

UNITED STATES OF AMERICA 109 FERC ¶ 61, 223
FEDERAL ENERGY REGULATORY COMMISSION

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

Cross-Sound Cable Company, LLC

Docket Nos. ER03-600-002
ER03-600-003
ER03-600-004

ORDER ON COMPLIANCE FILING AND REHEARING

(Issued November 26, 2004)

1. In this order, the Commission accepts Cross Sound Cable Company LLC's (CSC LLC) February 26 and March 22, 2004 compliance filings and grants in part and denies in part rehearing of the Commission's February 11, 2004 Order.¹ Our decision here benefits customers by providing clearer guidance on merchant transmission projects and ensuring that the provisions for such projects are just and reasonable.

I. Background

2. On June 1, 2000, the Commission approved, subject to conditions, TransÉnergie U.S. Ltd.'s (TransÉnergie) proposal to provide transmission service at negotiated rates over the Cross-Sound Cable (CSC), a direct current merchant transmission facility connecting Connecticut and Long Island, New York.² The Commission also directed TransÉnergie to specify in a compliance filing the procedures for customers to reassign their firm transmission rights.³ On July 3, 2000, in Docket No. ER00-1-002, TransÉnergie submitted a report on its proposed procedures for the reassignment of

¹ *Cross-Sound Cable Company, LLC*, 106 FERC ¶ 61,116 (2004) (February 11 Order).

² *TransÉnergie U.S., Ltd.*, 91 FERC ¶ 61,230 (2000).

³ *Id.* at 61,839-40; *see also Northeast Utilities Service Company*, 98 FERC ¶ 61,310 at 62,328 (2002).

transmission rights over the CSC. On December 15, 2002, the Commission issued an order accepting TransÉnergie's report.⁴

3. On April 23, 2002, the New England Power Pool (NEPOOL) filed tariff provisions to accommodate the CSC under Schedule 18 to NEPOOL's open access transmission tariff (NEPOOL OATT). On June 21, 2002, the Commission issued an order accepting such provisions.⁵

4. On March 3, 2003 (March 3 filing), CSC LLC, in Docket No. ER03-600-000, filed revised transmission reassignment procedures. CSC LLC noted that it does not have its own tariff; rather service is provided under the NEPOOL OATT. CSC LLC requested that the revised transmission reassignment procedures be accepted as a revised compliance filing. Alternatively, CSC LLC suggested that the Commission could direct CSC LLC to designate the revised procedures as a rate schedule under the NEPOOL OATT.

5. In a protest to the March 3 filing, ISO New England (ISO-NE) sought, among other things, clarification whether CSC LLC's March 3 filing was made pursuant to section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2000). ISO-NE also sought clarification whether future amendments by CSC LLC affecting service over the CSC would be made under section 205.⁶

6. On December 15, 2003, in Docket No. ER03-600-001, CSC LLC proposed substitute revised procedures for the reassignment of transmission rights, superceding the March 3 filing in its entirety. Under the substitute revised procedures, there were three ways for transmission rights to be reassigned: (1) through direct assignment; (2) by posting on the CSC Open Access Same-Time Information System (OASIS); and (3) through the default release procedure (which differs in certain respects from New England's Standard Market Design (SMD-NE)). In response, on January 5, 2004, ISO-NE filed a protest, arguing that CSC LLC's proposal to retain a physical rights regime is fundamentally inconsistent with market principles in SMD-NE.

7. On February 11, 2004, the Commission rejected the March 3 filing as moot and conditionally accepted the December 15 filing.⁷ Pursuant to ISO-NE's recommendations,

⁴ *TransÉnergie U.S., Ltd*, 93 FERC ¶ 61,289 (2000) (*TransÉnergie*).

⁵ *New England Power Pool*, 100 FERC ¶ 61,259 (2002).

⁶ ISO-NE Protest in Docket No. ER03-600-001 at 4-5.

⁷ See February 11 Order at P 1, 29.

the Commission ordered CSC LLC to file revisions, within 15 days of the date of the order, to the transmission reassignment procedures to: (1) delete from section 2 (which involves posting of available transmission capacity on the OASIS) references to ISO-NE and NEPOOL; and (2) revise section 11 to reflect the parallel roles of the New York ISO (NYISO) and ISO-NE with respect to curtailments. The Commission also noted that the substitute revised procedures should be given a designation by NEPOOL for inclusion in the NEPOOL OATT.

8. The February 11 Order also provided guidance for making filings. The Commission noted that NEPOOL, pursuant to section 205 of the FPA, or any party, pursuant to section 206 of the FPA, 16 U.S.C. § 824e (2000), may propose changes to NEPOOL's OATT, including changes to Schedule 18. The Commission further stated that, since ISO-NE is operating the CSC, it is appropriate, for the convenience of interested entities and to simplify record keeping, to have all operating-related documents in one place -- in this case, the NEPOOL OATT.

II. Compliance Filings

9. On February 26, 2004, in Docket No. ER03-600-002, CSC LLC submitted revised tariff sheets in compliance with the February 11 Order. The revised tariff sheets removed references to ISO-NE and NEPOOL from section 2 and expanded section 11 to reflect NYISO's parallel role with respect to curtailments. Finally, the reassignment procedures were designated by NEPOOL as Schedule 18 Implementation Rule.

10. On March 22, 2004, CSC LLC, in Docket No. ER03-600-004, further revised the language in section 11 of the reassignment procedures. CSC LLC states that the revisions are based on ISO-NE's recommendation in its comments to the February 26 filing. The revision clarifies that NYISO is responsible for determining whether system conditions within its footprint warrant curtailments of service over the CSC, while ISO-NE is responsible for making that determination with respect to system conditions within its footprint.

A. Notice of Filings, Interventions and Protests

11. Notice of CSC's February 26 compliance filing in Docket No. ER03-600-002 was published in the *Federal Register*, 69 Fed. Reg. 11,004 (2004), with comments, protests, and interventions due on or before March 18, 2004. The Interconnection Rights Holders Management Committee (IRH Management Committee) and NEPOOL Participants Committee filed timely motions to intervene. ISO-NE filed comments, requesting that the section 11 language be further revised to better reflect the responsibilities of NYISO with respect to curtailments. ISO-NE stated that CSC LLC supported such a change and recommended that it be implemented to avoid misinterpretation.

12. Notice of CSC LLC's March 22 compliance filing in Docket No. ER03-600-004 was published in the *Federal Register*, 69 Fed. Reg. 17,138 (2004), with comments, protests, and interventions due on or before April 12, 2004. None was filed.

B. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

C. Commission Decision

14. The Commission accepts CSC LLC's February 26 and March 22 filings, together, in compliance with the February 11 Order.

III. Requests for Rehearing

A. Requests for Rehearing

15. On March 12, 2004, CSC LLC, ISO-NE, and Long Island Power Authority and LIPA (jointly, LIPA) filed requests for rehearing of the February 11 Order, challenging the order on the basis, among other things, that it unlawfully deprives CSC LLC of its rights under section 205 of the FPA.⁸ On March 29, 2004, ISO-NE filed an answer, urging the Commission to apply the split of section 205 rights recently approved in connection with the application of ISO-NE and the New England transmission owners (New England TOs) for approval of a Regional Transmission Organization for New England (RTO-NE).⁹ On March 30, NEPOOL Participants Committee filed an answer to the requests for rehearing, stating that, while it agrees with the Commission's decision that changes to the NEPOOL OATT can only be proposed by NEPOOL pursuant to section 205 of the FPA, it takes no position with respect to CSC LLC's rights to propose rates, terms and conditions of service.¹⁰

⁸ See CSC LLC Request for Rehearing at 12; *see also* LIPA Request for Rehearing at 2.

⁹ ISO-NE Answer to Requests for Rehearing at 3-5

¹⁰ NEPOOL Participants Committee Answer at 4-5.

B. Discussion**1. Procedural Matters**

16. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2003), prohibits answers to requests for rehearing. We will accordingly reject ISO-NE's and NEPOOL Participants Committee's answers to the requests for rehearing.

2. Commission Determination**a. How Changes Affecting the CSC Should Be Filed**

17. As noted above, the February 11 Order provided guidance for filings relating to merchant transmission projects. The guidance was provided in response to ISO-NE's March 24, 2003 request for clarification as to how changes to NEPOOL's OATT, including changes to Schedule 18, should be filed. The Commission ruled that changes addressing substantive provisions regarding service on the CSC may be proposed by NEPOOL under section 205 of the FPA or by any party under section 206 of the FPA. The Commission further noted that changes include any new provisions or any modifications to existing provisions.¹¹

18. CSC LLC and LIPA request rehearing of the Commission's determination that only NEPOOL can file changes under section 205 of the FPA. They contend that this ruling deprives CSC LLC of its statutory right, as a public utility, to propose the terms of the use of its own facility, especially the right to propose changes to rates, terms and conditions of service. They also contend that the ruling will pose difficulties for the financing of merchant transmission facilities by adding uncertainty. For example, CSC LLC notes, NEPOOL could propose changes governing curtailments, creditworthiness standards, or generator interconnections, which could greatly affect the rights to transmission capacity on the CSC, and hence, CSC LLC's investment.

Commission Conclusion

19. The Commission will grant rehearing on this matter, and allow CSC LLC to make section 205 filings. CSC LLC is a merchant transmission provider created to provide transmission service over a merchant transmission facility. While TransÉnergie (CSC LLC's predecessor) originally proposed providing service under a stand-alone open access transmission tariff for service on the CSC, the Commission instead required that

¹¹ February 11 Order at P 19.

the service be provided under the open access tariff of an RTO to facilitate the operation and integration of the CSC into the regional transmission grid.

20. In this regard, as noted in *NEPOOL*, the Commission is pleased that the parties have been working together to meet the challenges facing the development of this new type of entity, with its unique circumstances and “unique needs.”¹² Further, as noted in our February 11 Order, we did not intend, when we required that the rates, terms and conditions for transmission service provided over the CSC to be placed under an RTO open access tariff, to discourage or make it more difficult for merchant transmission projects like CSC LLC to propose changes as circumstances warrant.¹³

21. We now turn to one other, minor matter. The February 11 Order states that “ISO-NE is operating the CSC.”¹⁴ CSC LLC notes that it has its own employees who conduct transmission system operations, albeit under the direction of ISO-NE. CSC LLC emphasizes, however, that the “hand on the switch” belongs to CSC LLC.¹⁵ CSC LLC requests rehearing to correct this statement. Rehearing is granted on this issue to clarify that CSC LLC operates the CSC, at the direction of ISO-NE.

b. Transmission Rights Holders’ Potential for Gaming

22. In its protest to CSC LLC’s December 15 filing in Docket No. ER03-600-001, ISO-NE presented a scenario under which transmission right holders had both the opportunity and the incentive to game the default release process. Further, ISO-NE noted that CSC LLC’s proposal to retain a physical rights regime was fundamentally inconsistent with market principles established in SMD-NE. Therefore, ISO-NE requested, *inter alia*, that the substitute revised procedures for the reassignment of transmission rights on the CSC be rejected. In the event that the Commission did not reject the proposal, ISO-NE requested that the Commission direct CSC LLC to develop secondary market release procedures that include a default release mechanism consistent with SMD-NE.¹⁶

¹² *New England Power Pool*, 99 FERC ¶ 61,338 at 62,454-55, *clarified*, 100 FERC ¶ 61,259 (2002) (*NEPOOL*).

¹³ February 11 Order at P 18; *accord* February 11 Order at P 21.

¹⁴ February 11 Order at P 19.

¹⁵ CSC LLC Request for Rehearing at 10.

¹⁶ ISO-NE Protest in Docket No. ER03-600-001 at 6.

23. The Commission fully considered ISO-NE's concerns, but did not adopt its recommendations on this issue. ISO-NE has requested rehearing, stating that the February 11 Order: (1) did not apply the correct standard of review; (2) was not reasoned decision making; (3) conflicted with Commission policy initiatives; and (4) mischaracterized ISO-NE's concerns.

Commission Conclusion

24. For the reasons discussed below we deny rehearing.

25. First, the Commission has a policy of encouraging innovative proposals to provide an incentive for construction of new infrastructure for the energy industry. The CSC was the first merchant transmission project proposed and is the only one in operation. While we note that the CSC merchant transmission project is a transmission facility, in some ways, because it is a direct current facility rather than an alternating current facility and thus flows can be directly controlled, and charged for, the CSC is more comparable to a generation facility than typical alternating current transmission facilities in that the natural monopoly aspects of a direct current line are greatly reduced and competition is possible. We also recognize that, to get financing, merchant transmission projects such as CSC need long-term contracts and a relatively stable regulatory environment. In order to encourage such innovative projects, we balance the needs of the project sponsors with our other policy initiatives and with our statutory obligations. Further, the additional transmission connection between New England and New York, especially in light of the August 14, 2003 blackout, warrants our support and encouragement.

26. Second, as demonstrated by the Commission's questions in its January 31, 2003 order in Docket No. ER03-210-000¹⁷ and the data requests in this proceeding,¹⁸ the

¹⁷ The Commission noted its concern that transmission rights' holders on the CSC could exercise market power. The Commission therefore directed ISO-NE to address this concern. *See New England Power Pool*, 102 FERC ¶ 61,112 at P 17-18 (2003) (SMD-NE Order).

On March 3, 2003, ISO-NE filed a report on this issue. In an order issued on July 10, 2003, the Commission noted that Schedule 18 of the NEPOOL OATT provides for the reassignment of unscheduled capacity. The Commission further noted that the question of unscheduled capacity would be further considered in the instant proceeding. *New England Power Pool*, 104 FERC ¶ 61,052 at P 16 (2003).

¹⁸ On July 23, 2003 and November 13, 2003, data requests were sent to CSC LLC. Responses were filed on August 22, 2003, October 1, 2003, November 3, 2003, and as part of the December 15 filing.

Commission *is* concerned about the possibility of parties withholding CSC capacity. We recognize that there is a potential for withholding CSC capacity, but we also believe that the probability of withholding CSC capacity is low enough that, at present, we need only monitor the situation. We expect the market monitors in both ISO-NE and NYISO,¹⁹ as well as our Office of Market Oversight and Investigations, to closely monitor the use of the CSC for evidence of withholding. Further, given CSC's capacity, compared to that of the New York and New England markets, the impact of any withholding of capacity would be minimal.

27. Third, in *TransÉnergie*, we found that since CSC LLC has no captive customers, it did not have market power; LIPA, through a competitive, transparent, open-season auction process, purchased all of the capacity rights on the CSC, and we accepted the resulting August 23, 2000 compliance filing, noting there were no complaints from any party about the open season.²⁰ Indeed, it is in LIPA's interest to "sell off" unneeded capacity on the CSC so it may reduce its costs.

28. Fourth, we noted in the February 11 Order, that "CSC LLC's physical rights regime, with its advance reservations, is consistent with SMD-NE"²¹ even though transmission rights under SMD-NE are economic rights, assigned as part of the LMP optimization process. We also stated that, in any event, "it is irrelevant whether these secondary market release provisions are or should be consistent with SMD-NE. What is relevant is whether these secondary market release provisions and all other provisions associated with the CSC are consistent with the NEPOOL OATT, particularly Schedule 18, which governs service over the CSC." The physical rights associated with the CSC can coexist with the economic transmission rights assigned through the LMP process, and be governed through Schedule 18 of the NEPOOL OATT. While ISO-NE believes that a physical rights regime is "fundamentally inconsistent"²² with SMD-NE, it has yet to demonstrate actual harm resulting from retaining CSC's physical rights. While we note the possibility of withholding secondary rights, we have addressed above why we believe this possibility is slight and can be addressed through the monitoring and enforcement efforts of ISO-NE, NYISO, and our Office of Market Oversight and Investigations should withholding occur.

¹⁹ CSC LLC is required to respond to data requests from market monitoring entities authorized by the Commission. *See* 91 FERC at 61,840.

²⁰ 93 FERC ¶ 61,289 at 61,973 (2000).

²¹ February 11 Order at P 24.

²² ISO-NE Protest in Docket No. ER03-600-001 at 9.

29. Fifth, transmission rights for the CSC were sold as physical, not financial, rights. CSC financed the construction of its transmission facility by selling physical rights. Compelling CSC to convert these rights from physical to financial would have negative economic impact if the physical rights are more valuable than the financial rights. This could jeopardize the sale of future physical rights for other merchant transmission projects. Therefore, we will not compel owners of CSC physical rights to convert them to financial rights.²³

c. Other Concerns

30. In its request for rehearing, ISO-NE makes several statements that need to be addressed. For example, it states, “The broad pronouncements in the Commission’s February 11 Order *suggest* that market-based entities need not comply with reliability standards, because to do so would conflict with previously-established financing arrangements.”²⁴ The February 11 Order contains no suggestion that market-based entities need not comply with reliability standards. Merchant transmission facilities, like all interconnected facilities, must be operated to ensure reliability in a region, and must operate consistent with applicable reliability standards. Financing arrangements cannot and do not affect the need to meet reliability standards; any suggestion to the contrary that they do is simply wrong.

31. In the February 11 Order, the Commission stated, “[a]ssigning property rights to firm transmission rights, which to date has been a cornerstone of merchant transmission project funding, does not per se indicate that withholding unused transmission capacity is an automatic or even a serious possibility.”²⁵ ISO-NE interprets this sentence as establishing a new “per se” standard for withholding. We disagree. The Commission did not establish a new standard when it used the words “per se” in this sentence. Indeed, the meaning of the sentence would not change if other phrases, such as “necessarily” or “in and of itself” were substituted for “per se,” or if “per se” were deleted and nothing substituted in its place.

²³ *Accord* February 11 Order at P 21.

²⁴ February 11 Order at 32 (emphasis added).

²⁵ *Id.* at P 23.

The Commission orders:

(A) The Commission hereby accepts CSC LLC's compliance filings, as discussed in the body of this order.

(B) The Commission grants rehearing in part and denies rehearing in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.