

I. Background

A. The Inventoried Energy Program

3. The Inventoried Energy Program is an ISO-NE program that was designed to provide incremental compensation to resources that maintain a certain amount of inventoried energy during cold periods when winter energy security is most stressed. ISO-NE defines
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amended, became effective by operation of law.⁹ Rehearing was similarly denied by operation of law on October 7, 2019.¹⁰ Subsequently, after the Commission regained a quorum, the Commission issued an order on June 18, 2020, accepting the Inventoried Energy Program.¹¹

6. During the Commission proceedings that culminated in the June 18 Order accepting the Inventoried Energy Program, some parties argued that the program's structure would improperly permit resources such as coal plants, nuclear plants, and hydropower plants, which already maintain inventoried energy as part of their operating model, to receive Inventoried Energy Program payments. According to the protesters, such resources would not change their operating behavior in response to the economic incentives provided by the Inventoried Energy Program and therefore should not receive incentive payments.¹² The Commission rejected this argument, stating that it was just and reasonable to provide similar compensation for similar service, and that the Inventoried Energy Program was aimed at compensating resources for a specific reliability attribute for which they are not currently compensated.¹³

B. The Belmont Decision

7. On appeal of the June 18 Order, the U.S. Court of Appeals for the D.C. Circuit Inventoried Energy Program.¹⁴ The court found, however, that the Commission in one respect; specifically, permitting certain types of generators to receive Inventoried Energy Program payments when those generators would not change their behavior in response to those payments.¹⁵

⁹ *ISO New England Inc.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER19-1428-001 (Aug. 6, 2019).

¹⁰ *ISO New England Inc.*, 169 FERC ¶ 61,013 (2019).

¹¹ *ISO New England Inc.*, 171 FERC ¶ 61,235 (2020) (June 18 Order).

¹² See Massachusetts Attorney General, Rehearing Request, Docket No. ER19-1428-

because pumped hydro resources participate in the markets as Binary Storage Facilities, a subcategory of Electric Storage Facilities (which are permitted to participate in the Inventoried Energy Program), pumped hydro resources should also be allowed to participate regardless of the *Belmont* generation. The Commission stated that hydroelectric resources are not allowed to participate in the Inventoried Energy Program.¹⁹ However, ISO-NE stated that it did not adopt the amendment, noting that *Belmont* did not provide an exception for pumped hydro resources to participate as Binary Storage Facilities, nor did it differentiate between pondage and pumped hydro resources but rather simply prohibited them. ISO-NE stated that the Commission's decision is not opposed to pumped hydro resources participating as Electric Storage Facilities provided that the Commission determines that the amendment meets the commission's mandate.²⁰

11. In ruling on the compliance filing, the Commission stated that the question before it was whether ISO-NE had done so. The Commission found that the issue was beyond the scope of the compliance proceeding. The Commission therefore accepted the compliance filing on April 24, 2023, without making any changes to the Inventoried Energy Program.²¹

II. Complaint

12. Brookfield states that it is the owner of the Bear Swamp pumped storage resource that satisfies the requirements applicable to an Electric Storage Facility and participates in the ISO-NE markets as an Electric Storage Facility.²² Brookfield argues that pumped storage Electric Storage Facilities

Facilities are designed for the exact same purpose to receive and store energy for later injection into the grid and that, because all Electric Storage Facility technologies operate under the same economic principles, the same incentive exists for all Electric Storage Facilities to provide reliability service through the Inventoried Energy Program.²⁴ Thus, according to Brookfield, it is unduly discriminatory, in violation of the FPA, to permit some types of Electric Storage Facilities specifically, battery storage Electric Storage Facilities to receive incentive payments from the Inventoried Energy Program, but to deny that opportunity to pumped storage Electric Storage Facilities.

13. According to Brookfield, undue discrimination occurs when (1) there is a difference in rates or services between two classes of persons, and (2) the two classes are similarly situated, i.e., there are no differences between the two classes that are material to the inquiry at hand.²⁵ Brookfield states that there are no material factual differences between pumped storage Electric Storage Facilities and other Electric Storage Facilities with respect to their ability to provide winter reliability services that would justify their disparate treatment with regard to the Inventoried Energy Program. Brookfield states that all Electric Storage Facilities operate under the same economic principles no matter how they store energy; decisions to charge (i.e., purchase and store energy) or discharge (i.e., resell stored energy) are based on market prices and efficiency losses. Thus, Brookfield argues that the fact that pumped storage Electric Storage Facilities use f1 0 0 1 29irtorage Facilities

Power Generators Association (NEPGA), New England Power Pool Participants Committee, and New England States Committee on Electricity filed notices of intervention or timely motions to intervene. FirstLight and NEPGA filed timely comments in support of the Complaint, and NECOS filed a timely protest. On September 5, 2023, Brookfield filed an answer to ISO-protest.

A. ISO-NE Answer

17. ISO-NE states that it is not opposed to pumped storage participation in the Inventoried Energy Program;³⁴ however, ISO-NE states that the Commission would have to issue an order directing ISO-NE to allow pumped storage resources to participate in the program on or before September 22, 2023 in order to implement the directive for the upcoming 2023-2024 winter.³⁵

generators from the Inventoried Energy Program
compliance directive.³⁹

prior

18. ISO-NE further states that the evidentiary record in the Winter Reliability Program proceeding, upon which the D.C. Circuit based its

20. FirstLight c
eliminating the ability of a pumped storage resource to participate in the Inventoried Energy Program is unduly discriminatory. FirstLight states that the Commission has held that all electric storage resources should have comparable access to both organized market-

Complaint because it is possible to do so without contradicting *Belmont*.⁴⁹ FirstLight states that it agrees with Brookfield that the court did not exclude Electric Storage Facilities from participating in Inventoried Energy Program, and because pumped storage is designed, operated, and registered within ISO-NE as an Electric Storage Facility, the compliance change specifically excluding pumped storage is unjust and unreasonable and inconsistent with Order No. 841.

22. NEPGA supports the Complaint and states that Brookfield demonstrates that there is no material difference among Electric Storage Facilities justifying this patently discriminatory treatment neither in how Electric Storage Facilities operate nor in their economic incentives to respond to the Inventoried Energy Program design.⁵⁰ NEPGA further states that the Tariff language expressly prohibiting pumped storage participation

IV. Discussion

A. Procedural Matters

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18 C.F.R. § 385.214 (2022), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30.
§ 358.213(a)(2) (2022), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We accept Brook answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

31. We grant the Complaint, effective August 2, 2023, and direct ISO-NE to allow pumped storage Electric Storage Facilities to be eligible to participate in ISO-markets as Electric Storage Facilities in the Inventoried Energy Program, as discussed below. We find that pumped storage Electric Storage Facilities are similarly situated to battery storage Electric Storage Facilities for purposes of participation in the Inventoried Energy Program. Battery storage Electric Storage Facilities are eligible to participate in the Inventoried Energy Program provided they meet the applicable operational requirements.0 1 72.024 403.99 Tm0 g0 GIuu8ec/P a0 g0 G[(u)-8(m)9(p)-8(ed)] TJET@MC 0 612 792

34. Brookfield has demonstrated that a pumped storage Electric Storage Facility operates in a similar fashion to a battery storage Electric Storage Facility in that each uses electricity as a fuel to charge its resource (for which it incurs a cost), can store energy and discharge it in a later period, and is paid for the electricity discharged from its system.⁶⁵ Furthermore, pumped storage Electric Storage Facilities and battery storage Electric Storage Facilities both profit from energy arbitrage in ISO- by attempting to maximize the difference between the costs incurred to store energy and the revenues earned from injecting that energy into the

amount of fuel to procure or maintain at the beginning of winter. However, this argument is not applicable to Electric Storage Facilities participating in the Inventoried Energy Program, since payments for participation in the Inventoried Energy Program, unlike the Winter Reliability Program, are not limited to payments based on unused fuel at the end of the winter. Rather, those participating resources' compensation (and thus operational choices) will likely be made on a day-to-day or hour-by-hour basis during Inventoried Energy Days,⁷³ as opposed to on a seasonal basis.⁷⁴ As noted above, such short-term operational decisions are driven by changing prices in the ISO-NE energy markets, and both battery storage and pumped storage Electric Storage Facilities are able to change their short-term behavior in response to those price changes. Furthermore, the Inventoried Energy Program includes a construct that gives certain participating resources additional incentives to perform (i.e., inject stored energy into the system) when needed that were not part of the Winter Reliability Program that Mr. Forshaw analyzed. Specifically, the Inventoried Energy Program includes a spot payment construct during Inventoried Energy Days, where program participants are paid the spot rate if they inject energy into the system and, if they have a forward obligation, charged the spot rate if they fail to do so in a manner consistent with their obligations under the program.⁷⁵ This feature of the Inventoried Energy Program further strengthens the incentives of all resources participating in the program to develop and maintain energy inventories and to supply that energy to the ISO-NE system when needed most. As such, regarding pumped storage operation under the Winter Reliability Program is not directly applicable to the Inventoried Energy Program at issue here.

38. N pumped storage hydro facilities cannot maintain stored energy for another period or increase their stored energy beyond their operating requirements, or are constrained by minimum flow requirements, are not relevant,

⁷³ ISO-NE will declare an Inventoried Energy Day when the average of the high and low temperature is less than or equal to 17 degrees Fahrenheit as reported by the National Weather Service at Bradley International Airport. For more information, see <https://www.iso-ne.com/participate/support/participant>

because those arguments fail to address the central question above: whether pumped storage hydroelectric facilities are similarly situated to other types of Electric Storage Facilities that are eligible to participate in the Inventoried Energy Program insofar as they have the ability to change their behavior in response to short-term economic incentives.

39. In addition, the Complaint is not a collateral attack on any prior ruling. As the discussion of the Forshaw Affidavit above demonstrates,⁷⁶ the Winter Reliability Program proceeding addressed pumped storage resources in a different context⁷⁷ and therefore is distinguishable in that respect from the Inventoried Energy Program. As to the Complaint is a collateral attack on the September 2022 Order, we find that claim unfounded, as that order was limited in scope to direct ISO-NE to fulfill the directive in *Belmont*, which did not opine on pumped storage resources.

The Commission orders:

- (A) The Complaint is hereby granted, as discussed in the body of this order.
- (B) ISO-NE is hereby directed to revise the Tariff, effective August 2, 2023, to allow pumped storage Electric Storage Facilities to be eligible to participate in the Inventoried Energy Program as Electric Storage Facilities.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.
