109 FERC ¶ 61,147

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

ISO New England, Inc., et al.	Docket Nos. RT04-2-001, RT04-2-002, RT04-2-003, RT04-2-004, ER04-116-001, ER04-116-002, ER04-116-003, and ER04-116-004
Bangor Hydro-Electric Company, et al.	Docket Nos. ER04-157-002, ER04-157-003, ER04-157-005, and ER04-157-007
The Consumers of New England v. New England Power Pool	Docket Nos. EL01-39-001, EL01-39-002, EL01-39-003, and EL01-39-004
New York Independent System Operator, Inc. and the New York Transmission Owners	Docket No. ER04-943-000
New England Power Pool	Docket No. ER05-3-000

ORDER ACCEPTING PARTIAL SETTLEMENT, SUBJECT TO CONDITIONS; ACCEPTING, IN PART, COMPLIANCE FILINGS; AND Granting, IN PART, AND DENYING, IN PART, REQUESTS FOR REHEARING

(Issued November 3, 2004)

1. On September 14, 2004, the New England Power Pool (NEPOOL), ISO New England, Inc. (ISO-NE), and the New England transmission owners[1] (Transmission Owners) (collectively, the Settling Parties) submitted for approval, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,[2] a Settlement Agreement seeking to resolve, in part, pending issues relating to the proposal made in this proceeding by ISO-NE and the Transmission Owners (collectively, the Filing Parties) to establish a regional transmission organization (RTO) for New England (the ISO-NE RTO). The Filing Parties' proposal was initially addressed by the Commission in an order issued March 24, 2004.[3] In that order, we found that the Filing Parties' proposal would, with modifications, comply with our minimum characteristics and functions for RTOs, as set forth in Order No. 2000.4

2. Rehearing and/or clarification of the March 24 Order was subsequently sought by numerous intervenors, while filings seeking to comply with our rulings were submitted by the Filing Parties on June 22, 2004 and August 11, 2004. In the meantime, settlement negotiations were undertaken by the parties pursuant to the settlement procedures established by the Commission in the March 24 Order. The Settling Parties state that their proposed Settlement Agreement was the product of these negotiations.5

3. The Settling Parties state that the Settlement Agreement, if approved, would resolve a number of the issues currently pending in this proceeding, while leaving for

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[1] Bangor Hydro Electric Company; Central Maine Power Company; NSTAR Electric & Gas Corporation; New England Power Company; Northeast Utilities Service Company; NSTAR Electric & Gas Corporation; The United Illuminating Company; and Vermont Electric Power Company.

[2] 18 C.F.R. § 385.602 (2004).

[3] ISO New England, Inc., *et al*., 106 FERC ¶ 61,280 (2004) (March 24 Order).

[4] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd*, Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

[5] On October 19, 2004, the Settlement Judge issued an order certifying the Settlement Agreement to the Commission.

resolution, herein, only a limited number of remaining issues raised either on rehearing and/or in response to the compliance requirements set forth in the March 24 Order (Reserved Issues). The Settling Parties state that, among other things, the Settlement Agreement would transfer to the ISO-NE RTO, NEPOOL's existing interests and assets under the currently-effective ISO-NE/NEPOOL arrangements, and provide for the determination and implementation of an ISO-NE RTO Operations Date.[6]

4. The Settling Parties state that the existing ISO-NE/NEPOOL arrangements would be replaced by the agreements conditionally accepted by the Commission in the March 24 Order, namely: (i) an ISO-NE RTO Tariff (including, for the most part, provisions previously accepted by the Commission under the ISO-NE/NEPOOL arrangements); (ii) a Participants Agreement; (iii) a Market Participants Service Agreement; and (iv) a Transmission Operating Agreement. In addition, the Settling Parties submit, as an exhibit to the Settlement Agreement, a Second Restated NEPOOL Agreement, pursuant to which NEPOOL would continue to exist as an advisory stakeholder body.

5. For the reasons discussed below, we will accept the Settlement Agreement, subject to conditions. We will also accept, in part, the Filing Parties' compliance filings and will grant, in part, and deny, in part, the remaining requests for rehearing, i.e., those requests for rehearing and/ or clarification identified in the Settlement Agreement as Reserved Issues.[7]

I. Background

6. On October 31, 2003, the Filing Parties submitted their RTO proposal for filing. In that submittal, the Filing Parties proposed to establish the ISO-NE RTO as the provider of regional transmission service in the six-state New England region currently served by ISO-NE under the ISO-NE/NEPOOL arrangements. The Filing Parties also sought a declaration that the existing contractual arrangements governing the operation of

[6] *See* Settlement Agreement at Attachment D. "Operations Date" is defined in the Transmission Operating Agreement, at section 10.01(a), as the date at least 30 calendar days following Notice to the Commission that ISO-NE and the Initial Participating Transmission Owners have unanimously agreed to place the ISO-NE RTO arrangements into effect. The Settlement Agreement further provides that such Notice shall not be issued until the earlier of November 1, 2004, or the date on which the Commission issues an order accepting the Settlement Agreement, without modification.

[7] For the reasons discussed below, we will also accept two related filings involving the proposed elimination of Through-and-Out Service Charges.

the New England markets would terminate as of the Operations Date of the ISO-NE RTO. In addition, the Transmission Owners, joined by Green Mountain Power Corporation and Central Vermont Public Service Corporation (the ROE Filers), submitted a related filing, pursuant to section 205 of the Federal Power Act (FPA),[8] in which they proposed a return on equity (ROE) recoverable under the regional and local transmission rates that will be charged by the ISO-NE RTO.[9]

7. In the March 24 Order, we found that the Filing Parties' proposal to establish the ISO-NE RTO will comply with the minimum characteristics and functions applicable to RTO operations as set forth by the Commission in Order No. 2000, subject to certain specified conditions.[10] As requested by the ROE Filers, we also accepted a 50 basis point ROE adder, applicable to Regional Network Service under the ISO-NE open access transmission tariff (OATT), but rejected this same adder as it would apply to the Transmission Owners' Local Service Schedules. We also rejected the ROE Filers' proposed 100 basis point adder as it applied to the ROE Filers' Local Service Schedules, but set for hearing, subject to suspension and refund, the ROE Filers' proposed 100 basis point adder as it would apply to Regional Network Service. Finally, we set for hearing, subject to suspension and refund, the ROE Filers' proposed base level ROE.

II. Requests for Rehearing and/or Clarification

8. Requests for rehearing and/or clarification of the March 24 Order were sought by numerous intervenors on a broad range of issues. Certain of these issues, namely, those issues identified by the Settling Parties in their proposed Settlement Agreement as Reserved Issues, i.e., issues not resolved by the Settlement Agreement, are discussed

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[8] 16 U.S.C. § 824d (2000).

[9] Specifically, the ROE Filers requested approval for: (i) a single, region-wide ROE; (ii) a 50 basis point adder attributable to their formation of the ISO-NE RTO; and (iii) a 100 basis point adder applicable to new construction.

[10] Among other things, we required the Filing Parties to submit, in a compliance filing, a seams resolution agreement with the New York Independent System Operator, Inc. (New York ISO), and an agreement with NEPOOL concerning the procedures pursuant to which the ISO-NE RTO would be permitted to acquire NEPOOL's reversionary interests in ISO-NE under the ISO-NE/NEPOOL arrangements. We also required the Filing Parties to make various other specified revisions to the operating agreements giving rise to the ISO-NE RTO.

below.

9. Answers to requests for rehearing were filed by a number of parties: (i) on April 30, 2004, by the Massachusetts Attorney General, the Rhode Island Attorney General, and the Rhode Island Division of Public Utilities and Carriers (Massachusetts Attorney General, et al.); (ii) on May 5, 2004, by Duke Energy North America, LLC (Duke Energy); (iii) on May 10, 2004, by NEPOOL, ISO-NE, the Transmission Owners, and the New England Consumer Owned Entities[11]; and (iv) on May 25, 2004, by NEPOOL and the New England Consumer Owned Entities.

III. Compliance Filings

10. The Filing Parties made their initial compliance filing in response to the March 24 Order on June 22, 2004 (First Compliance Filing). The First Compliance Filing includes, among other things: (i) a revised Interregional Coordination Agreement between ISO-NE and the New York ISO; (ii) a revised Transmission Operating Agreement; (iii) new planning procedures, including an identification of market efficiency upgrades and a discussion of how cost-effective transmission expansion solutions are assessed; and (iv) revisions to the ISO-NE RTO's Transmission, Markets and Services Tariff.[12]

11. In the transmittal sheet accompanying their submittal, the Filing Parties state that ISO-NE and the Transmission Owners were unable to reach agreement with respect to certain compliance matters. Specifically, the Filing Parties state that they were unable to reach an agreement on revising the Transmission Operating Agreement to comply with the Commission's directives regarding the Transmission Owners' RTO termination and withdrawal rights.[13] Accordingly, the Filing Parties, in their First Compliance Filing, include alternative proposals addressing this issue. Finally, the Filing Parties note that the First Compliance Filing leaves unaddressed NEPOOL's reversionary interests in the

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[11] Connecticut Municipal Electric Energy Cooperative, Massachusetts Municipal Wholesale Electric Company, Vermont Public Power Supply Authority, New Hampshire Electric Cooperative, Inc., Chicopee Municipal Lighting Plant of the City of Chicopee, Massachusetts, Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant.

[12] The Tariff is comprised of four sections, including: (i) General Terms and Conditions; (ii) the OATT; (iii) Market Rule 1; and (iv) the ISO-NE RTO Funding Tariffs. In addition, the Market Participants Service Agreement and a *Pro Forma* Independent Transmission Company Operating Agreement are included in the Tariff as Attachments A and B, respectively.

[13] *See* March 24 Order at P 59.

assets attributable to the ISO-NE/NEPOOL arrangements (an issue, as noted below, that was subsequently addressed by the Settling Parties' in their proposed Settlement Agreement).

12. Notice of the Filing Parties' First Compliance Filing was published in the *Federal Register*,[14] with interventions and protests due on or before August 20, 2004. Notices of intervention, motions to intervene and protests were filed by NEPOOL, Calpine Eastern Corporation[15] (Calpine, et al.), Duke Energy, the Connecticut Department of Public Utility Control (Connecticut PUC), the Vermont Public Service Board, the Long Island Power Authority and its subsidiary, LIPA (LIPA), the New England Conference of Public Utility Commissioners (NECPUC), and the New England Consumer Owned Entities. An answer to LIPA's protest was filed on August 11, 2004, by the New York ISO. On August 26, 2004, LIPA filed an answer to an answer.

13. On August 11, 2004, the Filing Parties made a second compliance filing addressing our requirement, in the March 24 Order, regarding the sharing of confidential information between the ISO-NE RTO and state commissions (Second Compliance Filing) . Notice of the Filing Parties' Second Compliance Filing was published in the Federal Register,[16] with interventions and protests due on or before September 1, 2004. Comments were filed by NECPUC.

IV. The Proposed Settlement Agreement

14. As noted above, the Settling Parties filed their proposed Settlement Agreement on September 14, 2004. The Settling Parties state that those provisions of the Settlement Agreement addressing NEPOOL's reversionary interests following the termination of the ISO-NE/NEPOOL arrangements (see Settlement Agreement at paragraph 8) are intended to comply with the requirements of the March 24 Order.[17] In compliance with these

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[14] 69 Fed Reg. 40,889 (2004).

[15] Joined by Mirant Americas Energy Marketing, LP; Mirant New England, Inc.; Mirant Canal, LLC; Mirant Kendall, LLC; and PSEG Energy Resources & Trade LLC.

[16] 69 Fed. Reg. 52,245 (2004).

[17] In the March 24 Order, we found that the Transmission Owners are permitted under their existing arrangements with NEPOOL to withdraw from the Restated NEPOOL Agreement and are entitled, along with ISO-NE, to file the necessary agreements to establish the ISO-NE RTO. However, we also held that any such proposal (continued…)

directives, the Settling Parties state that the tangible assets constituting the NEPOOL Assets, under the Interim Independent System Operator Agreement (ISO Agreement), will be transferred to the ISO-NE RTO as of the ISO-NE RTO Operations Date.[18] The Settling Parties state that, following the start-up of the ISO-NE RTO, neither NEPOOL nor any NEPOOL Participant will have any interest in any tangible assets of the ISO-NE RTO.

15. The Settling Parties state that under paragraphs 9, 10, and 15 of the Settlement Agreement, the Settling Parties have agreed to withdraw their requests for rehearing and/or their requests for clarification of the March 24 Order, as well as their objections to the Filing Parties' First and Second Compliance Filings, except as to certain specified "Reserved Issues."[19] Reserved Issues not addressed by the proposed Settlement Agreement include: (i) all issues relating to the ISO-NE RTO's return on equity; (ii) the majority of the issues raised on rehearing by the Transmission Owners; (iii) Mirant's issue, raised on rehearing, regarding whether the ISO-NE RTO should have immediate section 205 filing rights under the "exigent circumstances" described under certain provisions of the proposed Transmission Operating Agreement; (iv) indemnification issues raised on rehearing by ISO-NE; (v) issues relating to the establishment of Independent Transmission Companies and economic transmission expansion, as raised on rehearing by Public Service Electric and Gas Company[20] (PSEG); and (vi) assertions of error raised on rehearing by the New England Consumer Owned Entities.

16. The Settling Parties state that under paragraph 9 of the Settlement Agreement, an 18-month moratorium will be in effect as of the Operations Date of the ISO-NE RTO. The Settling Parties state that during the course of the moratorium, a Settling Party may not seek changes, pursuant to a section 206 filing, regarding issues addressed by the Settlement Agreement, except in the case of materially changed circumstances, or for

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would not, *ipso facto*, terminate NEPOOL's existence and that NEPOOL, under its existing arrangements, possessed certain reversionary interests in the assets attributable to the ISO-NE/NEPOOL arrangements. We also held that these reversionary interests could serve to impede the ISO-NE RTO's efficient start-up. Accordingly, we directed the Filing Parties to identify the nature and extent of these reversionary interests and to propose, in their compliance filing, options for acquiring these interests.

[18] *See* Settlement Agreement at Attachment K (proposed Bill of Sale between ISO-NE and NEPOOL). The term "Operations Date" is discussed *supra* note 6.

[19] See supra P 3.

[20] Joined by PSEG Power LLC and PSEG Energy Resources & Trade LLC.

those filings involving proposed market rule changes.

17. The Settling Parties note that the Settlement Agreement was supported by a 91 percent affirmative vote of the NEPOOL Participants Committee and that approval of the Settlement Agreement, by the Commission, will remove most of the remaining obstacles to the establishment of the ISO-NE RTO. The Settling Parties request that the Commission act on their proposed Settlement Agreement no later than November 1, 2004, consistent with the planned Operations Date of the ISO-NE RTO.

18. Notice of the Settling Parties' proposed Settlement Agreement was published in the *Federal Register*,[21] with interventions and protests due on or before October 22, 2004. Comments were filed by NECPUC, the Connecticut Attorney General, the Connecticut Office of Consumer Counsel, NEPOOL, and ISO-NE.

V. Proposed Elimination of Through-and-Out Service Charges

19. On June 21, 2004 and September 30, 2004, respectively, the New York ISO and the New York Transmission Owners[22] (New York Filing Parties), in Docket No. ER04-943-00, and NEPOOL, in Docket No. ER05-3-000, submitted proposed tariff revisions to their respective tariffs, pursuant to section 205 of the FPA, in order to reduce to zero the Through-and-Out Services Charges applicable in their regions.

20. Notice of the New York Filing Parties' and NEPOOL's proposed tariff changes was published in the *Federal Register*,[23] with interventions and protests due on or before July 12, 2004 (in Docket No. ER04-943-000) and October 22, 2004 (in Docket No. ER05-3-000). Motions to intervene and notices of intervention were timely filed by Mirant Corporation, the New York Municipal Power Agency (New York Municipal), and the New York State Department of Public Service, in Docket No. ER04-943-000, and by the Massachusetts Department of Telecommunications and Energy, ISO-NE, Northeast Utilities Service Company, and the New York Filing Parties, in Docket No. ER05-3-000. A motion to intervene out-of-time was filed, in Docket No. ER05-3-000, by DC Energy,

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[21] 69 Fed Reg. 59,912 (2004).

[22] Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

[23] 69 Fed Reg. 48,734 and 71,302 (2004).

LLC (DC Energy). In addition, a protest was filed, in Docket No. ER04-943-000, by New York Municipal.

VI. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[24] the notices of intervention and the timely, unopposed motions to intervene submitted in Docket Nos. ER04-943-000 and ER05-3-000, by the entities noted above, serve to make these entities parties to the proceedings in which these interventions were filed. In addition, we will accept the unopposed, late-filed intervention submitted by DC Energy in Docket No. ER05-3-000.

22. Rule 213(a) of the Commission's Rules of Practice and Procedure[25] prohibits an answer to a protest, an answer to a rehearing request, or an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to accept the answers filed by the entities noted above and therefore will reject them.

B. NEPOOL's Reversionary Interests

23. In the March 24 Order, we found that the Transmission Owners are permitted under their existing contractual commitments to NEPOOL to withdraw from the ISO-NE/NEPOOL arrangements.[26] We also held that the Filing Parties were entitled to file the necessary agreements to establish the ISO-NE RTO. However, we denied the Filing Parties' request that their existing ISO-NE/NEPOOL arrangements be deemed to be terminated as of the Operations Date of the ISO-NE RTO. Instead, we required the Filing Parties to make a compliance filing addressing, among other things, NEPOOL's reversionary interests in the assets attributable to the ISO-NE/NEPOOL arrangements and the terms pursuant to which these interests can be transferred to the ISO-NE RTO.

24. The Settling Parties state that under the Settlement Agreement all pending issues relating to these matters would be resolved. Specifically, the Settling Parties state that under the Settlement Agreement NEPOOL's reversionary interests in the ISO-

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[24] 18 C.F.R. § 385.214 (2004).

[25] *Id*. at § 385.213(a)(2).

[26] March 24 Order at P 28.

NE/NEPOOL arrangements would be transferred by way of a Bill of Sale, to be executed by ISO-NE and NEPOOL.[27] The Settling Parties state that pursuant to the Bill of Sale, the tangible assets constituting the NEPOOL Assets, under the Interim ISO Agreement, would be transferred to the ISO-NE RTO as of the ISO-NE RTO Operations Date. As of that date, the Settling Parties state that neither NEPOOL nor any NEPOOL Participant would have any interest in any tangible assets of the ISO-NE RTO.

25. We find that the proposed Bill of Sale will assist the Filing Parties in providing for an orderly transition to the ISO-NE RTO and otherwise complies with the requirements of the March 24 Order. As such, we will accept this aspect of the proposed Settlement Agreement without modification.

C. Governance Structure

26. In the March 24 Order, we found that the Filing Parties' proposed governance structure for the ISO-NE RTO generally met our RTO independence requirement, subject to three conditions.[28] First, we required the Filing Parties to include alternative energy suppliers as a sixth voting sector in the ISO-NE RTO stakeholder advisory process. Second, we modified the Filing Parties' proposal regarding the ISO-NE RTO's obligation to include alternative stakeholder proposals when making a section 205 filing.[29] Finally, we required that in nominating and electing a new ISO-NE RTO board, at least one new nominee must be named under those circumstances in which a second slate must be nominated.

27. The Settling Parties state that the Settlement Agreement satisfies each of these requirements. Specifically, the Settling Parties state that they have added a new sixth voting sector representing renewable interests, modified the necessary provisions of their proposed Participants Agreement relating to the submission of alternative stakeholder proposals, and amended the relevant provisions of the Participants Agreement addressing the ISO-NE RTO board nominations process. In addition, the Settling Parties proposed to retain those provisions of the Restated NEPOOL Agreement which address NEPOOL's stakeholder appeals process.

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[27] *See* Settlement Agreement at Attachment K.

[28] March 24 Order at P 51.

[29] We held that these alternative proposals must be included in the case of a Participants Committee vote of 60 percent or higher.

28. We will accept the Settlement Agreement as it relates to the governance structure issues addressed in the March 24 Order. However, we will require further support regarding the Settling Parties' proposed retention of certain requirements applicable to the NEPOOL appeals process. Section 11 of the Restated NEPOOL Agreement, as proposed, would keep in place NEPOOL's currently-effective review board appeals process, which gives stakeholders the right to appeal NEPOOL's actions and failure to take action. Section 11 would also authorize the review board to request that the ISO-NE RTO delay filing with the Commission any materials that are the subject of an appeal, with the ISO-NE RTO thereafter permitted "in its sole discretion … to elect to delay or not delay any such filing."[30] .

29. However, given the potential of this provision to delay a filing that should be brought to the Commission's attention in a timely manner, we will require the Settling Parties, in a compliance filing to be made on or before 30 days following the date of this order, to explain in greater detail how the review board process will operate.

D. RTO Termination and Withdrawal Rights

1. The March 24 Order

30. In the March 24 Order, we noted that the Filing Parties' proposed Transmission Operating Agreement addressed the right of a Transmission Owner to withdraw from the ISO-NE RTO. Specifically, proposed section 10.01(b) of that agreement would have permitted a Transmission Owner to unilaterally withdraw from the ISO-NE RTO upon the occurrence of certain stated conditions.[31] We rejected the Filing Parties' proposal because it would have prohibited any meaningful review by the Commission under section 205 of the FPA relating to a Transmission Owner's withdrawal from the ISO-NE RTO, even in those instances where revisions to the ISO-NE RTO's operating agreements would have been necessary.[32]

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[30] *See* Settlement Agreement at Exh. 6, Second Restated Agreement at section 11.7(e).

[31] The specified conditions included: (i) a default by the ISO-NE RTO; (ii) a change in federal policy concerning RTO formation matters; (iii) a Commission order revising the Filing Parties' division of their respective rights and duties; (iv) membership in an Independent Transmission Company; and (v) membership in another RTO following a merger or acquisition.

[32] March 24 Order at P 59.

(continued…)

31. Moreover, we found that the Filing Parties' proposal was inconsistent with our policy regarding RTO/ISO access and withdrawal rights.[33] Specifically, we noted that the RTO/ISO Access and Withdrawal Rights Policy Statement held, as a matter of Commission policy, that arrangements to join or exit an RTO or ISO must be reviewed by the Commission in the context of filings made under section 205. We also noted that this review is necessary in order to determine whether all of the elements contained in the filed arrangements meet the principles of Order No. 2000 and are otherwise just and reasonable under section 205 of the FPA. Accordingly, we required the Filing Parties to revise section 10.01(b) of the Transmission Operating Agreement.

2. Requests for Rehearing and/or Clarification

32. The Settling Parties state that under the Settlement Agreement, the requests for rehearing and/or clarification of the March 24 Order discussed below are identified as Reserved Issues.

33. First, the Transmission Owners seek clarification that compliance with the Commission's ruling regarding RTO termination and withdrawal rights simply requires clarifying language to section 10.01 of the Transmission Operating Agreement making clear the requirement that before a proposed termination or withdrawal can become effective, the requesting party would be obligated to make a section 205 filing in which it submits a replacement tariff, as may be required, and any other related arrangements necessary to effectuate the requested termination or withdrawal. The Transmission Owners assert that this interpretation of the March 24 Order is consistent with their proposal that the Mobile-Sierra public interest standard of review also apply to section 10.01.[34]

34. The Transmission Owners also seek rehearing regarding the Commission's determination, in the March 24 Order, that it would evaluate any request to withdraw from, or terminate, the ISO-NE RTO to determine, among other things, the extent to which the request satisfied the principles of Order No. 2000. The Transmission Owners assert that the Commission erred in making this determination because RTO

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[33] *Id., citing* Guidance on Regional Transmission Organization and Independent System Operator Filing Requirements under the Federal Power Act, 104 FERC ¶ 61,248 (2003) (RTO/ISO Access and Withdrawal Rights Policy Statement).

[34] *See* United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

participation, under Order No. 2000, is voluntary.

35. Finally, the Transmission Owners request clarification regarding the March 24 Order, at footnote 84, in which we cited our findings, as made elsewhere in our order, with respect to various provisions of the Transmission Operating Agreement. In footnote 84, we noted that to the extent that we had required these provisions to be revised, eliminated, or transferred to the ISO-NE RTO OATT, the Mobile-Sierra requests relating to these provision had, as a consequence, been rendered moot. On rehearing, the Transmission Owners seek clarification that footnote 84 was not intended by the Commission to modify, nullify or otherwise supercede our determinations regarding these provisions, including our finding regarding the Transmission Owners' termination and withdrawal rights under section 10.1 of the Transmission Operating Agreement.

3. Compliance Filings

36. The Filing Parties state that, in their First Compliance Filing, they were unable to reach an agreement regarding the appropriate revisions necessary to comply with our rulings in the March 24 Order regarding the issue of RTO termination and withdrawal rights. Specifically, the Filing Parties disagree as to whether the revisions required by the March 24 Order necessarily include the withdrawal of the Filing Parties' Mobile-Sierra request as it relates to section 10.01(f) of the Transmission Operating Agreement. The Transmission Owners argue that this revision was not required and therefore propose to leave their initially proposed Mobile-Sierra language intact, while adding language addressing the requirement that a section 205 filing also be made in the case of a requested termination or withdrawal from the ISO-NE RTO.[35]

[35] As proposed by the Transmission Owners, section 10.01(f) would include the following language (shown in italics):

> (f) *Approvals.* Notwithstanding any other provision contained herein or in any other document to the contrary, any termination or withdrawal permitted by this Section 10.01 shall be effective unless the FERC finds that such termination or withdrawal is contrary to the public interest under the "*Mobile-Sierra* Doctrine". *Each [Participating Transmission Owner] exercising its right to withdraw or terminate in accordance with this section 10.01 shall file with the FERC, pursuant to section 205 of the FPA, the tariffs and rate schedules applicable to transmission service over such [Participating Transmission Owner's] Transmission Facilities to become effective upon such termination or withdrawal.*

4. Responsive Pleadings

37. ISO-NE and NECPUC argue that the Transmission Owners' proposal to retain their proposed Mobile-Sierra provision fails to comply with the March 24 Order and is otherwise inconsistent with Commission precedent. NECPUC asserts that the Transmission Owners' proposal would inappropriately shift the burden to non-Transmission Owners to prove that withdrawal is contrary to the public interest. ISO-NE also argues that a Mobile-Sierra provision, as applied to a Transmission Owners' right to withdraw from, or terminate, the ISO-NE RTO, is inconsistent with the RTO/ISO Access and Withdrawal Rights Policy Statement.

5. Commission Finding

38. We will grant rehearing, in part, and grant, in part, the requested clarifications of the March 24 Order as it relates to the Transmission Owners' termination and withdrawal rights under the Transmission Operating Agreement. We will also require the Filing Parties to make a compliance filing on, or before, 30 days following the issuance of this order, consistent with our findings below.

39. With respect to the issue of whether the Transmission Owners' Mobile-Sierra request can be reconciled with our requirement that a requested withdrawal or termination, under section 10.01, must be reviewed by the Commission under section 205 of the FPA, we find that: (i) the Filing Parties may bind themselves to a Mobile-Sierra standard, as requested, but that (ii) the Commission's review of any requested withdrawal or termination will be under the just and reasonable standard of section 205 of the FPA. In this regard, we agree with the Transmission Owners that our section 205 filing requirement, in the case of a requested withdrawal from, or termination, of the ISO-NE RTO (and the section 205 review, in this instance, contemplated by the March 24 Order), may be reconciled with a Mobile-Sierra provision applicable to these withdrawal rights, subject to the clarifications provided below.

40. The Transmission Owners' proposed language would permit "any termination or withdrawal [to become] effective unless the [Commission] finds that such termination or withdrawal is contrary to the public interest under the Mobile-Sierra Doctrine." We cannot accept this limitation. Section 205 review (as required by the March 24 Order) means that the Commission will determine whether an action under review is just and reasonable. Intervenors asserted in response to the Filing Parties' initial proposal,[36] and

[36] March 24 Order at P 112.

we agree on rehearing, that, a full, meaningful review by the Commission of a requested withdrawal from, or termination of, the ISO-NE RTO would not be possible where the Transmission Owner's rights to do so are governed by a standard of review that limits the application of the just and reasonable standard. Accordingly, we will require the Filing Parties to modify section 10.1(f) of the Transmission Operating Agreement to make clear that while a challenge to a section 10.01(f) request made by any of the parties to the Transmission Operating Agreement will be subject to the Mobile-Sierra doctrine, as proposed by the Transmission Owners, the Commission's own review of a requested withdrawal or termination will be made under section 205 of the FPA, i.e., the Commission's own review will not be limited by application of the Mobile-Sierra doctrine.[37]

41. We also deny the Transmission Owners' argument, on rehearing, that our review of a requested withdrawal from the ISO-NE RTO should not take into consideration our RTO formation policies under Order No. 2000. In considering the justness and reasonableness of any filing made under section 205, including an RTO withdrawal filing, the Commission is required to consider its policies and precedents, as may be relevant to the issues presented for our review. Although participation in an RTO is voluntary, a transmission owner's withdrawal can have a substantial impact on other market participants and the markets themselves. In these circumstances, the policies enunciated in Order No. 2000 would be relevant and must be considered.

42. Finally, we will grant the Transmission Owners' requested clarification regarding the findings we cited in footnote 84 of the March 24 Order. That summary of

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[37] Section 10.01(f), as modified, will provide as follows (with the required changes shown in italics):

> (f) Approvals. Notwithstanding any other provision contained herein or in any other document to the contrary, any termination or withdrawal *requested under* this Section 10.01 shall be effective, *subject to: (i) a showing by any party to this agreement seeking to challenge the request* that *the requested* termination or withdrawal is contrary to the public interest under the "Mobile-Sierra Doctrine*;*" *and (ii) the FERC's determination under section 205 of the FPA that the termination or withdrawal is just, reasonable and not unduly discriminatory or preferential*. Each [Participating Transmission Owner] exercising its right to withdraw or terminate in accordance with this section 10.01 shall file with the FERC, pursuant to section 205 of the FPA, the tariffs and rate schedules applicable to transmission service over such [Participating Transmission Owner's] Transmission Facilities to become effective upon such termination or withdrawal.

findings was not intended to modify, nullify, or otherwise supersede any of the findings in our order to which footnote 84 made reference.

E. Section 205 Filing Rights

1. The March 24 Order

43. In the March 24 Order, we accepted the Filing Parties' proposed allocation of their respective section 205 filing rights, subject to certain conditions relating to the filing of generator interconnection agreements.[38] Specifically, in response to intervenors' concerns regarding the authority that would be exercised by the Transmission Owners over the filing of interconnection agreements under section 2.05 of the Transmission Operating Agreement, and to ensure compliance with our pro forma interconnection procedures set forth in Order No. 2003,[39] we required the Filing Parties to make a compliance filing, as may be necessary, to conform their proposed provision with our order on the Filing Parties' pending Order No. 2003 compliance filing proceeding, in Docket No. ER04-433-000, *et al.*

44. Regarding the Transmission Owners' proposed reservation of section 205 filing rights for Transmission Upgrades relating to generator interconnections, we found that the proposed allocation was ambiguous in its meaning, and therefore required the Filing Parties to clarify their proposal, consistent with the requirements of Order No. 2003.[40] We held that to the extent the Transmission Owners were seeking to reserve filing rights for the pricing policy that would apply to generator interconnections, such a reservation of rights would be inconsistent with Order No. 2003 because the Transmission Owners were not independent entities.[41]

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[38] March 24 Order at P 71.

[39] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *reh'g pending*

[40] The proposed provision was set forth at section 2.05(a)(ii) of the Transmission Operating Agreement.

[41] In Order No. 2003, we held that we would allow flexibility for variations from our *pro forma* interconnection requirements in those regions where an independent entity, such as an RTO, operates the regional transmission system. We stated that this treatment (continued…)

2. Requests for Rehearing

45. Rehearing requests addressed to the Commission's section 205 filing rights determinations in the March 24 Order were sought by the Transmission Owners and Mirant. The following Reserved Issues are identified in the Settlement Agreement.

46. The Transmission Owners request that to the extent the March 24 Order could be construed as a rejection of the interconnection-related section 205 filing rights provisions of the Transmission Operating Agreement, the Commission should reverse that finding and accept the Filing Parties' proposal under section 2.05(a)(ii) of the Transmission Operating Agreement to give the Transmission Owners joint section 205 filing authority over generator interconnection agreements and, second, accept the Filing Parties' proposal under section 3.04(b)(i) of the Transmission Operating Agreement to give Transmission Owners exclusive section 205 filing authority over the methodology by which the costs of Transmission Upgrades related to generator interconnections are allocated under the ISO-NE RTO OATT.

47. The Transmission Owners assert that under Atlantic City Electric Co. v. FERC,[42] the Commission may not require the Transmission Owners to cede section 205 filing rights, absent their voluntary consent. In addition, the Transmission Owners assert that the March 24 Order erroneously construed the requirements of Order No. 2003. Specifically, the Transmission Owners argue that while they are not independent entities, Order No. 2003 acknowledges the right of non-independent entities to make section 205 filings and to attempt to justify, therein, deviations from the Order No. 2003 pro forma requirements, relying on either a "regional differences" or "consistent with or superior to" rationale to support those proposed deviations.

48. Mirant asserts as error the Commission's failure in the March 24 Order to grant the ISO-NE RTO narrowly-circumscribed, but immediate section 205 filing rights in the case of "Exigent Circumstances." Mirant states that under section 3.04 of the Transmission Operating Agreement, as accepted by the Commission in the March 24 Order, the ISO-NE RTO would be required to wait 30 days to make a section 205 filing (where the Participating Transmission Owner and the ISO-NE RTO are unable to agree on such a filing), even when the reliability of the ISO-NE RTO bulk power system or the

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would be appropriate because the independent entity would have different operating characteristics than a non-independent entity and would be less likely to act in an unduly discriminatory manner than a Transmission Provider that is a market participant. *See* Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 827.

[42] 295 F.3d 1 (D.C. Cir. 2002).

efficiency or competitiveness of the ISO-NE RTO markets may be at stake. Mirant concludes that in these circumstances, the ISO-NE RTO should be given the authority to make a section 205 filing without delay, provided that such filing not address the rates, charges or revenue requirement of any Participating Transmission Owner.

3. Compliance Filing and Responsive Pleadings

49. The Filing Parties, in their First Compliance Filing, assert that their initial proposal in this proceeding regarding their division of section 205 filing rights authority for generator interconnection agreements (sections 2.05(a)(ii) and 3.04(b)(i) of the Transmission Operating Agreement) was consistent with Order No. 2003 and should have been accepted by the Commission. The Vermont Public Service Board, however, takes issue with this assertion, characterizing this aspect of the Filing Parties' First Compliance Filing as a collateral attack of the March 24 Order. The Vermont Public Service Board requests a ruling from the Commission requiring the Filing Parties to comply with the March 24 Order as it relates to sections 2.05(a)(ii) and 3.04(b)(i) of the Transmission Operating Agreement.

4. Commission Finding

50. We will grant rehearing of the March 24 Order as it relates to the allocation of section 205 filing rights set forth in sections 2.05(a)(ii) and 3.04(b)(i) of the Transmission Operating Agreement. The Filing Parties' proposed allocation of filing rights under section 2.05(a)(ii) and 3.04(b)(i) is not inconsistent with Order No. 2003, because the pro forma requirements adopted in Order No. 2003 do not address the issue of filing rights in this context. Accordingly, we will address here, as requested, the merits of proposed sections 2.05(a)(ii) and 3.04(b)(i).

51. Section 2.05(a)(ii) provides, in relevant part, that with respect to the interconnection of a Large Generating Unit, the Interconnection Agreement shall be a three-party agreement among the Participating Transmission Owner, the ISO-NE RTO, and the Interconnecting Non-Party.[43] With respect to the interconnection of other Generating Units, the ISO-NE RTO shall be a party to an Interconnection Agreement if, and to the extent, the Commission's regulations require the ISO-NE RTO to be a party. We agree that this proposed allocation of section 205 filing rights is consistent with Commission policy and therefore will accept this provision, as proposed.

[43] Similarly, in Docket No. ER04-433-000, *et al.*, NEPOOL proposes to revise section 11 of the *pro forma* Standard Large Generator Interconnection Procedures to provide for the execution and filing of three-party interconnection agreements.

52. Section 3.04(b)(i) delineates the section 205 filing authority for revenue requirements and their recovery through rates charged for all transmission facilities including (but not limited to) costs of transmission upgrades related to generator interconnections. We have previously held that the determination and allocation of revenue requirements and their recovery through rates charged are properly the right of the transmission owners. Accordingly, we will accept section 3.04(b)(i), as proposed.

53. We will also grant Mirant's request for rehearing. Mirant asserts that under the Filing Parties' proposed allocation of section 205 filing rights, a market flaw, if identified by the ISO-NE RTO, could not always be addressed by the ISO-NE RTO on a timely basis in the form of a section 205 filing, i.e., that under section 3.04(e), ISO-NE RTO would be required to delay a section 205 filing for 30 days where the Transmission Owners and the ISO-NE RTO are unable to mutually agree on the substance of the filing to be made. We agree with Mirant that section 3.04, as proposed, fails to give the ISO-NE RTO adequate authority to make such a filing. Moreover, section 3.04, as proposed, is generally inconsistent with the filing authority granted to the ISO-NE RTO under the Participants Agreement.[44] Accordingly, we will direct the Filing Parties to revise section 3.04, in a compliance filing, on or before 30 days following the issuance of this order. As revised, section 3.04 should grant to the ISO-NE RTO emergency filing authority consistent with the grant of filing authority recognized in the Participants Agreement in the case of Exigent Circumstances.

54. Finally, we will reject the Vermont Public Service Board's protest, given our acceptance, above, of sections 2.05(a)(ii) and 3.04(b)(i) of the Transmission Operating Agreement.

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[44] The Participants Agreement, at section 11.2, gives the ISO-NE RTO certain filing authority in the case of "exigent circumstances":

> In Exigent Circumstances, [the ISO-NE RTO] may unilaterally, upon written notice to the Participants Committee and Individual Participants, file with the Commission pursuant to section 205, if necessary, and implement a new or amended Market Rule, Operating Procedure, Manual, Reliability Standard, provision of the Information Policy (subject to 11.3), General Tariff Provision, or Non-[Transmission Owner] OATT Provision. Notwithstanding the generality of the foregoing, any change in the Information Policy shall be effective prospectively only and only for information received after such change becomes effective.

F. Seams Resolution Agreement

1. The March 24 Order

55. In the March 24 Order, we found that the ISO-NE RTO generally met our RTO scope and regional configuration requirements, subject to conditions concerning certain interregional seams issues.[45] Specifically, while we noted the Filing Parties' commitment, to date, to address inter-regional seams issues on a regional basis, under a Interregional Coordination Agreement entered into by ISO-NE and the New York ISO, we also found that the timetable for addressing these issues must be pursued by the parties without delay. Accordingly, we conditioned our approval of an ISO-NE RTO on the Filing Parties' development of a more comprehensive seams agreement with the New York ISO.

56. Among other things, we required the Filing Parties to address in their revised seams agreement specific milestones and timelines for resolution of all remaining seams issues within one year of the date of the Filing Parties' First Compliance Filing. We also required the Filing Parties to submit a proposal for eliminating Through-and-Out Service Charges between the ISO-NE RTO and the New York ISO within six months of the date of the Filing Parties' First Compliance Filing. Finally, we stated that because the New York ISO has significant trade with its RTO neighbor to the south, PJM Interconnection, L.L.C. (PJM), the Filing Parties should also explain in their First Compliance Filing the role that PJM could play in the resolution of broader, regional seams issues. We stated that the Filing Parties should identify the specific remaining seams issues that require the participation and involvement of PJM.

2. Requests for Rehearing

57. On rehearing, the Transmission Owners assert as error (and the Settlement Agreement identifies as a Reserved Issue) the Commission's determination in the March 24 Order that the ISO-NE RTO's elimination of Through-and-Out Service Charges need not be conditioned on (i) the elimination of comparable New York ISO charges; or (ii) the establishment of a seams agreement between the ISO-NE RTO and the New York ISO.

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[45] March 24 Order at P 91.

3. Compliance Filings

58. In their First Compliance Filing, the Filing Parties state that on June 18, 2004, ISO-NE and the New York ISO executed an Amended and Restated Coordination and Seams Issue Resolution Agreement (Seams Resolution Agreement). The Filing Parties state that, under the Seams Resolution Agreement, specific milestones and timelines are provided for resolution of the remaining seams issues within one year of the date of the Filing Parties' First Compliance Filing. The Filing Parties state that among the issues that will be addressed, pursuant to this agreed-to timeline, are: (i) facilitated checkout procedures; (ii) regional resource adequacy; (iii) partial unit Installed Capacity Sales; (iv) elimination of rate pancaking; (v) cross-border controllable line scheduling; (vi) coordination of inter-regional planning; and (vii) the implementation of "Virtual Regional Dispatch."[46]

59. The Filing Parties state that the Seams Resolution Agreement also includes a work plan for ongoing identification of additional seams issues that, upon approval, will be added to the Seams Resolution Agreement. The Filing Parties state that the Seams Resolution Agreement also addresses PJM's involvement in seams resolution matters. Specifically, the Filing Parties state that PJM is, and will continue to be, a member of the Intermarket Coordination Group, a committee established under the Seams Resolution Agreement.

60. Finally, the Filing Parties address the Commission's requirement that Through-and-Out Service Charges be eliminated between the ISO-NE RTO and the New York ISO. The Filing Parties state that they are committed to complying with this directive and recognize the importance of eliminating these charges. In furtherance of this objective, the Filing Parties state that they will make a filing as soon as reasonably practicable and in a timeframe that allows full public comment on or before

[46] Virtual Regional Dispatch would represent a new service offered by the ISO-NE RTO and the New York ISO to facilitate the physical dispatch of loads between these two markets for the purpose of promoting greater price convergence. Pursuant to the terms of the Seams Resolution Agreement, implementation of Virtual Regional Dispatch would occur in three phases. *See* Seams Resolution Agreement at Attachment 1, p. 3. In Phase I, a Virtual Regional Dispatch pilot program would be developed and implemented "as soon as practicable with a target date of the fourth quarter of 2004." Phase II would involve review of this pilot program and allow for its "potential" implementation in mid-2005. Phase III would include the review of the initial implementation of Virtual Regional Dispatch and further evaluation (in early 2006) of whether expanding Virtual Regional Dispatch would be warranted.

December 22, 2004. However, the Filing Parties also propose that the elimination of these charges be made contingent on the establishment of reciprocal terms of transmission access between the New York ISO and the ISO-NE RTO.

4. Responsive Pleadings

61. The New England Consumer Owned Entities characterize the Filing Parties' proposal to eliminate Through-and-Out Service Charges as a vague commitment at best. Similarly, LIPA argues that the Transmission Owners are continuing to delay and resist the elimination of these charges. In particular, LIPA objects to the Transmission Owners' insistence that their elimination of these charges be made contingent on the implementation of reciprocal terms of access vis a vis the New York ISO market. LIPA asserts that this condition is simply a restatement of the condition previously rejected by the Commission in the March 24 Order.

62. LIPA is also concerned about the implementation of cross border controllable line scheduling. LIPA asserts that while the Seams Resolution Agreement includes a milestone for the final resolution of this seams issue by June 2005, the Filing Parties should be required to provide regular progress reports to the Commission and market participants on its implementation and application to specific existing facilities. LIPA also asserts that further action is required by the Commission to ensure the timely resolution of additional and emerging seams issues. In particular, LIPA notes that there are a number of outstanding seams issues that have been identified in the Northeast ISO's quarterly seams report filed with the Commission that have yet to be given sufficient attention.

5. Commission Finding

63. We will deny, as moot, the Transmission Owners' request for rehearing, regarding the necessity for a reciprocity condition applicable to the ISO-NE RTO's elimination of its Through-and-Out Service Charges. With respect to these charges, the New York ISO has stated in its compliance filing, submitted in Docket No. ER04-943-000, that the elimination of its export charges will take place on the same date that a corresponding proposal applicable to the New England market becomes effective. NEPOOL's filing, in turn, submitted in Docket No. ER05-3-000, also proposes to eliminate NEPOOL's Through-and-Out Service Charge.[47]

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[47] NEPOOL's filing is not protested and, based on our review, has not otherwise been shown to be unjust or unreasonable or unduly discriminatory. Accordingly, we will accept NEPOOL's submittal for filing. We will also accept for filing the New York

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64. We will also accept the First Compliance Filing as it relates to our RTO scope and regional configuration requirements, subject to condition. First, we find that the Seams Resolution Agreement adequately addresses each of the seams issues identified by the Commission in the March 24 Order. However, we clarify, here, that the Virtual Regional Dispatch filing that the Filing Parties propose to submit for Commission review with a "target date" of the fourth quarter of 2004, i.e., the Filing Parties' proposed Phase I pilot program implementing Virtual Regional Dispatch, must be made by December 1, 2004. Further, we find that the Filing Parties' proposed timeline to resolve the remaining seams issues fail to comply with the requirements of the March 24 Order. As a result, we will condition our approval of the ISO-NE RTO on revision of the Seams Resolution Agreement to provide that, for each remaining seams issue, a proposal will be filed with the Commission 60 days prior to the implementation date of the proposal. We will also require the Filing Parties to clearly state the implementation dates in the Seams Resolution Agreement and to submit these revisions in a compliance filing to be made within 30 days of the date of this order. We find that these revisions will benefit all market participants are consistent with our goal of timely resolution of existing market seams that result in inefficiencies.

65. While we share LIPA's concern that continued oversight of the seams resolution process will be both appropriate and necessary, the Commission is fully prepared and able to carry out this monitoring function. Moreover, we will act promptly regarding any complaints that may be filed, as the Filing Parties proceed to implement the terms of the Seams Resolution Agreement. Finally, with respect to the identification of seams issues that may require the participation and involvement of neighboring markets, we note that under the Seams Resolution Agreement, the ISO-NE RTO and the New York ISO will be required to work closely with these third-party entities, including PJM and the Independent Market Operator of Ontario. We find that this commitment satisfies the requirements of the March 24 Order.

Filing Parties' submittal and will deny the protest filed by New York Municipal. The New York Municipal asserts that while they do not contest the elimination of seams between the New York ISO and New England markets, the elimination of Through-and-Out Service Charges in the New York region could result in increased transmission rates and that these "costs" would not be outweighed by the "benefits" attributable to the New York Filing Parties' proposals. We disagree. For all the reasons discussed in the March 24 Order, the elimination of inter-regional seams will provide significant regional benefit for all market participants and the markets as a whole. Moreover, it has not been demonstrated that these benefits will be outweighed by any countervailing costs or burdens.

G. The Cross Sound Cable

66. The March 24 Order granted LIPA's request with respect to its existing agreement for transmission service across the Cross Sound Cable merchant transmission facility. Specifically, we required the ISO-NE RTO, in the Merchant Transmission Operating Agreement it intends to negotiate with Cross Sound Cable LLC, to include appropriate grandfathering language to cover existing transmission service agreements, including LIPA's agreement. However, the agreement at issue has yet to be executed and filed by the parties. Accordingly, we will address the Filing Parties' compliance with this directive in the March 24 Order at such time as the agreement at issue is filed.

H. Mobile-Sierra Provisions

1. The March 24 Order

67. The March 24 Order accepted certain of the Filing Parties' proposed Mobile-Sierra provisions, but required that other provisions of the Transmission Operating Agreement, for which Mobile-Sierra protection was requested, must be revised, eliminated, or transferred to the ISO-NE RTO OATT.[48] We noted, however, that because Mobile-Sierra protection may be appropriate with respect to at least some of these provisions, we would permit the Filing Parties to include in their compliance filing a fuller justification supporting their requests.

2. Requests for Rehearing

68. On rehearing, the Transmission Owners assert that the Commission erred in the March 24 Order in rejecting their requested Mobile-Sierra treatment covering each of the provisions of the Transmission Operating Agreement, as identified in their initial filing. First, the Transmission Owners assert that they have a statutory right to obtain Mobile-

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[48] March 24 Order at P 131. Specifically, we rejected the Filing Parties' proposed provisions addressing billing (Transmission Operating Agreement section 3.10) and termination and withdrawal rights (Transmission Operating Agreement section 10.01). We also required that Transmission Operating Agreement section 3.10 be transferred to the ISO-NE RTO OATT. Finally, we required that Transmission Operating Agreement section 3.09 (planning and expansion) and schedule 10.05 (Independent Transmission Companies) be transferred to the RTO-NE OATT, and rejected section 10.05(b).

Sierra treatment for any portion of their agreement for which it is claimed. The Transmission Owners assert, in this regard, that the Mobile-Sierra doctrine provides the contracting parties the right to define their arrangements by contract and that any agreed-upon contractual limitations that bind the parties will also bind the Commission's authority to change the contract.

69. The Transmission Owners further assert that the rationale relied upon by the Commission in rejecting certain of the Filing Parties' Mobile-Sierra requests (i.e., that these provisions affected the rights and interests of other market participants or the performance and operation of the market as a whole) would prohibit any party required to file any contract with the Commission under section 205 of the FPA from seeking Mobile-Sierra protection, given the fact that any such contract, by definition, "affects" or "relates to" the wholesale sale or transmission of electricity in interstate commerce.

3. Compliance Filing and Responsive Pleadings

70. In their First Compliance Filing, the Filing Parties provide additional support for their contention that, as initially proposed, the Transmission Operating Agreement warrants Mobile-Sierra protection with respect to certain requested provisions (discussed below). The Filing Parties argue that each of these provisions delineates key rights and obligations of the Transmission Owners and the ISO-NE RTO, under the Transmission Operating Agreement, and that the Filing Parties, with respect to these provisions, deserve to be accorded contractual certainty as a condition to their commitment to establish a New England RTO.

71. The New England Consumer Owned Entities argue that because the fundamental workings of the ISO-NE RTO will involve a new division of rights and responsibilities among all market participants, it is critical that the agreements giving rise to these rights and responsibilities remain flexible and open to revision, as may be necessary. As such, the New England Consumer Owned Entities assert that the Filing Parties' have failed to demonstrate that any of the provisions addressed in the Transmission Operating Agreement should be accorded Mobile-Sierra treatment. In addition, the Vermont Public Service Board and NECPUC challenge the appropriateness of according Mobile-Sierra-treatment to specific provisions discussed below.

4. Commission Finding

72. We will deny the Transmission Owners' request for rehearing regarding the Commission's authority to review (and reject) their Mobile-Sierra requests under our just and reasonable standard. First, we disagree that the Commission is precluded from reviewing, in any substantive way, a request for Mobile-Sierra protection at the time that the underlying agreement at issue (in this case, the Transmission Operating Agreement) is initially filed for acceptance under section 205. Indeed, section 205 requires the

Commission to determine whether any such rate, term or condition submitted for our review is just and reasonable.

73. In the March 24 Order, we did just that. In making this determination, we stated that we would consider, among other things, whether the provision for which Mobile-Sierra protection is sought has an effect on non-parties to the agreement or the operation of the market as whole. The Transmission Owners respond (and we acknowledge) that, by definition, any agreement filed with the Commission under section 205 has at least some nexus with the broader interests of third-party market participants and the overall operation of the wholesale markets. However, where the interests of third-party market participants, or the effects on the market as a whole, are significant, we cannot find that a two-party agreement that would have the effect of limiting our ability to protect these broader interests is just and reasonable.

74. Accordingly, we reach, below, the underlying merits supporting the Filing Parties' requests for Mobile-Sierra treatment as they relate to each provision of the Transmission Operating Agreement at issue. For the reasons discussed below, we will accept, in part, and reject, in part, the Filing Parties' compliance filing as it relates to these requests. Specifically, we will grant Mobile-Sierra protection, as requested, applicable to the following provisions of the Transmission Operating Agreement: sections 3.01, 3.09, 3.11, 3.13, 4.01(e), 6.07, 11.04 (a)–(d), and 11.05. We will reject Mobile-Sierra protection applicable to sections 9.01, 9.06, 10.01, and 11.14. Section 10.05 must be removed from the Transmission Operating Agreement and we are not ruling on section 3.10 (which has been withdrawn by the Filing Parties).

75. ***Section 3.01 (grant of operating authority to the ISO-NE RTO*).** Section 3.01 of the Transmission Operating Agreement sets forth the grant of operating authority from the Participating Transmission Owners over their assets to the ISO-NE RTO and the ISO-NE RTO's assumption of such authority. Section 3.01 provides that, effective as of the Operations Date of the ISO-NE RTO, each Participating Transmission Owner will authorize the ISO-NE RTO to exercise Operating Authority over each Participating Transmission Owner's transmission facilities. Section 3.01 also sets forth limitations on the ISO-NE RTO's operating authority.

76. The Filing Parties assert that section 3.01 is a provision that works in tandem with section 3.02 (which defines the ISO-NE RTO's Operating Authority) and that, as such, Mobile-Sierra treatment is appropriate for the same reason already recognized by the Commission in the March 24 Order, as it relates to section 3.02.[49] We agree with the

[49] March 24 Order at P 129.

(continued…)

Filing Parties that section 3.01 works in close tandem with section 3.02, a provision for which we have already granted the Filing Parties' request for Mobile-Sierra protection, and that both provisions primarily affect the rights and interests of the Filing Parties. Accordingly, we will accept the Filing Parties' proposed Mobile-Sierra treatment for section 3.01.

77. ***Section 3.09 (transmission planning and expansion*).**[50] The Filing Parties assert that Mobile-Sierra protection is warranted, as it relates to section 3.09, because prospective investors in new transmission facilities demand certainty when it comes to the planning and construction process. NECPUC objects, arguing that the underlying rights and obligations addressed by section 3.09, in its entirety, should be addressed in the ISO-NE RTO OATT, not the Transmission Operating Agreement.

78. We will grant Mobile-Sierra treatment, as requested by the Filing Parties. Section 3.09 provides direction to the Transmission Owners and the ISO-NE RTO to follow planning procedures contained in the ISO-NE RTO OATT. As such, this provision will have no adverse impact on third parties or the New England market. With respect to NECPUC's request for rehearing, we deny NECPUC's request to transfer section 3.09 and schedule 3.09(a) in their entirety to the OATT. Section 3.09 and sections 6 and 7 of schedule 3.09(a) concern general references to previously adopted planning procedures and do not belong in the more detailed ISO-NE RTO OATT.

79. ***Section 3.10 (collection and disbursement of payments*).** The Vermont Public Service Board points out that while the Filing Parties, in their First Compliance Filing, have deleted section 3.10 from their revised Transmission Operating Agreement (based on the Filing Parties' representation that this provision will be the subject of a future filing), it could still be inferred that Mobile-Sierra protection is being sought by the Filing Parties with respect to this provision. The Vermont Public Service Board argues that the Commission should reject any pre-approved Mobile-Sierra treatment. We agree with the Vermont Public Service Board and will not rule on Mobile-Sierra protection for this section on a pre-approved basis.

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[50] Section 3.09 sets forth the rights and obligations of the Participating Transmission Owners and the ISO-NE RTO with respect to system planning and expansion. Specifically, section 3.09 and its corollary provision, schedule 3.09(a), delineate the Transmission Owners' obligation to build in response to the regional needs as may be determined by the ISO-NE RTO. Section 3.09 also provides for the recovery of costs for such projects.

80. ***Section 3.11 (treatment of grandfathered agreements*).**[51] The Filing Parties assert that Mobile-Sierra treatment is appropriate, as it relates to section 3.11, for the same reason justifying grandfathered treatment of the underlying transmission contracts, i.e., because these contracts represent negotiated rights and obligations which should not be abrogated. We agree. The Grandfathered Transmission Agreements will have no significant effect on market participants that are not parties to these agreements or on reliable operation of the New England market. Therefore, we will grant Mobile-Sierra treatment to section 3.11, as requested.

81. ***Section 3.13 (protection of municipal/tax exempt status*).**[52] The Filing Parties argue that absent the assurance provided by section 3.13 (and the application of Mobile-Sierra treatment as it relates to this provision), tax-exempt municipalities may be reluctant to participate in an RTO. We find that section 3.13 primarily affects the municipal tax-exempt Transmission Owners to whom it applies. We also agree with the Filing Parties that section 3.13 provides a necessary incentive to tax-exempt municipalities to join the ISO-NE RTO. We will therefore grant Mobile-Sierra protection as it relates to section 3.13.

82. ***Section 4.01(e) (disclaimer of transmission facility warranties*).**[53] The Filing Parties assert that Mobile-Sierra protection is appropriate as it relates to section 4.01 (e), consistent with the unique interests and needs of the Transmission Owners. We agree that the rights and obligations addressed by section 4.01(e) concern primarily the rights and obligations of the Participating Transmission Owners and the ISO-NE RTO alone. Accordingly, we will grant Mobile-Sierra treatment, as requested.

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[51] Section 3.11 provides that existing transmission agreements, as identified in Attachment G-1 and schedule 3.11(c) to the NEPOOL OATT (Grandfathered Transmission Agreements) will not be modified or abrogated following the establishment of the ISO-NE RTO.

[52] Section 3.13 provides that the Transmission Operating Agreement shall not be effective as to a municipal tax-exempt transmission owner unless and until that transmission owner's bond counsel renders an opinion that participation in the Transmission Operating Agreement will not adversely affect its tax-exempt status.

[53] Section 4.01(e) provides that Transmission Owners, in their grant of operating authority to the ISO-NE RTO, make no express or implied representations or warranties with respect to their transmission facilities.

83. ***Section 6.07 (requirements applicable to management agreements*).**[54] The Filing Parties note that section 6.07 is designed to ensure that the ISO-NE RTO's contractual commitments are fair and non-discriminatory. The Vermont Public Service Board objects to the Filing Parties' request for Mobile-Sierra protection as it relates to this provision. The Vermont Public Service Board asserts that Mobile-Sierra protection is unnecessary because the asserted need (preventing discrimination) would be sufficiently addressed by the Commission itself, given the fact that the management agreements at issue must be filed with the Commission. We will grant Mobile-Sierra treatment, as requested. Section 6.07 will primarily affect the ISO-NE RTO, a party to the Transmission Operating Agreement and will not adversely affect the rights and interests of third parties. Moreover, application of a Mobile-Sierra provision as it relates to this requirement will facilitate, not deter, Commission oversight and review of the ISO-NE RTO's management agreements.

84. ***Section 9.01 (indemnification requirements) and Section 9.06 (assumption of liability).***[55] The Filing Parties note that while the Transmission Owners and the ISO-NE RTO have taken alternative positions with respect to these provisions, as reflected in the Transmission Owners' request for rehearing of the March 24 Order, the provisions themselves, once accepted, will represent a fundamental aspect of the Filing Parties' RTO formation proposal and should not be thereafter modified unless the Commission makes a public interest finding supporting such a revision. We agree that the issues addressed by sections 9.01 and 9.06 affect primarily the rights and interests of the Filing Parties alone. Accordingly, we will accept the Filing Parties' proposed Mobile-Sierra provision as it relates to these provisions.

85. ***Section 10.01 (term, default, and termination*).** For the reasons discussed above (see supra section D, regarding the Transmission Owners' RTO termination and

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[54] Section 6.07 provides that the ISO-NE RTO will not enter into any management agreement relating to the provision of transmission services unless the agreement has: (i) been approved by the Commission; (ii) does not violate the ISO-NE RTO's Code of Conduct and is on an arms-length basis; and (iii) is the result of a competitive solicitation process, the outcome of which is based on skill, qualifications, costs, reputation, and associated risks.

[55] As noted in Section P of this order, below, section 9.01 of the Transmission Operating Agreement addresses the Filing Parties' obligations to indemnify the other with respect to third-party liabilities attributable to their respective acts and omissions. Section 9.06, by contrast, addresses the Filing Parties' respective liabilities covering their own claims against each other (*i.e.*, two-party claims).

withdrawal rights), we are rejecting the Filing Parties' Mobile-Sierra request as it relates to section 10.01 of the Transmission Operating Agreement.

86. ***Section 10.05 (Independent Transmission Companies***). The Filing Parties continue to include section 10.05 in their request for Mobile-Sierra treatment. NECPUC points out that in the March 24 Order, the Commission required the Filing Parties to transfer its proposed provisions addressing the formation and operation of Independent Transmission Companies to the ISO-NE OATT. In the March 24 Order, we required that section 10.05 be removed from the Transmission Operating Agreement and placed in the ISO-NE RTO OATT. Below, we address the substance of the Filing Parties' Independent Transmission Company requests. For the reasons discussed below, we will require the Filing Parties to remove section 10.05 from the Transmission Operating Agreement and add it to the ISO-NE OATT. Accordingly, we need not address here the appropriateness of Mobile-Sierra treatment for this provision.

87. ***Section 11.04(a)-(d) (limitations on amendments to the Transmission Operating Agreement)***.[56] The Filing Parties assert that absent a Mobile-Sierra provision applicable to section 11.04(a)-(d), third parties would be permitted to seek the modification of the Transmission Operating Agreement and thus undo the negotiated compromises reached by the ISO-NE RTO and the Transmission Owners in establishing the ISO-NE RTO. Section 11.04(c) must be revised to reflect the Mobile-Sierra determinations made herein. With that change, Mobile-Sierra protection will be given to section 11.04(a)-(d) because such a ruling is consistent with the provision-by-provision Mobile-Sierra analysis we have undertaken here.

88. ***Section 11.05 (additional Participating Transmission Owner).***[57] The Filing Parties assert that a Mobile-Sierra provision is appropriate with respect to section 11.05 in order to ensure proper coordination between all of the Participating Transmission Owners and the ISO-NE RTO. We agree that the rights and obligations addressed by

[56] Section 11.04(a)-(d) sets forth the procedures for amending the Transmission Operating Agreement. Under section 11.04, any future amendment to the Transmission Operating Agreement will require the agreement of the ISO-NE RTO and a specified percentage of Transmission Owners, operating under an administrative committee structure. In addition, section 11.04(c) also sets forth those provisions that the Filing Parties seek to be protected under the *Mobile- Sierra* public interest standard of review.

[57] Section 11.05 sets forth the method by which a Transmission Owner can become a Participating Transmission Owner under the Transmission Operating Agreement.

section 11.05 concern primarily the interests of the Filing Parties themselves and that, as such, Mobile-Sierra treatment is warranted.

89. ***Section 11.14 (dispute resolution procedures).***[58] The Filing Parties assert that section 11.14 deserves Mobile-Sierra protection because this provision allows the Filing Parties and market participants to know what their rights and obligations are in connection with dispute resolution matters. The Vermont Public Service Board objects, pointing out that the negotiation period set forth in section 11.14 (not less than 60 calendar days) is too specific to be subject to such a high bar for review.

90. We will reject the Filing Parties' request to apply the Mobile-Sierra public interest standard of review to section 11.14. The matters addressed by section 11.14 expressly include obligations applicable to all market participants, i.e., to non-parties to the Transmission Operation Agreement. Specifically, section 11.14 states that, in the event of a dispute: "Each affected Party and each market participant shall designate one or more representatives with the authority to negotiate the matter in dispute to participate in such negotiations." We also note that an identical dispute resolution procedures provision exists in the ISO-NE RTO OATT, as directed by the Commission in the March 24 Order.[59] As such, providing Mobile-Sierra treatment to the Transmission Operating Agreement's dispute resolution procedures provision, section 11.14, would preclude the Commission from maintaining consistency with the ISO-NE RTO OATT concerning dispute resolution procedures. We will therefore reject Mobile-Sierra treatment for section 11.14 of the Transmission Operating Agreement.

I. Independent Transmission Companies

1. The March 24 Order

91. The March 24 Order found that the Filing Parties' proposed procedures regarding the establishment and operation of Independent Transmission Companies within the ISO-NE RTO framework was generally consistent with the Commission's

[58] Section 11.14 specifies the procedures for resolving disputes under the Transmission Operating Agreement. Section 11.14 requires the parties to engage in good-faith negotiations for at least 60 days in an effort to resolve their disputes unless exigent circumstances exist, or if other provisions of the Transmission Operating Agreement require a party to submit a dispute directly to the Commission for resolution. Any dispute not resolved through good-faith negotiations may be submitted for resolution by the Commission or a court or agency with jurisdiction over the dispute.

[59] March 24 Order at 173.

policies and precedents, subject to the following conditions: (i) the re-filing of the relevant procedures as revisions to the ISO-NE RTO OATT; (ii) clarification that an Independent Transmission Company's authority over rate discount matters was subject to the rate discount authorizations set forth in the ISO-NE RTO OATT; [60] (iii) clarification that the ISO-NE RTO would be given the final say over planning procedures; (iv) clarification regarding an Independent Transmission Company's authority over the development of Reliability Must Run related costs; and (v) clarification regarding the circumstances under which a project identified by an Independent Transmission Company could be incorporated into the ISO-NE RTO's Regional System Plan; and (vi) clarification regarding an Independent Transmission Company's authorization over line loss responsibility determinations.[61]

2. Requests for Rehearing

92. Rehearing of the Commission's findings in the March 24 Order, with respect to establishment and formation of Independent Transmission Companies, was sought by the Transmission Owners and PSEG. The following Reserved Issues are identified in the Settlement Agreement:

93. First, the Transmission Owners assert as error the Commission's rejection of the proposal that would have given an Independent Transmission Company the unilateral right to file with the Commission a mechanism for determining loss responsibility. The Transmission Owners note that this provision, as proposed, was limited in its application to circumstances where an Independent Transmission Company is financially responsible for line losses and was required to allocate the costs of these losses to their customers. The Transmission Owners submit that this limited right would have only applied where the Locational Marginal Prices for the region do not take line losses into account and only when the Independent Transmission Company is responsible for these costs.

94. PSEG asserts as error the Commission's acceptance in the March 24 Order of a framework that would permit the Independent Transmission Company to operate as a transmission provider. PSEG asserts, in this regard, that permitting an Independent Transmission Company to control transmission access would be the equivalent of allowing that entity to control access to the market itself, given the nexus between these

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[60] We also required the Filing Parties to clarify the effect of any such discounts on other market participants

[61] March 24 Order at P 149.

markets under a Locational Marginal Pricing paradigm. PSEG concludes that the Commission should not permit any transmission-owning entity, including an Independent Transmission Company, to control market access.

95. PSEG also asserts as error the Commission's determination in the March 24 Order that, as proposed by the Filing Parties, an Independent Transmission Company would be permitted to calculate Total Transmission Capacity, given its familiarity with the transmission facilities within its footprint. PSEG argues that an Independent Transmission Company should not, and cannot, calculate Total Transmission Capacity. PSEG asserts that calculating these figures requires a broad regional perspective. For this same reason, PSEG also argues, on rehearing, that an Independent Transmission Company should be permitted to play no role in billing, in determining protocols for transmission line-loading relief, in coordinating outage scheduling, in processing transmission service reservations, or in administering its tariff.

96. PSEG also seeks rehearing regarding the Commission's determination in the March 24 Order that an Independent Transmission Company would be permitted to exercise certain authority over rate discounting practices. PSEG argues that an Independent Transmission Company should be given no role in awarding discounts for transmission service over its facilities, whether or not the applicable tariff permits the discount. PSEG asserts that the fiduciary obligations of an Independent Transmission Company could require it to discriminate in favor of particular market participants. At a minimum, PSEG submits that the Commission should not permit such authority until the Filing Parties can adequately explain the potential implications and effects of these discounts. Finally, PSEG asserts as error the Commission's failure to require ISO-NE RTO monitoring with respect to all activities undertaken by the Independent Transmission Company.

3. Compliance Filing

97. In their First Compliance Filing, the Filing Parties state that they have complied with each of the requirements in the March 24 Order regarding the establishment and operation of Independent Transmission Companies. Specifically, the Filing Parties state that schedule 10.05 of their proposed Transmission Operating Agreement has been re-filed, with appropriate conforming changes, as new Attachment M to the ISO-NE RTO OATT. In addition, to clarify the circumstances under which a project identified by an Independent Transmission Company could be incorporated into the ISO-NE RTO's Regional System Plan, the Filing Parties propose to define the term "Material Adverse Effect" as a means of identifying those projects that will be excluded.[62]

[62] The Filing Parties propose to define "Material Adverse Effect" as follows:
(continued…)

98. The Filings Parties also state that they have modified section 7.1 of their proposed Independent Transmission Company procedures to address the Commission's findings in the March 24 Order regarding rate discounts. The Filing Parties state that revised section 7.1 makes clear that an Independent Transmission Company can only make decisions on rate discounts to the extent applicable under the rate design for the Independent Transmission Company Rate Schedule and to the extent rate discounting is authorized as to such transmission services.

99. The Filing Parties also clarify the role that an Independent Transmission Company would play in the development of Reliability Must Run-related costs. The Filing Parties state that the relevant provision (section 5.2 of their proposed Independent Transmission Company procedures), addresses Independent Transmission Company action to reduce congestion. The Filing Parties further state that this provision would not permit an Independent Transmission Company to exercise final authority in determining the costs that may be recovered through such contracts. The Filing Parties state that authority, rather, would rest with the ISO-NE RTO.

100. Finally, the Filing Parties state that that they have the complied with the directives of the March 24 Order by removing those provisions in their initially proposed Independent Transmission Company procedures relating to line losses.

3. Responsive Pleadings

101. The Vermont Public Service Board challenges the adequacy of the Filing Parties' explanation of the role that would be given to an Independent Transmission Company in the development of Reliability Must Run-related costs. The Vermont Public Service Board asserts that the explanation of this role, as provided by the Filing Parties in their First Compliance Filing, still leaves a number of unanswered questions. In

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> For purposes of review of [Independent Transmission Company]-proposed plans, a proposed facility or project will be deemed to cause a "material adverse impact" on facilities outside of the [Independent Transmission Company] System if: (i) the proposed facility or project causes non-[Independent Transmission Company] facilities to exceed their capabilities or exceed their thermal, voltage or stability limits, consistent with all applicable reliability criteria, or (ii) the proposed facility or project would not satisfy the standards set forth in section 1.3.9 of the [ISO-NE RTO] Tariff. This standard is intended to assure the continued service of all non-[Independent Transmission Company] Firm Load customers and the ability of the non-[Independent Transmission Company] systems to meet outstanding transmission service obligations.

particular, the Vermont Public Service Board notes that it is unclear what is intended by the representation that an Independent Transmission Company will have "certain authority" to take operating actions to reduce costs associated with transmission congestion. The Vermont Public Service Board requests that, among other things, the Commission require the Filing Parties to expressly provide, in Attachment M, that it is the ISO-NE RTO that has the ultimate authority over Independent Transmission Company operating actions taken pursuant to section 5.2 of Attachment M.

102. The Vermont Public Service Board also takes issue with the adequacy of the Filing Parties' proposed revisions to section 7.1 of Attachment M concerning the effects of rate discounts on other customers. The Vermont Public Service Board asserts that because rate discounting is not currently authorized (and because the impact on customers cannot be determined at this time), the Commission should require that this provision (section 7.1) be rejected as non-applicable.

4. Commission Finding

103. We will deny, in part, and grant, in part, rehearing, and accept, in part, and reject, in part, the Filing Parties' First Compliance Filing as it relates to those aspects of the March 24 Order concerning the establishment and operation of Independent Transmission Companies.

104. We will grant rehearing regarding the Transmission Owners' assertion that the Commission erred in its determination that an Independent Transmission Company may not have a unilateral right to file a mechanism for determining loss responsibility. In the March 24 Order, we based our rejection of this requested authority on the assumption that the provision at issue (section 6 of the Filing Parties' proposed Independent Transmission Company framework) could prejudge the appropriate allocation of costs that have yet to be quantified in a particular case. It would not. Section 6, as proposed, provides in its entirety, as follows:

> To the extent the [Independent Transmission Company] is responsible for the costs of losses, the [Independent Transmission Company] shall possess the unilateral right to file at FERC, without any [ISO-NE RTO] approval, a mechanism for determining loss responsibility with the [Independent Transmission Company] System, provided that this method does not affect the costs of losses assigned to entities other than the [Independent Transmission Company] in areas outside of the [Independent Transmission Company] System and is not inconsistent with design of the markets administered by [the ISO-NE RTO], including the congestion pricing methodology for the [ISO-NE RTO] region approved by the FERC and any provision for losses contained therein.

105. Section 6, on its face, does not propose to allocate loss responsibility. Moreover, as the Transmission Owners correctly point out in their rehearing request, the Commission has already approved the assignment of responsibility for calculation of line losses to an Independent Transmission Company participating in the Midwest ISO.[63] Accordingly, we will accept section 6, as proposed, for inclusion in the Filing Parties' Independent Transmission Company framework.

106. We will deny PSEG's request for rehearing regarding the authority of an Independent Transmission Company to calculate Total Transmission Capacity. Under the Filing Parties' proposed framework, as accepted in the March 24 Order, the Independent Transmission Company may determine Total Transmission Capacity consistent with the ISO-NE RTO's methodology and provide its calculations to the ISO-NE RTO. However, the ISO-NE RTO would (and must) have the final authority regarding these determinations, not the Independent Transmission Company, because the ISO-NE RTO will be responsible for matters relating to the short term reliability of the New England markets.

107. We will also deny PSEG's rehearing argument that an Independent Transmission Company should not be given the authority to institute Transmission Load Relief procedures. We clarify that the provision at issue (section 8 of the Independent Transmission Company framework) limits the authority that can be exercised by the Independent Transmission Company. Specifically, section 8 provides that the Independent Transmission Company shall develop protocols for the coordination of transmission service curtailments on the Independent Transmission Company system, subject to coordination with the ISO-NE RTO and in accordance with all applicable OATTs and operating procedures. In addition, as we stated in the March 24 Order, while the ISO-NE RTO and the representatives of the proposed Independent Transmission Company would be permitted to jointly develop and establish the Independent Transmission Company's authorized planning procedures, the ISO-NE RTO, not the Independent Transmission Company, would have the final say.[64]

108. We will also reject PSEG's argument that the Independent Transmission Company framework should be revised to allow the ISO-NE RTO to monitor all Independent Transmission Company activities. Under section 12 of the Independent Transmission Company framework, the Independent Transmission Company will rely upon ISO-NE RTO to determine if the division of functions creates a competitive or

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[63] *See* Commonwealth Edison Company, 90 FERC ¶ 61,192 at 61,626 (2000).

[64] March 24 Order at P 156.

reliability problem that affects the ISO-NE RTO's ability to provide efficient, reliable, and non-discriminatory service and administration of markets within the ISO-NE RTO region. We find the Independent Transmission Company proposal to rely upon ISO-NE RTO for this function reasonable, because the ISO-NE RTO has the broad regional perspective needed to properly assess whether competition in the bulk power market is being fostered.

109. We will deny PSEG's rehearing request regarding the level of responsibility that should be given to an Independent Transmission Company with respect to billing matters. In fact, allowing the Independent Transmission Company to bear the primary responsibility for billing matters, as proposed by the Filing Parties, is appropriate where, as here, the ITC will also have responsibility for a number of related duties and functions (e.g. maintaining its own rate schedules and overseeing its rate discounting practices and line loss calculations). Moreover, the Independent Transmission Company's billing responsibility, as proposed, is generally consistent with the procedures followed by PJM and the Midwest ISO.

110. We will deny PSEG's argument on rehearing, that our acceptance of the Independent Transmission Company framework would allow an Independent Transmission Company to operate as a transmission provider. Section 7.1 of the Independent Transmission Company framework provides that the ISO-NE RTO will be the transmission provider under the OATT of non-discriminatory open access transmission service over the Independent Transmission Company system.

111. We will also deny PSEG's rehearing argument that Independent Transmission Companies should have no role in developing operational protocols. As we stated in the March 24 Order:

> While under the Filing Parties' proposal, the ISO-NE RTO and the representatives of the proposed Independent Transmission Company would be permitted to jointly develop and establish the Independent Transmission Company's authorized planning procedures, moreover, the [ISO-NE] RTO, not the Independent Transmission Company would have the final say. Specifically, in the event any dispute arises regarding the terms and conditions of these procedures, the [ISO-NE] RTO would be authorized to submit its proposal directly to the Commission.[65]

112. With respect to the arguments raised by the Vermont Public Service Board and PSEG regarding rate discounting authority, the Filing Parties have modified section 7.1

[65] *Id.* at P 156.

of their proposed Independent Transmission Company procedures to address the Commission's findings in the March 24 Order regarding rate discounts.66 The Filing Parties state that revised section 7.1 makes clear that an Independent Transmission Company can only make decisions on rate discounts to the extent applicable under the rate design for the Independent Transmission Company Rate Schedule, and to the extent rate discounting is authorized as to such transmission service. We clarify that to the extent that an Independent Transmission Company is developed in the ISO-NE RTO, the service schedule proposed may contain such rate discounts. Any discount provision allowed under an Independent Transmission Company rate design would not adversely affect the revenues of non-Independent Transmission Companies' transmission providers operating within the ISO-NE RTO region. Moreover, this rate discounting authority would be consistent with the policy set forth in Order No. 888.[67]

113. We will accept, in part, the Filing Parties' First Compliance Filing as it relates to their proposed provisions governing the establishment and operation of Independent Transmission Companies. First, we will require the Filing Parties to modify their provisions allowing the inclusion of Independent Transmission Company projects in the ISO-NE RTO's Regional System Plan. In the March 24 Order, we stated that in the event the ISO-NE RTO determines that any of the projects identified in the Independent Transmission Company plan would cause a material adverse impact on the ISO-NE RTO's facilities, the Independent Transmission Companies' plan cannot be incorporated into the Regional System Plan.[68] The Filing Parties propose to retain tariff language in Attachment M that would not explicitly preclude the ISO-NE RTO from accepting projects identified by the RTO that would cause a material adverse impact on the ISO-NE RTO's facilities to be included into the Regional System Plan. As a result, we will require the Filing Parties, in their compliance filing, to revise section 10.3.

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[66] *Id.* at P 154.

[67] *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pubic Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,743-44 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,272 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and rev'd in part sub nom*.Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.*, New York v. FERC, 535 U.S.1 (2002).

[68] March 24 Order at P 159.

114. In the March 24 Order, we required that section 10.05, in its entirety, be removed from the Transmission Operating Agreement and placed in the ISO-NE RTO OATT. The Filing Parties, however, have removed only certain portions of section 10.05 from the Transmission Operating Agreement. We will direct the Filing Parties to fully comply with this aspect of the March 24 Order. Specifically, the Filing Parties are required to remove section 10.05, in its entirety, from the Transmission Operating Agreement, make any conforming changes as may be required, and to re-file these provisions as revisions to the ISO-NE RTO OATT.

115. We will deny the Vermont Public Service Board's protest regarding the adequacy of the Filing Parties' explanation of the role to be played by an Independent Transmission Company in the development of Reliability Must Run costs. While the Vermont Public Service Board is concerned about the potential for abuse on the part of the Independent Transmission Company, we note that it will be the ISO-NE RTO, not the Independent Transmission Company, which will have the ultimate authority over the development of Reliability Must Run costs.

J. Tariff Administration and Design

1. The March 24 Order

116. The March 24 Order found that Filing Parties' RTO formation proposal met the Commission's RTO tariff administration and design requirements, subject to the following conditions: (i) revised procedures making clear that the Filing Parties' Alternative Dispute Resolution provisions will be available to all market participants on an equal basis; and (ii) revisions to the Filing Parties' maintenance rules making clear that generators who are not required to meet Installed Capacity obligations, i.e., generators whose units are classified as "de-listed" resources, must not be required to adhere to the same maintenance rules that apply to generators who are required to meet these obligations, i.e., generators whose units are classified as "listed" resources.

2. Compliance Filing

117. The Filing Parties assert that in their First Compliance Filing they have complied with each of the tariff administration and design requirements set forth by the Commission in the March 24 Order. With respect to the Commission's requirement that generators not required to meet Installed Capacity obligations not be required to adhere to maintenance rules applicable to the Installed Capacity market, the Filing

Parties state that they have revised section 8.3.3 of Market Rule 1 by adding a new section 8.3.3.1 ("De-listed Resource Outage Provision").[69]

3. Responsive Pleadings

118. Calpine Eastern, et al. take issue with the Filing Parties' proposed revisions to section 8.3.3. Calpine Eastern, et al. assert that the Filing Parties' proposed revisions ignore the fundamental principle underlying the Commission's directive in the March 24 Order, i.e., that a capacity resource obligation should only arise when a unit owner enters into an explicit commercial transaction for the sale of capacity. Calpine Eastern, *et al.* argue that the Filing Parties' proposed revision, by contrast, provides only that de-listed resources be treated as a separate class of resources entitled to slightly greater deference when determining whether maintenance requests will be approved, while essentially imposing the same obligation on such resources as on a listed Installed Capacity resource. In addition, Calpine Eastern, et al. assert that the Filing Parties' proposed revisions to section 8.3.3 do not contain adequate compensation provisions for resources that are subject to forced re-listing.

119. The New England Consumer Owned Entities also object to the Filing Parties' proposed revisions to section 8.3.3 of Market Rule 1. The New England Consumer Owner Entities argue that the Filing Parties' proposed revisions exceed the scope of the requirements addressed by the Commission in the March 24 Order. Specifically, the New England Consumer Owned Entities argue that the Filing Parties' proposed revisions would not have the effect of releasing non-Installed Capacity resources from Installed Capacity maintenance obligations (as the March 24 Order requires), but, in addition, would grant these non-Installed Capacity resources certain undue preferences vis a vis Installed Capacity resources.[70] The New England Consumer Owned Entities submit these revisions, if approved, would create unjustified incentives and rewards for generators who know their resources are needed to meet reliability needs.

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[69] The proposed provision states, among other things, that "[o]utage requests for De-Listed Resources shall have precedence over the outage requests or schedules of listed [Unforced Capacity] Resources and shall normally be granted."

[70] The New England Consumer Owner Entities point out, for example, that under the Filing Parties' proposed provision, outage requests for De-Listed Resources would be given precedence over the outage requests or schedules of listed Uninstalled Capacity resources and will normally be granted.

4. Commission Finding

120. We will reject the Filing Parties' First Compliance Filing as it relates to the tariff administration and design requirements of the March 24 Order. We agree with Calpine Eastern, et al. and the New England Consumer Owned Entities that the Filing Parties' proposed revision to section 8.3.3.1 does not satisfy our requirement that de-listed resources not be required to meet the same maintenance standards as listed resources. However, we reject the Calpine Eastern, et al. argument that section 8.3.3.1 of Market Rule 1 does not contain adequate compensation for resources that re-listed. We find that the Filing Parties' Market Rule 1 provisions provide appropriate compensation to resources that are re-listed.

121. Under Market Rule 1, a re-listed resource is eligible to receive the Uninstalled Capacity clearing price used for load shifting in the obligation month for which the resource has been re-listed, plus any additional reasonably incurred maintenance and opportunity costs associated with re-scheduling the outage and becoming an Installed Capacity resource. We find that these provisions are reasonable. Accordingly, we direct the Filing Parties, in a compliance filing to be made within 30 days following the issuance of this order, to revise section 8.3.3.1 to comply with the requirement for de-listed resources, as discussed herein.

K. Billing Procedures

1. March 24 Order

122. In the March 24 Order, we required the Filing Parties to revise section 3.10 of the Transmission Operating Agreement to eliminate provisions for separate billing for transmission and market services to avoid an unwarranted "me first" call on the ISO-NE RTO's receivables and to avoid spreading the potential costs unto all other market participants in the form of increased financial assurances.[71]

2. Requests for Rehearing

123. On rehearing, the Transmission Owners' argue that the Commission erred in the March 24 Order in finding that the Filing Parties' proposed separation of revenues under section 3.10 of the Transmission Operating Agreement should be rejected. The

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[71] March 24 Order at P 119.

Transmission Owners argue that section 3.10, as proposed, appropriately recognized the need to separate these revenues in order to ensure that revenues would remain unencumbered property of the Transmission Owners, such that they would be available to provide an appropriate and acceptable level of security to lenders and equity investors in Transmission Owner's transmission businesses.

124. The Transmission Owners argue that the revenues received for the provision of transmission service using their facilities rightfully belong to the Transmission Owners. Nonetheless, the Transmission Owners argue that the March 24 Order suggests that the Transmission Owners' interests in retaining rights to their accounts receivable for transmission service could be outweighed by the potential costs that could be borne by all other market participants in the form of increased financial assurances.

3. Compliance Filing and Responsive Pleadings

125. The Filing Parties, in their First Compliance Filing, propose to eliminate section 3.10 of the Transmission Operating Agreement, pending stakeholder consideration of a revised provision. The Filing Parties state that they are developing alternative billing and invoicing provisions to replace the as-filed version of this provision, which they intend to submit to a stakeholder review process. The Filing Parties state that a revised section 3.10 will be filed with the Commission following the completion of this stakeholder process.

126. The New England Consumer Owned Entities urge that any finding that the ISO-NE RTO meets the operating authority requirements of Order No. 2000 must remain conditional until a revised section 3.10 is filed, reviewed and accepted.

4. Commission Finding

127. We will deny the Transmission Owners' rehearing request as it relates to our finding, in the March 24 Order, regarding the ISO-NE RTO's billing procedures. As we determined in the March 24 Order, the Filing Parties proposed a dual billing system that could lead to increased financial assurance of certain market participants. In fact, in their answer, the Filing Parties acknowledged that the proposed dual billing system may potentially lead to increased financial assurance of certain market participants.

128. We find that in the initial stages of RTO development in the New England Region a billing system that could potentially lead to increased financial assurances for certain market participants, could dampen participation in the marketplace. This is inconsistent with our goal to increase participation in RTO markets. Additionally, in the First Compliance Filing, the Filing Parties deleted section 3.10 of the Transmission Operating Agreement consistent with the Commission's directive. Further, given the fact that the Filing Parties are developing new billing provisions utilizing the stakeholder

mechanisms, we would not oppose a dual billing system to provide additional financial assurance to the Transmission Owners as long as such billing practice does not result in additional credit requirements being imposed on market participants.

129. Finally, we will deny the protest argument raised by the New England Consumer Owned Entities regarding the Filing Parties' compliance with all aspects of our RTO operational control requirements as they relate to section 3.10. Beyond the guidance provided herein, we need not further condition the start-up of the ISO-NE RTO.

L. Facility Ratings

130. In the March 24 Order, we required the Filing Parties to revise section 3.06(v) of the Transmission Operating Agreement to provide for collaboration between the ISO-NE RTO and Transmission Owners in the establishment of transmission facility ratings. The Transmission Owners seek clarification that the March 24 Order only requires the Transmission Owners to collaborate with the ISO-NE RTO on the establishment of transmission facility ratings, but does not require the Transmission Owners to transfer the ultimate authority over these matters to the ISO-NE RTO. The Transmission Owners assert, in this regard, that their proposed division of functions as between ISO-NE and the Transmission Owners and that their proposed approach for establishing ratings were consistent with the policy set forth in Order No. 2000.

131. We will grant the requested clarification. The March 24 Order did not require the Transmission Owners to transfer the ultimate authority for establishing transmission facility ratings to the ISO-NE RTO. Rather, we are requiring cooperation and consultation between the Transmission Owners and the ISO-NE RTO, as may be appropriate.

M. Transmission Outage Scheduling

1. The March 24 Order

132. In the March 24 Order, we rejected proposed section 3.08 of the Transmission Operating Agreement which addressed the repair and maintenance of transmission facilities. As proposed, section 3.08 would have allocated certain responsibilities over transmission outage scheduling to the ISO-NE RTO, while allocating other responsibilities to the Transmission Owners. In the March 24 Order, we held that the ISO-NE RTO should be given the ultimate authority over these matters, in a provision to be included either in the ISO-NE RTO OATT, or in Market Rule 1.72 We also required

the Filing Parties to include language in Market Rule 1 making it clear that all proposed outages must be considered together by the ISO-NE RTO when it decides to accept a proposed Transmission Owner outage plan. We found that by considering all proposed outages (both transmission and generation), the ISO-NE RTO would be able to ensure that the system impact attributable to these outages would be minimized in a way that would reduce congestion and promote market efficiency.[73]

2. Requests for Rehearing

133. On rehearing, the Transmission Owners assert that the Commission erred in the March 24 Order in not accepting section 3.08, as proposed. The Transmission Owners argue that while Order No. 2000 does not require the Transmission Owners to provide the ISO-NE RTO with any authority to cancel or reschedule outages based on economic or reliability market considerations, the Transmission Owners have been willing to voluntarily provide defined and limited authority for economic or market-based rescheduling of outages to the ISO-NE RTO. The Transmission Owners assert that when the Commission rejected this balance in the March 24 Order, it did so on a basis not required by Order No. 2000.

134. The Transmission Owners further argue that the Commission erred in requiring that transmission facility outage provisions be removed from the Transmission Operating Agreement and transferred to the ISO-NE RTO OATT, or to Market Rule 1. The Transmission Owners submit that keeping these provisions in the Transmission Operating Agreement, as proposed, would ensure that the terms and conditions governing the ability of the Transmission Owners to maintain their own assets could only be changed with their consent. The Transmission Owners urge that if the Commission does not grant rehearing on this issue, it should clarify that transmission outage provisions should be transferred from the Transmission Operating Agreement to the ISO-NE RTO OATT, and should not be included in Market Rule 1.

135. The Transmission Owners also argue that there are numerous protections already in place that would grant the Commission and market monitors sufficient authority to ensure that the Transmission Owners would not schedule outages in a manner to manipulate the market for Firm Transmission Rights.

136. In addition, the Transmission Owners argue that permitting the ISO-NE RTO to exercise unlimited authority to reschedule transmission maintenance outages for

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[72] *Id.* at P 120.

[73] *Id.* at P 121.

economic considerations would limit the ability of the Transmission Owners to develop mechanisms that provide the appropriate incentives for operational and planning actions designed to improve market outcomes.

3. Compliance Filing

137. The Filing Parties state that they have removed section 3.08 of the Transmission Operating Agreement and transferred the substance of this provision to new Appendix G to Market Rule 1 as it relates to the ISO-NE RTO's authority to modify outage schedules. The Filing Parties also state that Appendix G reflects the Commission's ruling, in the March 24 Order, that the ISO-NE RTO be given the ultimate authority to modify outage schedules.

4. Responsive Pleadings

138. Duke Energy, the New England Consumer Owned Entities, and the Vermont Public Service Board argue that Appendix G, as proposed, continues to limit the authority of the ISO-NE RTO, contrary to the requirements of the March 24 Order. In particular, these intervenors point out that under the Filing Parties' proposed revision, the ISO-NE RTO would be given no authority to require the rescheduling of an outage based on any estimated or actual impacts on congestion or Reliability Must Run costs in financial, day-ahead markets, whether or not such outage had previously been scheduled. These intervenors argue that Appendix G should expressly state that the ISO-NE RTO shall have the ultimate authority to modify outage schedules based on either reliability or economic considerations.

139. Duke Energy, the Vermont Public Service Board and Calpine Eastern, et al. also argue that the First Compliance Filing fails to include language in Market Rule 1 making clear that all proposed outages be considered together by the ISO-NE RTO when it decides to accept a proposed Transmission Owner outage plan.

5. Commission Finding

140. We will deny the Transmission Owners' rehearing request with regard to the ISO-NE RTO's ultimate authority to reschedule transmission outages for economic or reliability considerations. We agree with the Transmission Owners that the Commission's reasoning in giving the ISO-NE RTO ultimate authority to reschedule outages for economic or reliability considerations was not based on our directives in Order No. 2000. However, as we stated in the March 24 Order, allowing the Transmission Owners any influence in the rescheduling of transmission outages creates

an inherent conflict of interest, especially where the Transmission Owner also owns or controls generation resources or has load serving obligations.[74]

141. We also recognize the Transmission Owners' claim that there are sufficient checks in place to prevent the Transmission Owners from manipulating the Firm Transmission Rights market. However, the conflict of interest would still exist for any affiliate of a Transmission Owner that might purchase Firm Transmission Rights at auction, since any outage could be designed to favor the affiliate.[75] Our directive to provide the ISO-NE RTO with ultimate authority to reschedule transmission outages for economic or reliability considerations, combined with the oversight of the Market Monitoring Unit and the Commission, will adequately safeguard against Firm Transmission Rights market manipulation by Transmission Owners.

142. We will deny the Transmission Owners' request for rehearing regarding the Transmission Owners' ability to develop mechanisms that provide appropriate incentives for operational and planning actions designed to improve market outcomes. The impact of the transmission outage scheduling provision on the Transmission Owners will be minimized due to the infrequency of outage schedule modifications and is otherwise outweighed by the need to eliminate the inherent conflict of interest that Transmission Owners would have in scheduling transmission outages.

143. With respect to protesters' concerns, we agree that Appendix G of Market Rule 1, as filed, does not include language requiring the ISO-NE RTO to consider all proposed transmission and generation outages together in accepting a proposed transmission owner outage plan, and we will require the ISO-NE RTO to correct this error in a filing within 90 days of issuance of this order. We also agree with the protestors that Market Rule 1 fails to provide the ISO-NE RTO with the authority to require the rescheduling of an outage based on any estimated or actual impacts on congestion or Reliability Must Run costs in financial, day-ahead markets, whether or not such outage has previously been scheduled. Market Rule 1 must contain plainly stated language that the ISO-NE RTO shall have the ultimate authority to modify outage schedules based on either reliability or economic considerations. This will provide the ISO-NE RTO adequate authority to ensure that the system impact caused by such outages will be minimized in a way that

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[74] *Id.* at P 120.

[75] *See, e.g.*, Exelon Corporation, *et al.*, 97 FERC ¶ 61,009 (2001); PJM Interconnection, L.L.C., *et al.*, 97 FERC ¶ 61,319 (2001).

reduces congestion and promotes market efficiency. We will require the Filing Parties to revise Appendix G of Market Rule 1 to comply with this directive.

144. We will also deny the Transmission Owners' request for rehearing and clarification regarding placement of provisions regarding this authority. In fact, transmission facility outage provisions must be placed in the ISO-NE RTO OATT or Market Rule 1. We recognize the Transmission Owners' concern that keeping the outage scheduling provision in the Transmission Operating Agreement would ensure that only the Transmission Owners could alter the provisions. However, placement in the OATT, or Market Rule 1, will ensure that authority over these matters will be given to the ISO-NE RTO and thus made subject to the stakeholder input process, in which the Transmission Owners may participate. Moreover, the ISO-NE RTO must have the ultimate and unlimited authority to modify outage schedules because of reliability or economic considerations. As such, we will require the Filing Parties to revise Appendix G of Market Rule 1 to comply with this directive.

N. System Planning and Expansion

1. The March 24 Order

145. The March 24 Order found that the Filing Parties' proposed system planning and expansion procedures met the Commission's RTO formation requirements, subject to the following four conditions: (i) modification of the provision relating to the Request for Alternative Proposals to expand system transmission capacity, consistent with our rulings in a related proceeding addressing the procedures available to the ISO-NE when no viable solutions have been proposed to meet a near-term reliability need;[76] (ii) re-filing of the Filing Parties' proposed system planning and expansion provisions as revisions to the planning sections of the ISO-NE RTO OATT;[77] (iii) clarification that at the end of the ISO-NE RTO planning process, if there is no agreement to build a given project, a filing must be made by the ISO-NE RTO, including a recommendation as to whether it would be appropriate for the Commission to require an enlargement of facilities under the FPA or to take other steps; and (iv) clarification of the standards and procedures to be followed by the ISO-NE RTO to promote market efficiency upgrades, identify cost-

[76] *See* ISO New England Inc., 106 FERC ¶ 61,190 (2004) (Gap RFP Order).

[77] We found that with the exception of those provisions that affect only (or predominantly) the rights and responsibilities of the Filing Parties alone, *i.e.*, sections 6 and 7 of schedule 3.09(a), provisions addressing system planning and expansion do not belong in the Transmission Operating Agreement, given the effect that these provisions may have on market participants as a whole.

effective solutions, and allocate any Financial Transmission Rights or Auction Revenue Rights that would result from the construction of new facilities.

2. Requests for Rehearing

146. Rehearing of the March 24 Order, with respect to the Commission's findings regarding transmission planning and expansion matters, was sought by the Transmission Owners, PSEG, and the New England Consumer Owned Entities. The following Reserved Issues are identified in the Settlement Agreement.

147. First, PSEG asserts as error the Commission's failure in the March 24 Order to prescribe an appropriate amount of time in the planning process during which the market can respond to a planning need identified by the ISO-NE RTO. PSEG argues that this time allowance is necessary in order to create a level playing field for all responses to transmission congestion. In addition, PSEG argues that the ISO-NE RTO should be required to publish its needs assessment with a sufficient amount of time allowed for a market response, and the ISO-NE RTO should be required to withhold its cost-benefit analysis until the "market window" has closed. PSEG claims that such a policy is necessary because competing merchant developers would otherwise have difficulty in obtaining financing for their proposed projects to the extent they would be required to compete against estimates that may, by definition, be less than accurate.

148. Finally, PSEG asserts as error the Commission's failure in the March 24 Order to include a sensible scope change process in the event of cost overruns during the course of a project. PSEG argues that without an efficient mechanism to change the scope of a project, the economic expansion process could lead to the development of upgrades that cost more than the congestion they eliminate.

149. The New England Consumer Owned Entities claim that the March 24 Order failed to approve necessary enforcement mechanisms for the commitment to construct new and upgraded transmission facilities. The New England Consumer Owned Entities also assert that the Filing Parties should be required to provide market participants the opportunity to support grid expansion by allowing third-party buy-in for capital contribution upgrades identified in the ISO-NE RTO plan up to their load ratio shares.[78]

[78] The New England Consumer Owned Entities argue that the benefits attributable to such participation would only be realized if third parties are permitted to participate in such projects, whether through contributions of capital or joint construction and/or ownership with Transmission Owners. The New England Consumer Owned Entities assert that smaller entities, such as municipal systems, while not in a position to fund and

(continued…)

150. The New England Consumer Owned Entities also assert as error the Commission's determination not to adopt revisions to the Filing Parties' proposed system planning and expansion procedures that would require Transmission Owners to: (i) jointly develop, along with the ISO-NE RTO, a detailed implementation plan that would include schedules and benchmarks leading to the completion of planned facilities; (ii) report to the ISO-NE RTO at least quarterly, or as otherwise agreed, on their progress toward achieving the schedules and benchmarks included in the implementation plan; and (iii) submit to the ISO-NE RTO their plan to cure delays, where progress on significant schedules and benchmarks are not being achieved. In addition, the New England Consumer Owned Entities argue that in the event the ISO-NE RTO determines that a Participating Transmission Owner is not using its "best efforts" to complete a given project, the ISO-NE RTO should be authorized, in this instance, to request that other entities be permitted to submit proposals to either build the planned project or to otherwise meet the identified expansion need.

151. The Transmission Owners, on rehearing, object to the Commission's requirement that the Filing Parties' proposed system planning and expansions provisions be re-filed as revisions to the ISO-NE RTO OATT. The Transmission Owners argue these provisions exclusively concern terms and conditions related to the unique rights and obligations of the Transmission Owners. The Transmission Owners further assert that comparable provisions were accepted by the Commission for inclusion in the transmission operating agreement applicable to the Midwest ISO.[79]

3. Compliance Filing

152. In their First Compliance Filing, the Filing Parties state that they have re-filed their proposed system planning and expansion provisions, with the exception of sections 6 and 7 of schedule 3.09, as a revision to planning provisions of the ISO-NE RTO OATT. The Filing Parties also state that the remaining provisions of schedule 3.09 have been modified to reflect the Commission's directive that the ISO-NE RTO is required to file a report if there is no agreement to build a given project and to eliminate the provisions that could release a Participating Transmission Owner from the obligation to build based on the non-binding written opinion of the chair of a state siting board.

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construct their own projects, would nonetheless bring important consumer benefits and capital to such projects.

[79] *See* Appendix B to the Midwest ISO Transmission Owners' Agreement.

153. The Filing Parties state that in order to identify market efficiency upgrades and assess cost effective solutions, as required by the March 24 Order, they have developed a new planning procedure proposal, but that these new planning procedures have yet to receive NEPOOL stakeholder approval.[80] Accordingly, the Filing Parties submit these proposed procedures for informational purposes only. The Filing Parties state that these procedures include: (i) standards for identifying Reliability Transmission Upgrades; (ii) standards for identifying Market Efficiency Transmission Upgrades, including use of a "Base Economic Evaluation Model" for determining the net present value of bulk power system resource costs and analysis of other data to calculate the net cost load with and without the transmission upgrade; and (iii) procedures for identifying Reliability and Market Efficiency Transmission Upgrades.

154. The Filing Parties state that the revised tariff sheets included in their First Compliance Filing also include modifications to section 48.5 of the ISO-NE RTO OATT, regarding Requests for Alternative Proposals. The Filing Parties state that, as required by the March 24 Order, these provisions have been conformed to the requirements of the GAP RFP Order, including a new provision allowing for the filing with the Commission of proposed Requests for Alternative Proposals at least 60 days in advance of issuance, and the filing of jurisdictional contracts or funding mechanisms and the informational filing of other contracts.

4. Responsive Pleadings

155. The New England Consumer Owned Entities argue that the First Compliance Filing fails to explain how the ISO-NE RTO will allocate any financial rights or Auction Revenue Rights that would result from the construction of new facilities. In addition, the New England Consumer Owner Entities take issue with the Filing Parties' apparent definition of "Market Efficiency Transmission Upgrades" as upgrades designed primarily to provide a net reduction in total production cost to supply the system load. The New England Consumer Owner Entities point out that while it is appropriate to consider the "net reduction" amount, this analysis should include a consideration (along with all net cost factors) all net economic benefits associated with a potential system upgrade.

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[80] In comments submitted in response to the Filing Parties' First Compliance Filing, NEPOOL states that at a June 30, 2004 meeting of NEPOOL's Participants Committee, a vote was taken in support of the Filing Parties' proposed planning procedures.

156. In addition, NECPUC claims that the Filing Parties have failed to remove all provisions of section 3.09 from the Transmission Operating Agreement. NECPUC argues that section 3.09 (b), which deals with dispute resolution, should have been moved to the ISO-NE RTO OATT.

5. Commission Finding

157. We will grant rehearing, in part, and deny rehearing, in part, of the March 24 Order, as it relates to our RTO system planning and expansion requirements. First, we will deny rehearing regarding the New England Consumer Owned Entities' argument that the March 24 Order erred by not directing the Filing Parties to adopt the New England Consumer Owned Entities' proposals for third-party participation. Section 48 of the initial ISO-NE RTO OATT filed states in part:

> The purpose of the Regional System Plan is to identify system reliability and market efficiency needs and types of resources that may satisfy such needs so that Market Participants may provide efficient market solutions (e.g., demand-side projects, distributed generation and/or merchant transmission) to identified needs.

158. There are no provisions that prohibit a third-party from providing a solution to an identified need. Thus, the ISO-NE RTO regional planning process provides the opportunity for third party participation in transmission projects.

159. We also disagree that our rejection of the New England Consumer Owned Entities' proposal to require that third parties be given the opportunity to make capital contributions on individual transmission projects or become joint owners is a retreat from our previous recognition of third-party participation, or is otherwise inconsistent with our previous rulings regarding third-party participation. The Commission has consistently found that our long term competitive goals are better served by RTO expansion plans that allow for third-party participation and allow for the construction of merchant projects outside the plan.[81] However, we have not required Transmission Owners to provide consumer-owned entities, or other load serving entities, an equity share in every individual transmission project or require that third parties must be given the opportunity to make capital contributions in individual transmission projects.

160. With respect to the New England Consumer Owned Entities' assertion that the Commission erred by not adopting certain enforcement mechanisms applicable to a Participating Transmission Owners' obligation to build, we disagree that this obligation

[81] PJM Interconnection, L.L.C., 96 FERC ¶ 61,061 at 61,241 (2001).

can be influenced by (or avoided by) the Transmission Owner's considerations of its own interests in a given project. In addition, consistent with the Commission's requirement to file a report in the event there is no agreement to build a given project, the Filing Parties have committed to file reports consistent with the March 24 Order.[82] Therefore, we will deny the New England Consumer Owner Entities request for rehearing.

161. With respect to the arguments raised on rehearing by PSEG and the New England Consumer Owned Entities regarding cost overruns, posting of the needs assessment prior to the market window, and the timing of the cost-benefits analysis, we agree that these issues should be addressed in the Regional System Plan. However, it would be premature to consider the merits of such proposals at this time. The Filing Parties are working through the stakeholder process to develop revisions to the Regional System Plan. We will review these issues once the Filing Parties submit their Regional System Plan.

162. We find the Filing Parties have transferred the relevant portions of schedule 3.09(a) (Planning and Expansion) to the Transmission Operating Agreement as directed in the March 24 Order. The Commission will clarify that footnote 84 did not direct that section 3.09 of the Transmission Operating Agreement should be transferred to the RTO-NE OATT. As we have previously indicated, all of section 3.09 and sections 6 and 7 of schedule 3.09(a) concern general references to previously adopted planning procedures and, as such, should remain in the Transmission Operating Agreement.

163. As noted above, we required the Filing Parties to clarify certain of the standards and procedures that will be followed by the ISO-NE RTO in developing and implementing its Regional System Plan. In response, the Filing Parties explain that in order to identify market efficiency upgrades and to assess cost-effective solutions, a variety of new planning procedures were developed. The Filing Parties also explain,

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[82] ISO-NE RTO OATT, section 48.6 (Obligation of Participating Transmission Owners to Build) states in relevant part:

> In the event that a [Participating Transmission Owner] PTO does not construct or indicates in writing that it does it not intend to construct a transmission upgrade included in the [Regional System Plan] RSP; or demonstrates that it has failed (after making a good faith effort) to obtain necessary approvals or property rights under applicable law, ISO-NE shall promptly file with the Commission a report on the results the Transmission Owner responsible for the planning, design or construction of such transmission upgrade, in order to permit the Commission to determine what action, if any, it should take. Similar provisions are proposed in schedule 3.09(a) (Planning and Expansion) of the Transmission Operating Agreement.

however, that these proposed planning procedures are addressed in their First Compliance Filing in outline form only, i.e., not in the form of proposed tariff revisions that could be accepted for filing. The Filing Parties state that they were unable to comply with this aspect of the March Order 24 Order due to their inability to obtain stakeholder support for these proposed changes.[83] We find that the Filing Parties have failed to provide the clarifications and proposed changes contemplated by the March 24 Order. Accordingly, we will require the Filing Parties to include, in their compliance filing on, or before, 60 days following the issuance of this order, all tariff revisions required to fully satisfy this aspect of the March 24 Order.

O. Market Monitoring

1. March 24 Order

164. In the March 24 Order, we held that the Filing Parties' RTO formation proposal met our RTO market monitoring requirements, subject to certain conditions relating to the ISO-NE RTO's market information policy and the imposition of penalties.84 With respect to the ISO-NE RTO's information policy, we required the Filing Parties to submit a filing within 30 days of the date of our order addressing PJM's planned revision of its information policy. In their filing, we required the Filing Parties to address any variations that may be required in that policy as it would apply to the ISO-NE RTO.

165. We also required the Filing Parties to address the Commission's November 17, 2003 order amending all market-based rate tariffs and authorizations to ensure compliance with six Market Behavior Rules.[85] We noted that in MBR Tariff Order, we had held that it was appropriate to authorize Market Monitoring Units to enforce certain ISO/RTO tariff matters concerning market behavior for matters that objectively identifiable and for which penalties are clearly set forth in the tariff. We further noted that because the Filing Parties' RTO formation proposal in this proceeding was filed prior

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[83] Among other things, the Filing Parties' outline fails to discuss how the ISO-NE RTO will allocate Firm Transmission Rights or Auction Revenue Rights attributable to the construction of new facilities.

[84] March 24 Order at P 187.

[85] Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003) (MBR Tariff Order), *order on rehearing*, 107 FERC ¶ 61,175 (2004).

to the issuance of the MBR Tariff Order, the Filing Parties had not addressed the extent to which their RTO formation proposal satisfied the requirements of the MBR Tariff Order. Accordingly, we directed the Filing Parties to demonstrate that the ISO-NE RTO's market rules, including any penalty provisions, comply with MBR Tariff Order.

2. Requests for Rehearing

166. On rehearing, the New England Consumer Owned Entities assert as error our determination not to approve independent, outside guidelines applicable to the ISO-NE RTO itself. The New England Consumer Owned Entities also assert that the Commission erred in the March 24 Order in rejecting the New England Consumer Owned Entities' proposal to require the ISO-NE RTO to release actual bid and offer data, preferably on the day following the trading day, but in no event more than a week after the fact.

3. Compliance Filing

167. In their First Compliance Filing, the Filing Parties state the ISO-NE RTO's market monitoring and sanctioning authority is consistent with the Commission's directive in the MBR Tariff Order. The Filing Parties state that, as such, they are proposing no revisions to these provisions at this time.

168. In their Second Compliance Filing, the Filing Parties state that their revised information policy proposal is based on PJM's recently revised information policy and the Commission's order accepting that revised policy.[86] The Filing Parties note that under NEPOOL's existing Information Policy, ISO-NE is prohibited from disclosing confidential information to state commissions unless: (i) ISO-NE is authorized to release the confidential information by the Furnishing Participant; (ii) ISO-NE has been ordered to release the confidential information by an agency with jurisdiction over such matters; or (iii) such information is released to a state commission subject to an appropriate confidentiality order entered under such agency's procedures sufficient to preserve the confidential nature of the information submitted, and with advance notice to the Furnishing Participant.

169. The Filing Parties state that PJM's revised information policy establishes a more streamlined method for the release of confidential information to state commissions that would alleviate the need for those state commissions to invoke more time-consuming legal processes. The Filing Parties propose to implement this approach, subject to certain

[86] *See* PJM Interconnection, L.L.C., 107 FERC ¶ 61,322 (2004) (PJM Information Policy Order).

revisions appropriate for the New England region. First, the Filing Parties assert that PJM's provisions do not adequately define the scope of confidential material that could be provided to state utility commissions. To clarify the intended scope of the ISO-NE RTO information policy, the Filing Parties propose that while ISO-NE will provide access to non-public or confidential market data to state commissions to enable them to carry out their regulatory functions, other information, including but not limited to draft versions of reports and analyses, internal ISO-NE RTO documents not related to market data, and privileged legal information need not be provided.

4. Responsive Pleadings

170. In its comments on the Filing Parties' Second Compliance Filing, NECPUC states that it looks forward to working with the ISO-NE RTO as it proceeds to finalize its information policy proposal, in the context of an existing stakeholder proceeding. As that process moves forward, NECPUC states that it recognizes and accepts the fact that variations may be required as PJM's policy is tailored to fit the needs of the New England market.

171. NECPUC points out, in particular, that the information policy approved for PJM does not list with sufficient specificity the types of material that would be considered confidential. NECPUC states that having the Commission make a finding that certain types of market data are confidential and warrant protection from disclosure (e.g., bid data that is less than six months old, generator-specific outage information, or fuel supply and contract information), would allow at least some of the New England Commissions to sign a non-disclosure agreement to keep the information confidential. NECPUC asserts that a specific finding by the Commission would allow at least some of the state commissions, based on that finding, to protect the information without requiring the state commission to issue its own protective order.

172. NECPUC also asserts that the PJM provision relating to the destruction or return of confidential material should be modified by adding "unless such actions are inconsistent with or prohibited by applicable state law in which case the material will continue to be treated as confidential. Finally, NECPUC states that the information policy process approved by the Commission should provide for the ISO-NE RTO to file with the authorized commission a copy of the document provided with redactions of the confidential material if it is practical and feasible to create a redacted document.

5. Commission Finding

173. We will deny the New England Consumer Owned Entities' rehearing request regarding the need to review and monitor the acts and/or omissions of the ISO-NE RTO. Order No. 2000 does not require an independent, outside review of the operation of the

RTO. In the March 24 Order, moreover, we stated that the Commission is both able and prepared to fulfill this role.

174. We will also deny rehearing of the March 24 Order regarding the market information transparency issues raised by the New England Consumer Owned Entities. While we agree with the New England Consumer Owned Entities that market participants need access to bid and offer data to permit parties to monitor the market, we find that such data should not be released immediately after bidding, i.e., after only one day or even one week after bidding. In fact, there would be a risk of collusion presented by such disclosure. The Commission has previously required ISO-NE to disclose individual bid data with a six-month time lag to market participants and we will not require the ISO-NE RTO to disclose this data prior to that time.[87]

175. As we stated in *California Independent System Operator Corporation*,[88] the release of bid information with less than six months' delay does not protect the commercial sensitivity of the data.[89] Further, the ISO-NE RTO Market Monitoring Units will: (i) perform independent evaluations and prepare annual and ad hoc reports on the overall competitiveness and efficiency of the New England Markets; (ii) conduct evaluations and prepare reports on its own initiative or at the request of others; (iii) provide information to be directly included in the monthly market updates that are provided at the meetings of the Participants Committee; and (iv) produce weekly, quarterly and annual reports regarding the New England Markets.[90] We find that the ISO-NE RTO's market monitoring provisions provide market transparency and appropriate access to interested market participants.

176. We will accept, in part, and reject, in part, the Filing Parties' compliance filings as they relate to market monitoring matters. First, we will accept the Filing Parties' Second Compliance Filing, subject to condition. Upon review, we find that the proposed changes to the ISO-NE RTO information policy, as outlined by Filing Parties in their Second Compliance Filing, are generally consistent with the information policy approved

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[87] *See* NSTAR Services Company v. New England Power Pool, *et al.*, 92 FERC ¶ 61,065 (2000).

[88] 90 FERC ¶ 61,316 at 62,047 (2000).

[89] *See also* PJM Interconnection, L.L.C., 88 FERC ¶ 61,274 (1999).

[90] *See* section 9 of the Participants Agreement and Market Rule 1.

for PJM.[91] We also agree with NECPUC that that certain variations to this policy may be appropriate as it applies to the New England market. However, we will not prejudge these issues here in the absence of a specific proposal and prior to the conclusion of the existing stakeholder process. However, we will require the Filing Parties to submit tariff sheets reflecting their proposed changes to the PJM information policy no later than 60 days following the date of this order.

177. With respect to market monitoring matters, we are not satisfied that the Filing Parties' proposed market monitoring provisions, as included in their initial RTO formation proposal in this proceeding, fully comply with the requirements of the MBR Tariff Order. In the MBR Tariff Order, we stated that Market Monitoring Units, existing under an ISO/RTO framework, serve an important policing function, but that these Market Monitoring Units should be permitted to enforce certain ISO/RTO tariff requirements, if (and only if) those tariff requirements are: (i) expressly set forth in the tariff; (ii) involve objectively-identifiable behavior; and (iii) do not subject market participants to sanctions, or other consequences, other than those expressly approved by the Commission and set forth in the tariff. The ISO-NE RTO Tariff imposes penalty charges on market power abuses that cannot be dealt with prospectively, such as physical withholding that can only be identified *ex post* through investigations and/or audits. In cases dealing with physical or economic withholding, it appears that evaluation of the conduct would involve subjective judgments. The Commission's Market Behavior Rules establish that this type of inquiry is to be conducted by the Commission, not by the market monitor.

178. The market monitoring provisions included in the Filing Parties' RTO proposal (in Market Rule 1, at Attachments A and B), however, do not appear to fully satisfy these requirements, particularly the requirement that the enforcement authorizations set forth in these provisions identify objectively identifiable behavior. Rather, it appears that at least some of the conduct that could be sanctioned under the Market Rule 1 provisions at issue may involve subjective evaluations. For example, section III.B.3.3 (addressing "Inaccurate Bid or Operating Information") allows for sanctions for an understatement, or for a maximum limit, when the market participant "knew or should have known" that the resource's limit was greater. Similarly, sanctions are permitted, under section III. B.3.2.3, when a market participant misrepresents operating conditions under those circumstances where the market participant "knew or should have known" the statement to be "materially inaccurate."[92]

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[91] *See* PJM Information Policy Order at P 11.

[92] *See also* sections III.B.3.2.2 and III.B.3.2.4.

179. In the MBR Tariff Order, however, we stated that subjective inquiries of this sort are to be conducted by the Commission, not by a Market Monitoring Unit. Moreover, the standard set forth in the Filing Parties' proposed market monitoring provisions, i.e., the "knew or should have known" standard,[93] is inconsistent with the standard adopted by the Commission in the MBR Tariff Order with respect to Market Behavior Rule 3.[94] Specifically, Market Behavior Rule 3 prohibits a market participant from providing inaccurate information to market monitors unless "due diligence" is exercised. In addition, the market monitor, under section III.B.3.2.6, is given virtually unfettered discretion in determining what are "good faith" excuses regarding the availability of resources. While this provision delineates some excuses, such excuses "are not limited to" those set forth in the tariff. Likewise, in the tariff's "Interpretation" section, the market monitor is given discretion to determine the effect of a market participant's investigation of a failure of a resource to perform.[95]

180. We are also concerned by the extent of the discretion that may be exercised by the market monitor under Market Rule 1 at Attachment A. While the types of conduct subject to mitigation as described in Appendix A are appropriate, for example, in order to be consistent with the guidance provided in recent orders, including the Midwest ISO order,[96] we do not believe that the ISO-NE RTO has defined some of the types of conduct subject to mitigation in a manner that includes sufficiently clear, objectively quantifiable standards. We believe that in the definition of physical withholding, III.A.4.22, actions that constitute "unjustified deratings" should be defined. In III.A.4.3, in which the

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[93] Although this standard is defined at section III.B.3.7.2, the definition requires subjective discretion of the type that the Commission has retained for itself.

[94] Market Behavior Rule 3 states as follows:

> Seller will provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission, Commission-approved market monitors, Commission-approved regional transmission organizations, or Commission-approved independent system operators, or jurisdictional transmission providers, unless Seller exercised due diligence to prevent such occurrences.

[95] *See* section III.B.3.7.2 ("the [ISO-NE RTO] may consider a Market Participant's efforts (or lack of efforts) to investigate a Resource's failure to perform . . . .")

[96] Midwest Independent Transmission System Operator, Inc., 108 FERC ¶ 61,163 (2004).

ISO-NE RTO investigates physical withholding according to the process in III.A.3, the concepts of "conduct … consistent with competitive behavior" and causing "a material effect on market clearing prices" should be made concrete. In III.A.5.4 the Filing Parties again should define what actions are "not consistent with competitive conduct." Also, in III.A.5.5.3, the Filing Parties should address what role "sensitivity analyses" or "such models and methods [the ISO-NE RTO] shall deem appropriate" will play in determining whether and what level of mitigation is to be applied.

181. The above-cited examples are not exhaustive, but merely illustrative of the type of discretion that the Commission will not allow a market monitor to exercise in imposing sanctions. Accordingly, we will direct the Filing Parties to modify their proposed market monitoring provisions, in a compliance filing to be made within 30 days of the date of this order, to ensure that these provisions are consistent with the Market Behavior Rule and do not vest the market monitor with discretion that the Commission has retained for itself. Rather the conduct subject to sanctions should be limited to conduct that is objectively identifiable.

182. Further, since all market-based rate sellers in the ISO-NE RTO's markets are subject to the Commission's Market Behavior Rules, we will require the Filing Parties to include the Commission's Market Behavior Rule 2, as applicable, in the ISO-NE RTO's tariff.[97] As we found in our order with respect to the California Independent System Operator's proposed tariff Amendment 55 by including such language in an RTO tariff, we can provide uniformity and clarity for market participants through consistent requirements. Of course, any potential violations of this provision of the tariff identified by the Marketing Monitoring Units should also be referred to the Commission. By including the language of the Commission's Market Behavior Rule 2 in the ISO-NE RTO's tariff, we will have further included a strong general anti-manipulation standard which, due to the uniformity of its language, in sellers' tariff's and other ISO/RTO tariffs, will help us develop clear rules and interpretations of the standard bringing additional certainty to the market.

[97] In exercising its discretion to determine the appropriate remedy for violations of Market Behavior Rule 2, as added to the ISO-NE RTO's tariff, the Commission will apply the policies and principles set forth in the MBR Tariff Order, and subsequent relevant precedent.

P. Indemnification

1. The March 24 Order

183. With respect to third party liabilities, the March 24 Order required the Filing Parties to conform Article IX of the Transmission Operating Agreement to the indemnification requirements advanced by the Transmission Owners, subject to the guidance and rationale set forth in our order.[98] First, we agreed with the Transmission Owners that the Transmission Operating Agreement should include an indemnification provision requiring the ISO-NE RTO and the Transmission Owners to be responsible for any third party liabilities attributable to their own respective acts or omissions. We held that each party should be responsible for its respective third-party liabilities, i.e., for those liabilities not addressed by the limitations on liability provisions in the ISO-NE RTO OATT (addressing liabilities as between the ISO-NE RTO and the ISO-NE RTO's OATT customers) or the Filing Parties' own side agreement concerning their respective second-party liability limitations as to each other.

184. As such, we rejected ISO-NE's proposed indemnification provisions. Under those provisions, as proposed, the ISO-NE RTO could not have been held liable to any Transmission Owner for any third-party claims filed against the Transmission Owner, even claims attributable to the ISO-NE RTO's own acts or omissions (except in cases involving the ISO-NE RTO's gross negligence or willful misconduct).

2. Requests for Rehearing

185. On rehearing, ISO-NE asserts that the Commission's acceptance of the Transmission Owners' indemnification proposal, in the March 24 Order, was premised on the Commission's erroneous assumption that the Transmission Owners' proposal would maintain the current allocation of risks for third party liabilities as between ISO-NE and the Transmission Owners under the ISO-NE/NEPOOL arrangements. ISO-NE argues that, in fact, it was ISO-NE's proposal that would have maintained these risks "as is" by refusing to carve out the Transmission Owners as a distinct sub-group deserving of its own indemnification provision. ISO-NE concludes that the Commission should reject the Transmission Owners' proposed indemnification provision in favor of the proposal advanced by ISO-NE.

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[98] March 24 Order at P 229.

186. In the alternative, ISO-NE asserts that should the Commission, on rehearing, reaffirm its decision to accept the Transmission Owners' reciprocal indemnification provisions, the Commission should ensure that the ISO-NE RTO will be able to recover the entirety of its indemnification costs, whether through insurance coverage or as pass-through to market participants. ISO-NE also requests that the Commission require that the ISO-NE RTO's negligence be a pre-condition to the ISO-NE RTO's obligation to indemnify the Transmission Owners for its third-party liabilities. Finally, ISO-NE asserts that the Commission should require the Transmission Owners to make representations and warranties about the condition of their facilities.

3. Compliance Filing

187. The Filing Parties point out in their First Compliance Filing that in their initial RTO formation proposal, herein, ISO-NE and the Transmission Owners advanced alternative provisions to be included in the Transmission Operating Agreement, at Article IX, regarding their respective liabilities to each other for third party liability claims.[99] Accordingly, in their First Compliance Filing, the Filing Parties state that the initial proposal advanced by ISO-NE (which we rejected in the March 24 Order) has been struck from the Transmission Operating Agreement, leaving in place those provisions, as sponsored by the Transmission Owners, which we accepted.

4. Commission Finding

188. We will accept the Filing Parties First Compliance Filing and deny rehearing with respect to our findings in the March 24 Order regarding the appropriate third-party liability provisions to be included in the Transmission Operating Agreement.

189. The fundamental issues raised by ISO-NE, on rehearing, are: (i) whether the ISO-NE RTO should be at risk for third-party claims attributable to its own acts or omissions, given its ability to pass these costs through to all market participants on a socialized basis, or (ii) whether these same liabilities, which are attributable to the ISO-NE RTO's own acts or omissions, should be allocated to the Transmission Owners alone.

190. In the March 24 Order, we correctly held that under the existing arrangements governing the rights and obligations of ISO-NE and NEPOOL, ISO-NE's third-party liability risks for ordinary negligence are allocated to all market participants by way of

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[99] Both proposals were included in bracketed form in the Filing Parties' initial submissions.

NEPOOL.[100] We noted that while ISO-NE now proposed to allocate these same risks to the Transmission Owners alone, ISO-NE had failed to provide any supportable justification for doing so. Accordingly, we accepted the Transmission Owners' proposed reciprocal indemnification provisions, consistent with ISO-NE's existing risks and liabilities under the ISO-NE/NEPOOL arrangements and our precedent, as established in *TRANSLink Development Company*, LLC.[101]

191. On rehearing, ISO-NE presents no evidence or argument that would undermine, in any way, the rationale underlying our ruling in the March 24 Order. Contrary to ISO-NE's assertions, for example, the Commission correctly interpreted the ISO-NE/NEPOOL arrangements regarding the socialized cost responsibility borne by all market participants with respect to third-party liabilities attributable to the acts or omissions of ISO-NE. In fact, ISO-NE concedes this point in its rehearing request.[102] By accepting the Transmission Owners' cross indemnification provisions, therefore, the Commission simply keeps in place this socialized cost responsibility by allocating to the ISO-NE RTO third-party liabilities attributable to the ISO-NE RTO's own acts or omissions. The ISO-NE RTO, in turn, is free to pass these costs through to all market participants on a socialized basis under its administrative services and capital funding tariffs.

192. We will also deny ISO-NE's requested clarifications and conditions regarding its management of these risks and the specific means by which the ISO-NE RTO will be permitted to pass any such costs through to market participants. In fact, the assurances, if any, required by the ISO-NE RTO with respect to these matters, cannot be fairly evaluated by the Commission without specific tariff language submitted for our review and consideration.

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[100] Specifically, we referenced section 10.4 of the ISO Agreement which requires NEPOOL as a whole, *i.e.*, *all* market participants, to indemnify ISO-NE for third-party liabilities attributable to ISO-NE's acts or omissions, except in cases of gross negligence or willful misconduct.

[101] 102 FERC ¶ 61,033 (2003) at P 39.

[102] *See* ISO-NE request for rehearing at 4 ("Under the current NEPOOL arrangements, each NEPOOL participant . . . retains the third-party liability to which it is subject, including third-party liabilities resulting from the acts or omission of [ISO-NE].").

Q. Return On Equity

1. The March 24 Order

193. The March 24 Order found that the ROE Filers' voluntary proposal to establish the ISO-NE RTO and their commitment to transfer the day-to-day operational control authority over their transmission facilities to the ISO-NE RTO warrants a 50 basis point incentive adder, as requested, to the ROE component recovered in the ISO-NE RTO's transmission rates for Regional Network service. Accordingly, we accepted this incentive adder with respect to these facilities without suspension or hearing.

194. However, we rejected the proposed 50 basis point adder as it relates to the ISO-NE RTO's Local Service Schedules. We also accepted, subject to suspension, hearing, and subject to our Pricing Policy Statement (when issued), the ROE Filers' proposed 100 basis point adder attributable to new transmission investment. We rejected the ROE Filers' proposed 100 basis point adder as it would apply to the Local Service Schedules. Finally, we accepted, subject to suspension and hearing, the ROE Filers' proposed base level ROE. However, in order to provide the parties an opportunity to resolve these matters among themselves, we held the hearing in abeyance and instituted settlement judge procedures.

2. Requests for Rehearing

195. Request for rehearing of the Commission's findings in the March 24 Order regarding the ROE Filers' proposed base level ROE and ROE adders was sought by the ROE Filers and the New England Consumer Owned Entities. The following Reserved Issues are identified in the Settlement Agreement.

196. First, the ROE Filers assert that the Commission erred in rejecting their proposed 50 basis point adder for RTO participation and 100 basis point adder for new transmission investment as these adders would have related to the ISO-NE RTO's Local Service Schedules. The ROE Filers assert that while the facilities that are subject to these Local Service Schedules may be distinguishable from facilities that are part of the Regional Network Service, based on voltage and other issues, these facilities nonetheless form an integral part of the regional interstate grid, and transmission service over these facilities will be provided pursuant to the ISO-NE RTO OATT. The ROE Filers argue that the fact that a transmission asset is subject to Local Network Service Schedules does not mean that it is not integrated with the regional network or that it does not provide regional benefits. The ROE Filers argue that, as such, they should be permitted to recover both adders with respect to facilities that will be subject to Local Network Service.

197. The ROE Filers also seek clarification that the Filing Parties would be authorized to include, in their compliance filing, changes to the ISO-NE RTO OATT that would allow them to receive the 50 basis point adder for facilities classified as providing Regional Network Service. The ROE Filers explain that absent modification to the Local Service Schedules contained in schedule 21 of the ISO-NE RTO OATT, the ROE Filers would not be able to receive any benefit from the adder. The ROE Filers state that this is so because the adder would increase the Regional Network Service revenue credit without increasing the level of rolled-in cost recovery under the Local Network Services in the ISO-NE RTO OATT.

198. The ROE Filers also request clarification regarding certain policy issues relating to the calculation of their proposed base-level ROE. Specifically, the ROE Filers request clarification that they will be permitted to use a midpoint return between the high and low utilities indicated in their proposed proxy group of companies. In addition, the ROE Filers seek clarification that their proxy group, as proposed, is appropriate.

199. The New England Consumer Owned Entities assert as error the Commission's acceptance of the ROE Filers' proposed incentive adders as applicable to the Regional Network Service that will be provided by the ISO-NE RTO. The New England Consumer Owned Entities argue that these adders are unjustified to the extent they represent an above-cost ROE that will have the effect of transferring funds from non-Transmission-owning entities to the shareholders and/or retail loads of Transmission Owners or their affiliates.

3. Commission Finding

200. We will grant the clarification sought by the ROE Filers regarding the changes to Schedule 21 of the various Local Network Service Tariffs in order to properly account for the 50 basis point adder for facilities classified as providing Regional Network Service. This change recognizes that the revenues resulting from the 50 basis point adder are not to be included in the revenues credited against the total annual transmission costs for the purposes of determining the Local Network Service revenue requirements.

201. However, we will deny the ROE Filers' request for rehearing as it relates to the application of the 50 basis point adder and the 100 basis point adder to facilities subject to the ISO-NE RTO's Local Network Service Schedules. As we stated in the March 24 Order, these adders are intended to serve as an incentive for transmission owners to turn over operational control of their transmission facilities to an independent entity responsible for providing regional transmission service under the terms and conditions of a regional tariff. However, the New England wholesale electricity market, under the Filing Parties' RTO proposal, will continue to be administered under a bifurcated tariff structure under which the ISO-NE RTO will administer a regional tariff for service over Pool Transmission Facilities, i.e., high voltage facilities that serve a region-wide function.

202. By contrast, the Local Network Service Schedules, under this RTO framework, will be administered by each Transmission Owner under an individual Local OATT for service over facilities in their respective service territories, notwithstanding the coordinating role that will be played by the ISO-NE RTO regarding certain functions and services relating to these facilities. These facilities, moreover, consist of lower voltage lines or radials performing a primarily local function. The ROE Filers' request to receive incentive adders applicable to these facilities under their Local Network Service Schedules is inconsistent with our policy regarding the recovery of these adders. In fact, by definition, the Local Network facilities at issue are not used to provide Regional Network Service, nor will they be under the day-to-day operational authority of an independent entity.[103]

203. We will grant, in part, the ROE Filers' request for clarification regarding the appropriate methodology to be used to calculate their proposed base level ROE. First, we will grant the ROE Filers' request for clarification regarding the use of the midpoint return to calculate their proposed ROE.[104] We find that the use of a midpoint return is an appropriate measure for determining a single, region-wide ROE in this proceeding. This determination is consistent with our findings in the Midwest ISO proceeding where we found that the use of a midpoint return was appropriate because the companies included in the proxy group, as here, represented a diverse group of companies.[105] As such, the use of the midpoint return in this case will not result in a skewed range of distribution. Rather, it will appropriately reflect (and take due account of) the entire range of results indicated by the proxy group.

204. The ROE Filers' proposed proxy group consists of twelve utilities doing business in the Northeast, including Transmission-owning members of the ISO-NE RTO, the New York ISO, and PJM, all of whom issue share of publicly-traded stock. We believe a proxy group comprised of Northeast utility companies provides a sufficiently representative universe of companies for calculating an ROE applicable to the New England Transmission Owners in this proceeding.

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[103] Although the Local Network Service Schedules are provided pursuant to the ISO-NE RTO OATT, the day-to-day operation of these facilities will not be administered by the ISO-NE RTO; the Transmission Owens will continue to be responsible for the day-to-day operation of the facilities subject to the Local Network Service Schedules.

[104] The midpoint of all estimates of return of a proxy group is the average of the highest and lowest estimated returns of all members of the group.

[105] *See* Midwest Independent Transmission System Operator, Inc., 106 FERC ¶ 61,302 at P 8-10 (2004).

205. ROE Filers' witness, Dr. Avera, proposes that this group exclude firms that do not pay common dividends, or for which no growth rate data is currently available, as reported by I/B/E/S International, Inc. (I/B/E/S), or Value Line. We find this approach is generally acceptable. However, we will not preclude the presiding judge from finding candidates for inclusion in the proxy group for which comparable data can reasonably be substituted for the growth rate data reported by I/B/E/S or Value Line. We also find it appropriate, as Dr. Avera proposes, to exclude from consideration in the proxy group, companies whose low-end ROE was lower than these companies' reported debt cost. In addition, we agree that the inclusion of PPL Corporation (PPL) in this Proxy Group is inappropriate. Specifically, we find PPL should be excluded from the Proxy Group because its 17.7 percent cost of equity is an extreme outlier and the inclusion of this number in the calculation in an unreliable ROE that will skew the results. As Dr. Avera states in his testimony, it is often necessary to eliminate illogical results from cost of equity estimates that fail to meet threshold tests of economic logic. We believe a 13.3 percent growth rate is not a sustainable growth rate over time and therefore does not meet threshold tests of economic logic.

206. In the March 24 Order we accepted, subject to suspension, hearing and the application of our Pricing Policy Statement (when issued), the ROE Filers' proposed 100 basis point adder[106] attributable to new transmission investment. This incentive is, we stated, is an appropriate first step to encouraging vital capital investment in the enlargement, improvement, maintenance and operation of facilities for the transmission of electric energy in interstate commerce. In order to avoid any potential delay in the hearing as a result of this directive, we find it necessary to provide guidance regarding the types of investments that would qualify for this adder. We direct the parties and the presiding judge to develop a record, in this case, addressing the pros and cons of applying a 100 basis point adder for investments that, among other things: (i) are approved through the RTEP process; (ii) are capable of being installed relatively quickly; (iii) include the use of improved materials that allow significant increases in transfer capacity using existing rights-of-way and structures; (iv) utilize equipment that allows greater control of energy flows, enabling greater use of existing facilities; (v) has sophisticated monitoring and communication equipment that allows real-time rating of

[106] This ROE adder will be applied to net book value over time of such transmission facilities (i.e., the dollar amount of the incentive that is reflected in the cost of service will decrease over time as the book value of the transmission assets are depreciated). In addition, the overall allowed equity return, adjusted for any ROE adder, will be limited to the zone of reasonableness for the public utility authorized to receive an incentive adder.

transmission facilities, facilitating greater use of existing transmission facilities; or (vi) is a new technology and/or innovation that will increase regional transfer capability.[107]

207. Finally, we will deny rehearing the New England Consumer Owned Entities' assertion that the incentive adders requested by the ROE Filers represent an unjustified above-cost return that will have the effect of transferring funds from non-transmission owning entities to the Transmission Owners' shareholders. In fact, a return on equity is not susceptible to a precise calculation. It is based, rather, on a range of reasonable returns, which take into account a number of factors that may be both cost-related and policy-related, including business risk factors. In this context, it is appropriate for the Commission to adjust the allowed return for Transmission Owners that undertake commitments designed to enhance the overall competitiveness and efficiency of the wholesale markets, so long as the resulting rate of return is within the range of reasonable returns.

The Commission orders:

(A) The Settlement Agreement is hereby accepted, subject to conditions, as discussed in the body of this order.

(B) Rehearing and/or clarification of the March 24 Order is hereby granted, in part, and denied, in part, as discussed in the body of this order.

(C) The Filing Parties' First Compliance Filing and Second Compliance Filing are hereby accepted, subject to conditions, as discussed in the body of this order.

(D) The Filing Parties are hereby directed to make a compliance filing on, or before, 30 days following the issuance of this order, as discussed in the body of this order, unless otherwise directed.

(E) The New York Filing Parties' submittal, in Docket No. ER04-943-000, is hereby accepted for filing, as discussed in the body of this order.

[107] These technologies are fully tested and commercially available but are not widely diffused and of sufficient size and scale to have an immediate and meaningful impact on the grid.

(F) NEPOOL's submittal, in Docket No. ER05-3-000, is hereby accepted for filing, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.
Commissioner Kelliher concurring in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc., *et al.*,	Docket Nos. RT04-2-001, RT04-2-002, RT04-2-003, RT04-2-004, ER04-116-001, ER04-116-002, ER04-116-003, and ER04-116-004
Bangor Hydro-Electric Company, *et al*.,	Docket Nos. ER04-157-002, ER04-157-003, ER04-157-005, and ER04-157-007
The Consumers of New England v. New England Power Pool	Docket Nos. EL01-39-001, EL01-39-002, EL01-39-003, and EL01-39-004
New York Independent System Operator, Inc., and the New York Transmission Owners	Docket No. ER04-943-000
New England Power Pool	Docket No. ER05-3-000

(Issued November 3, 2004)

Joseph T. KELLIHER, Commissioner *concurring in part*:

I write separately to express my views on the portion of this order that directs the ISO New England, Inc.(ISO-NE) and the New England transmission owners collectively, the Filing Parties) to modify the ISO-NE Regional Transmission Organization's (ISO-NE RTO) information policy to conform with a confidential information sharing policy recently approved for PJM Interconnection, LLC.[108] In *PJM*, the Commission approved streamlined procedures for PJM to provide confidential information to state commissions, state agencies that share regulatory responsibilities with the state commissions, or any organization formed by such state regulatory commissions.

[108] *PJM Interconnection, LLC*, 107 FERC ¶ 61,322 (2004) ("*PJM*").

As the Filing Parties point out, existing procedures are already in place that provide state entities with a process for requesting confidential information.[109] In my view, in order to justify approval of additional streamlined procedures for distributing confidential information to state entities, the Filing Parties would need to demonstrate that (1) providing state entities with confidential information possessed by the ISO-NE RTO is necessary for the state entities to discharge their legal responsibilities, and (2) the state entities cannot obtain such information under state law.[110] There is no doubt that state entities desire this information. So far, there has been no demonstration made that streamlined access to confidential information held by ISO-NE RTO is necessary to enable state entities to carry out their statutory responsibilities. There has also been no demonstration thus far that state entities are or will be unable to obtain access to confidential information from the ISO-NE RTO under state law or existing procedures. In the absence of an adequate showing on either of these critical points by the Filing Parties, I cannot support providing state commissions or other state entities with confidential information from ISO-NE RTO.

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Joseph T. Kelliher

[109] *See* New England Power Pool Information Policy § 3.1(a).

[110] *PJM*, 107 FERC at 62,500 (Commissioner Kelliher, dissenting).