clear River as a 485 MW combined cycle natural gas turbine in Burrillville, Rhode Island, which is in the Southeast New England Capacity Zone. ISO-NE states that Clear River initially obtained a CSO in the tenth FCA (FCA 10), which was held in February 2016 for the 2019-2020 Capacity Commitment Period. Thus, Clear River had an original commercial operation date of June 1, 2019.<sup>9</sup> ISO-NE explains that Clear River also cleared in the eleventh and twelfth FCAs (FCA 11 and FCA 12) and obtained CSOs for the 2020-2021 and 2021-2022 Capacity Commitment Periods.

14. ISO-NE states that Invenergy subsequently covered Clear River's CSO for Capacity Commitment Periods 2019-2020 and 2020-2021. ISO-NE asserts that the critical path schedule reports that Invenergy submitted to ISO-NE indicate that little progress has been made to commence construction since Clear River first obtained a CSO in FCA 10, and the commercial operation date is currently reported to be later than June 1, 2021.<sup>10</sup> ISO-NE states that, because Invenergy has now covered Clear River's CSO for two Capacity Commitment Periods and the current commercial operation date is more

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<sup>9</sup> ISO-NE CSO Termination Transmittal at 2.

<sup>10</sup> As noted below, in its answer to Invenergy's protest, ISO-NE identifies December 31, 2021 as Clear River's expected commercial operation date. *See* ISO-NE CSO Termination Answer at 5-6.

than two years beyond the start of the Capacity Commitment Period for which Clear River initially cleared an auction, ISO-NE is filing to terminate Clear River's CSO for the 2021-2022 Capacity Commitment Period, in accordance with section III.13.3.4(c) of the Tariff. ISO-NE states that, if the Commission accepts the termination filing, it will terminate Clear River's CSO, draw down the financial assurance associated with the terminated CSO, and remove Clear River's qualified capacity, rendering it ineligible to participate in FCA 13, which will be held in February 2019.<sup>11</sup>

15. ISO-NE requests that the Commission issue an order within 60 days of the date of the filing because ISO-NE and market participants need certainty as to the status of Clear River in advance of FCA 13.<sup>12</sup>

## 2. Invenergy's Protest

16. Invenergy requests that the Commission reject ISO-NE's filing and allow Clear River to retain its CSO.<sup>13</sup> Invenergy states that ISO-NE has apparently concluded that its discretionary authority under Tariff section III.13.3.4(c) does not allow it to take into account the specific circumstances of Clear River's development, particularly that Invenergy is still awaiting a permitting decision by the Rhode Island Energy Facility Siting Board (Rhode Island Siting Board) on Invenergy's nearly three-year-old application. Invenergy argues, however, that the Commission is able to consider how the Tariff language should be applied in different circumstances, as well as the policy implications of ISO-NE's decision to seek termination of Clear River's CSO.<sup>14</sup>

17. Invenergy states that Clear River is one of two units that it is developing at the Burrillville site that together will total 1,080 MW. Invenergy explains that the two highly efficient, air-cooled generating units will use 90 percent less water than a traditional, water-cooled plant, will have among the lowest heat rates in New England, and will displace older, less environmentally-friendly generation.<sup>15</sup> Invenergy asserts that, because the facility will connect directly to both of the main natural gas transmission lines owned by Algonquin Gas Transmission and because each turbine is dual-fueled,

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<sup>11</sup> *Id.* at 2-3.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> Invenergy CSO Termination Protest at 1.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 7.

capable of running on ultra-low-sulfur diesel stored on site in a two million gallon tank, Clear River will help reduce New England's fuel security concerns.<sup>16</sup>

18. Invenergy states that it has been actively developing Clear River since 2014.<sup>17</sup> Invenergy states that it secured Clear River's site in 2014; submitted its interconnection application, submitted its air permit application, applied to the Rhode Island Siting Board for a construction permit, and qualified the full facility in the Forward Capacity Market in 2015; and obtained a CSO for Clear River's 485 MW in FCA 10 in 2016. Invenergy explains that initial local support for Clear River yielded a tax and property value agreement with the Town of Burrillville and that, in 2015, it entered into two successive letters of intent with the local water utility, Pascoag Utility District, to develop a water supply plan for Clear River. However, it explains that, after an opposition campaign by local and outside parties, the water utility terminated the then-current letter of intent in August 2016. Invenergy states that the termination, coupled with delays in obtaining an alternate water source, created an approximately one-year delay with the permitting review by the Rhode Island Siting Board.<sup>18</sup>

19. Invenergy asserts that, even absent a construction permit, it continued to fund development activities, including \$44 million on pre-construction, development, and security postings, of which only \$9 million is refundable if the project's CSO is terminated.<sup>19</sup> Invenergy states that, beyond the \$44 million that it has already spent, it is committed to funding an additional \$60 million in upgrades to National Grid's transmission system but that it cannot prudently agree to fully fund those upgrades until the Rhode Island Siting Board issues Clear River's permit.<sup>20</sup> Invenergy explains that the Rhode Island Siting Board was in the midst of hearings on its permit application when ISO-NE submitted this CSO termination filing but that the board has since stayed the hearings pending the outcome of this proceeding.

20. Invenergy also argues that the recent revision to Clear River's commercial operation date (now December 31, 2021) is the result of National Grid's revision of the completion date for certain interconnection upgrades and must be considered in context.<sup>21</sup>

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<sup>16</sup> *Id.* at 7-8.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.* at 9, 16-17.

<sup>21</sup> *Id.* at 4-5.

Invenergy explains that, when it submitted its September 2018 monthly report via ISO-NE's Critical Path Schedule software, it was required to submit the revised Capacity Network Resource Interconnection Service upgrades date provided by National Grid. Invenergy states that National Grid's delay of the completion date of those upgrades by an additional six months caused the Critical Path Schedule software to automatically extend Clear River's commercial operation date past June 1, 2021. Invenergy asserts that the September 2018 update to Clear River's critical path schedule that pushed its commercial operation date out past June 1, 2021 is related to an updated completion date for a Capacity Network Resource Interconnection upgrade—the West Farnum upgrade—that is not needed for Clear River to achieve commercial operation. Invenergy states that only the Network Resource Interconnection Service upgrades are required for Clear River to reach commercial operation by June 1, 2021. It adds that, under National Grid's revised schedule, all of those upgrades will be completed by that date.<sup>22</sup>

21. Invenergy further argues that ISO-NE has previously stated that termination of a CSO is reserved for “only the most egregious cases”<sup>23</sup> and that Invenergy's good faith efforts to develop Clear River since 2014 do not constitute an egregious case. It notes that ISO-NE has acknowledged that “the disconnect between the Forward Capacity Market rules and the length of the state siting and environmental permitting process can be expected to continue to interfere with the ability of new generation projects to become commercial.”<sup>24</sup> Invenergy states that the delay of Clear River is an example of this problem.

22. Invenergy explains that it submitted its siting application to the Rhode Island Siting Board in October 2015, prior to participating in FCA 10 but that the board proceedings have been delayed extensively for reasons beyond Invenergy's control.<sup>25</sup> Invenergy notes that terminating its CSO for Capacity Commitment Period 2021-2022

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<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 2 (citing ISO-NE, Filing, Docket No. ER14-2440-000, at 1 (filed July 16, 2014) (2014 ISO-NE Filing)). Invenergy points to ISO-NE's filing in 2014 to revise its market rules to allow a resource to seek from the Commission a one-year deferral of its CSO in cases where its development is delayed and ISO-NE concludes the absence of the resource will lead to a violation of “any [North American Electric Reliability Corporation (NERC)] or [Northeast Power Coordinating Council (NPCC)]. . . criteria or of the ISO New England System Rules.” *See* Invenergy CSO Termination Protest at 12; ISO-NE Tariff § III.13.3.7.

<sup>24</sup> *Id.* at 2-3 (quoting 2014 ISO-NE Filing at 5).

<sup>25</sup> *Id.* at 3.



will not impact the results of FCA 12, which has already been conducted, and will merely serve to remove Clear River from FCA 13 when Clear River expects to be in service for the associated 2022-2023 Capacity Commitment Period. Finally, Invenergy argues that terminating Clear River's CSO will send a signal to opponents of new natural gas-fired generation projects that delay tactics will prove effective in stopping development of those projects in the future.<sup>26</sup>

### 3. Other Pleadings

23. Cogentrix supports ISO-NE's filing. Cogentrix argues that the filing is consistent with the Tariff provisions, which Cogentrix views as unambiguous, and that ISO-NE is substantively and procedurally justified in seeking the termination.<sup>27</sup> Cogentrix argues that the termination is necessary to maintain the proper functioning of the Forward Capacity Market because Clear River is unlikely to reach commercial operation in the foreseeable future.<sup>28</sup> Cogentrix adds that Clear River's continued inclusion in the capacity market will suppress auction clearing prices, reducing capacity revenues to other suppliers and threatening the financial incentive for alternative supply resources that can contribute to resource adequacy.<sup>29</sup>

24. Also supporting ISO-NE's filing, Burrillville disputes Invenergy's claim that Rhode Island permitting delays were entirely beyond Invenergy's control. Burrillville claims that Invenergy repeatedly failed to submit complete information to Burrillville, the Rhode Island Siting Board, and other Rhode Island governmental agencies conducting reviews of Invenergy's permitting applications.<sup>30</sup> Burrillville asserts that the Rhode Island Siting Board was forced to suspend the Clear River docket for 90 days because Invenergy failed to secure a firm water contract in advance of submitting its application. Burrillville also alleges that Invenergy failed to notify the Rhode Island Siting Board of certain ISO-NE and Commission activities, leading to additional delays.<sup>31</sup>

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<sup>26</sup> *Id.* at 5.

<sup>27</sup> Cogentrix CSO Termination Comments at 4-5.

<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> Burrillville CSO Termination Answer at 2-3.

<sup>31</sup> *Id.* at 5. Burrillville asserts that Invenergy failed to notify the Rhode Island Siting Board that Unit 2 of the Clear River project did not qualify for participation in FCA 12 in September 2017; that Invenergy had submitted a complaint against ISO-NE to

#### 4. ISO-NE's Answer

25. ISO-NE asserts that there is no dispute that Clear River is subject to termination under Tariff section III.13.3.4(c). ISO-NE states that, pursuant to Tariff section III.13.3.2.2(a)(ix), one of the critical path schedule milestones that a Project Sponsor must satisfy is documentation regarding the completion of transmission upgrades. ISO-NE explains that Invenergy received a schedule from the interconnecting transmission owner, National Grid, indicating that the reported completion date for all necessary transmission upgrades for Clear River is December 31, 2021, which is more than two years after June 1, 2019.<sup>32</sup> ISO-NE disputes Invenergy's claim that only Network Resource Interconnection Service upgrades must be completed to achieve that milestone. ISO-NE notes that, while the completion of Network Resource Interconnection Service upgrades allows a resource to become commercial for energy purposes, Capacity Network Resource Interconnection Service upgrades must be completed for the resource to meet all of its critical path schedule milestones and be considered commercially operational for the Forward Capacity Market.<sup>33</sup>

26. ISO-NE adds that Invenergy has been working with another interconnecting transmission owner, Eversource, on other transmission upgrades that are also necessary for Clear River to meet all of its critical path schedule milestones. ISO-NE states that it has not been provided with, and is not aware of, a schedule for completion of those upgrades and that it is unclear if those transmission upgrades will be completed prior to June 1, 2021.<sup>34</sup>

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the Commission in November 2017 (Docket No. EL18-31-000); and that ISO-NE and National Grid filed an unexecuted Large Generator Interconnection Agreement among ISO-NE, National Grid, and Clear River (Docket No. ER18-349-000). Invenergy ultimately withdrew the complaint in January 2018. The Commission accepted the unexecuted Large Generator Interconnection Agreement in January 2018. *ISO New England Inc.*, 162 FERC ¶ 61,058 (2018).

<sup>32</sup> ISO-NE CSO Termination Answer at 4-5.

<sup>33</sup> *Id.* at 5 (citing ISO Tariff § III.13.3.8, which states that “[a] resource (or portion thereof) achieves [Forward Capacity Market] Commercial Operation when (1) the ISO has determined that the resource (or portion thereof) has achieved all of its critical path milestones, including completion of any transmission upgrade necessary for the resource to obtain the requisite interconnection service[.]” ISO Tariff § III.13.3.8 (15.0.0).

<sup>34</sup> ISO-NE CSO Termination Answer at 6.

27. ISO-NE states that it recognizes and appreciates the challenges, which Invenergy cites, to obtaining the necessary permits to construct and operate a new resource in a 39-month planning period between the FCA and the associated Capacity Commitment Period. ISO-NE notes, however, that the Tariff allows new resources that cover their CSOs to extend their commercial operation date to 63 months from the time in which they initially obtained a CSO. ISO-NE argues that, when a resource's development becomes delayed beyond that point, allowing it to retain its CSO can negatively affect the outcome of the Forward Capacity Market and system planning studies.<sup>35</sup>

28. ISO-NE states that the project site for Clear River remains completely undeveloped and that it is unclear whether, or when, the Rhode Island Siting Board will approve Clear River's permits. ISO-NE states that it is also uncertain if the December 31, 2021 completion schedule for the West Farnum transmission upgrades that was provided in September 2018 remains valid. For these reasons, ISO-NE states that it does not believe it is likely that Clear River will be complete by June 1, 2022, which is the start of the Capacity Commitment Period for FCA 13.<sup>36</sup>

#### 5. Invenergy's Answer

29. Invenergy reiterates that Clear River does not dispute ISO-NE's authority to make termination filings but argues that the circumstances here do not represent an egregious case for termination and that Invenergy's request for waiver meets the Commission's criteria for granting waivers.<sup>37</sup> Invenergy states that ISO-NE has based its termination decision on the speculation that Clear River's commercial operation may be further delayed due to other uncertainties.<sup>38</sup> Invenergy argues that unknown risks are part of project development and neither ISO-NE nor the Commission should engage in speculation as to whether further delays to Clear River's development will materialize.<sup>39</sup> Invenergy reiterates the significant investment that it has already made toward the development of Clear River and the benefits that Clear River will provide once completed. Invenergy states that it is prepared to resume work toward obtaining a permit

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<sup>35</sup> *Id.* at 6-7.

<sup>36</sup> *Id.* at 7-8.

<sup>37</sup> Invenergy CSO Termination Answer at 2-3.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.* at 8-9.

early next year from the Rhode Island Siting Board and reiterates that Clear River is on schedule to be in service before the FCA 13 Capacity Commitment Period.<sup>40</sup>

30. Invenergy argues that the fact that allowing Clear River to retain its CSO and participate in FCA 13 could affect auction outcomes or system planning is not relevant because this proceeding is not about auction prices and auction prices are the result of many factors.<sup>41</sup> Invenergy asserts that if the Commission considers the potential for price suppression it should also consider the potential for higher auction prices if Clear River is excluded from FCA 13.

## 6. Commission Determination

31. We accept as just and reasonable ISO-NE's termination filing, to become effective November 19, 2018, the end of the 60-day notice period required by FPA section 205. We find that the conditions for termination set forth in Tariff section III.13.3.4(c) have been met with respect to Clear River's CSO for Capacity Commitment Period 2021-2022. Section III.13.3.4(c) states that ISO-NE shall have the right to seek termination of a CSO if one or more of several conditions are satisfied. ISO-NE asserts that two of these conditions are satisfied for Clear River: (1) Invenergy has covered the CSO for two Capacity Commitment Periods, and (2) as a result of milestone date revisions, the date by which Clear River will have achieved all its critical path schedule milestones, including reaching commercial operation, will be more than two years after the beginning of the Capacity Commitment Period for which it first received a CSO.

32. As to the first condition, Invenergy does not dispute ISO-NE's assertion that it covered Clear River's CSO for the 2019-2020 and 2020-2021 Capacity Commitment Periods and in fact acknowledges that it did so.<sup>42</sup> Tariff section III.13.3.4(c) is clear that the action of a capacity resource covering its CSO for two Capacity Commitment Periods is sufficient to permit ISO-NE to seek termination of its CSO through a filing with the Commission. Because the condition for termination is met, consistent with the Tariff, we accept ISO-NE's termination filing as just and reasonable.

33. As to the second condition, ISO-NE and Invenergy disagree as to whether National Grid's revision of the completion date for the West Farnum upgrade to December 2021 renders Clear River unable to meet its critical path schedule milestones, including achieving commercial operation by June 1, 2021. Because we have found

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<sup>40</sup> *Id.* at 9-10.

<sup>41</sup> *Id.* at 11-12.

<sup>42</sup> Invenergy CSO Termination Protest at 3.

above that the first condition for termination is satisfied, we will not opine on the issue of whether this second condition is also satisfied.

**B. Invenergy's Request for Waiver**

**1. Filing**

34. As explained above, Invenergy requests waiver of any requirement in Tariff section III.13.3.4(c) or elsewhere in the Tariff that would otherwise permit the termination of Clear River's 2021-2022 CSO, the forfeiture of Clear River's financial assurance, and the prohibition of its participation in FCA 13. In the alternative, if the Commission accepts ISO-NE's termination filing, Invenergy requests that the Commission waive any provision of Tariff section III.13.3.4(c) that would require immediate forfeiture of Clear River's financial assurance or prohibit Clear River from participating in FCA 13.<sup>43</sup>

35. Invenergy argues that its request satisfies the Commission's criteria for granting waiver. First, Invenergy asserts that it acted in good faith because it took reasonable measures to secure all major permits and timely develop the Clear River project. Second, Invenergy contends that the request is of limited scope because it seeks waiver only for Clear River (i.e., it is not challenging ISO-NE's general authority under Tariff section III.13.3.4(c) or asking the Commission to opine on whether ISO-NE should or could have exercised its discretion differently).

36. Third, Invenergy claims that the request addresses a concrete problem because Clear River will be prohibited from participating in the upcoming FCA 13 absent rejection of the termination filing or granting of the waiver request. Fourth, Invenergy asserts that granting the waiver will not harm any third party or have any other undesirable consequence. Invenergy contends that permitting it to cover Clear River's FCA 12 CSO for some portion of the associated Capacity Commitment Period, 2021-2022 would not affect the results of that auction, which was conducted in early 2018, or interfere with ISO-NE's administration of the Forward Capacity Market.<sup>44</sup> Invenergy acknowledges that Clear River's participation in FCA 13 will increase available supply and that some parties may contend that this will unduly suppress prices. However, Invenergy argues that the Commission has found that, even though a waiver may indirectly impact the competitive landscape, it should not be deemed to constitute harm to any third party. For support, Invenergy points to *Calpine*, in which the Commission found that granting a request for waiver for a new resource to belatedly lock in the FCA

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<sup>43</sup> Invenergy Waiver Request at 2.

<sup>44</sup> *Id.* at 17-18.

10 clearing price would not result in competitive harm because it “will not restrict or negatively affect other market participants from offering into the auction and obtaining a capacity position, if they clear.”<sup>45</sup>

## 2. Pleadings

37. Burrillville protests Invenenergy’s request for waiver, making substantially the same arguments that it offers in support of ISO-NE’s CSO termination filing. Burrillville asserts that Invenenergy’s claim that Rhode Island permitting delays were entirely beyond Invenenergy’s control is untrue, arguing that many of the delays were caused by events within Invenenergy’s control.<sup>46</sup> Burrillville claims that Invenenergy failed to secure a firm water contract for Clear River, repeatedly failed to submit complete information to Burrillville, the Rhode Island Siting Board, and other Rhode Island governmental agencies conducting reviews of Invenenergy’s permitting applications, and delayed notifying the Rhode Island Siting Board and other parties of developments within the FCA process and in proceedings before the Commission.<sup>47</sup>

38. ISO-NE urges the Commission to deny Invenenergy’s request for waiver because it does not meet the requirement that the waiver not have undesirable consequences, such as harming third parties. ISO-NE states that the continued participation of Clear River in FCAs as an Existing Capacity Resource will affect auction outcomes and, as a result, third parties because, unlike New Capacity Resources, Existing Capacity Resources are automatically entered into each round of the FCA at a zero price.<sup>48</sup> ISO-NE states that Existing Capacity Resources are also utilized in the assumptions for calculating the FCA’s Installed Capacity Requirement, which will affect the amount of capacity procured.

39. ISO-NE asserts that, absent termination, ISO-NE will continue to use Clear River in system planning studies (such as the Interconnection Procedures and the Regional and Inter-Regional Transmission Planning Processes).<sup>49</sup> ISO-NE states that Clear River may be a barrier to other new entry if ISO-NE permits it to retain its CSO because it would be

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<sup>45</sup> *Id.* at 18 (citing *Calpine Energy Servs, L.P.*, 154 FERC ¶ 61,082, at P 13 (2016) (*Calpine*)).

<sup>46</sup> Burrillville Waiver Request Protest at 4.

<sup>47</sup> *Id.* at 4-9.

<sup>48</sup> ISO-NE Waiver Request Protest at 5.

<sup>49</sup> *Id.* at 5.

necessary to build other new resources around Clear River due to its inclusion in system planning studies. ISO-NE contends that it is precisely because Existing Capacity Resources can affect these processes and studies that the Tariff allows ISO-NE to terminate a resource's CSO after it is late for two years. ISO-NE argues that it is therefore important for the proper administration of the Forward Capacity Market and the overall system planning process that the termination provisions in the Tariff apply to Existing Capacity Resources that are significantly late in achieving commercial operation.

40. ISO-NE asserts that Clear River will not achieve commercial operation for Forward Capacity Market purposes until early 2022, which is over 71 months after it initially cleared FCA 10, and exceeds the 63 months allowed through the Tariff.<sup>50</sup> ISO-NE further contends that Invenergy has made little progress in developing Clear River. ISO-NE adds that, given the amount of opposition and controversy surrounding Clear River, it is now unclear whether the Rhode Island Siting Board will approve the permits and, if it does, whether the permits will be appealed. ISO-NE states that, for these reasons, it does not believe it is likely that Clear River will be complete by June 1, 2022, the start of the FCA 13 Capacity Commitment Period.<sup>51</sup>

### **3. Commission Determination**

41. The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>52</sup> The petitioner bears the burden of justifying its waiver request.<sup>53</sup>

42. We deny Invenergy's request for waiver because we find, contrary to Invenergy's position, that the waiver would result in undesirable consequences. We find that, on balance, if Clear River is allowed to retain its CSO, or retain its Existing Capacity Resource status,<sup>54</sup> after failing to achieve commercial operation within 63 months after

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<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.* at 6-7.

<sup>52</sup> *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016).

<sup>53</sup> *Wisconsin Power & Light Co.*, 150 FERC ¶ 61,221, at P 38 (2018).

<sup>54</sup> Invenergy's alternative request for waiver asks the Commission to waive any provision of Tariff section III.13.3.4(c) that would require immediate forfeiture of Clear River's financial assurance or prohibit Clear River from participating in FCA 13.

the FCA in which it initially obtained a CSO, it will have undesirable consequences for both system planning and Forward Capacity Market pricing.

43. With respect to the impact on system planning, ISO-NE explains that it includes Existing Capacity Resources in the calculations of the Installed Capacity Requirement for the FCA and in system planning studies, such as interconnection procedures and regional and inter-regional transmission planning processes. ISO-NE adds that it has included Clear River in these processes since Clear River cleared FCA 10.<sup>55</sup> We agree with ISO-NE that continuing to do so will have negative consequences for multiple aspects of system planning. The Installed Capacity Requirement is a key parameter in setting capacity demand in each FCA. Including Clear River in the calculations of the Installed Capacity Requirement for FCA 13 and subsequent auctions risks misrepresenting capacity availability for the associated delivery years. In turn, the FCA may send incorrect market signals for the value of capacity and therefore procure an economically inefficient quantity of capacity overall and/or in certain capacity zones.

44. Similarly, continuing to account for Clear River as an Existing Capacity Resource may also skew the results of interconnection studies and transmission planning studies.<sup>56</sup> Conducting interconnection studies based on an incorrect assumption can create a barrier to other new resources whose interconnection may rely on, or be impacted by, Clear River's operational status and the existence of its associated transmission upgrades. Likewise, using an incorrect assumption in transmission planning studies may call into question the accuracy and integrity of those studies, including any transmission issues or potential solutions they identify. For these reasons, we find that including Clear River in these studies will have undesirable consequences.

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Invenergy Waiver Request at 2. With respect to FCA 13 participation, we understand this to be a request for Clear River to maintain its Existing Capacity Resource status in the Forward Capacity Market and in future system planning processes. Because we find that granting one element of Invenergy's alternative request—i.e., permitting Clear River to retain its Existing Capacity Resource status—will have undesirable consequences, we also deny its request to retain Clear River's financial assurance. In any case, Clear River does not explain why it should be permitted to retain its financial assurance notwithstanding its failure to meet its CSO.

<sup>55</sup> ISO-NE Waiver Request Protest at 5.

<sup>56</sup> ISO-NE states that “[s]ince clearing in FCA 10, [Clear River] has been included as an Existing Generating Capacity Resource in system planning studies such as Interconnection Procedures and the Transmission Planning Processes.” ISO-NE CSO Termination Answer at 7 n.22.



45. With respect to the impact on the Forward Capacity Market pricing, we note that, if Clear River is allowed to retain its CSO, its 485 MW will be entered into FCA 13 as a price taker because it has a multi-year CSO.<sup>57</sup> Clear River would be a price taker despite its current critical path schedule indicating that it will achieve commercial operation no sooner than December 31, 2021,<sup>58</sup> 71 months after it originally obtained a CSO in FCA 10 and 31 months after the June 1, 2019, date by which it was supposed to begin providing capacity service. We find that allowing a resource that is so significantly late in achieving commercial operation to be treated as an Existing Capacity Resource will have undesirable consequences for Forward Capacity Market pricing.

46. Finally, we note that this order addresses only the CSO termination filing submitted by ISO-NE and the companion waiver request submitted by Invenergy. Today's order simply evaluates whether the relevant ISO-NE Tariff provisions, the records in these proceedings, and Commission precedent warrant termination of Clear River's CSO, and does not address whether the Clear River project is in fact "needed." Therefore, our decision to accept ISO-NE's request and deny Invenergy's waiver should not be construed as a determination by the Commission that the Clear River project is not needed, as that question is not before us.

The Commission orders:

(A) ISO-NE's filing to terminate Clear River's CSO for the 2021-2022 Capacity Commitment Period is hereby accepted, to become effective on November 19, 2018, as discussed in the body of this order.

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<sup>57</sup> A new generation resource can choose (prior to the FCA being held) whether it wants to obtain a multi-year capacity supply obligation if it clears in the FCA. *See* ISO-NE Tariff § III.13.1.1.2.2.4 (Capacity Commitment Period Election). After clearing in the first auction, a new generation resource that elects to obtain a multi-year capacity supply obligation is entered into the FCA as a price-taker for up to six subsequent years. *Id.*

<sup>58</sup> We conclude that December 31, 2021, is the appropriate commercial operation date by which to judge Clear River's development status given that both ISO-NE and Invenergy acknowledge that, according to ISO-NE's critical path schedule software, Clear River's current commercial operation date is December 31, 2021. ISO-NE CSO Termination Answer at 3, 5-6; Invenergy CSO Termination Protest at 4.

(B) Invenergy's request for waiver is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner McIntyre is not voting on this order.

( S E A L )

Kimberly D. Bose,  
Secretary.