

106 FERC ¶ 61, 116
UNITED STATES OF AMERICA
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. ER03-600-000
ER03-600-001

ORDER ACCEPTING FILING, AS MODIFIED, REJECTING
FILING AND PROVIDING GUIDANCE

(Issued February 11, 2004)

1. On March 3, 2003, in Docket No. ER03-600-000, Cross-Sound Cable Company, LLC (CSC LLC) filed revised procedures for the reassignment of transmission rights on its merchant transmission line. After requesting that the Commission defer action, on December 15, 2003, in Docket No. ER03-600-001, CSC LLC filed substitute revised procedures governing the release and reassignment of transmission rights, replacing the procedures originally filed on March 3. This order rejects as moot the March 3 filing and accepts the proposed substitute revised procedures filed on December 15, as modified as discussed below, effective as of the date of this order. This order benefits customers by providing guidance for filings relating to merchant transmission projects and by ensuring that the provisions for merchant transmission projects are just and reasonable.

Background

2. On June 1, 2000, the Commission accepted, subject to conditions, a proposal by TransÉnergie U.S. Ltd. (TransÉnergie) to provide transmission service at negotiated rates over the Cross Sound Cable (CSC), a merchant transmission facility connecting Connecticut and Long Island, New York.¹ One of the conditions of the June 1 Order required TransÉnergie to specify in a compliance filing the procedures for customers to reassign their transmission rights.² On July 3, 2000, in Docket No. ER00-1-002,

¹ TransÉnergie U.S., Ltd., 91 FERC & 61,230 (2000) (June 1 Order).

² Id. at 61,839-40.

TransÉnergie submitted a report on its proposed procedures for the reassignment of transmission rights over the CSC, which the Commission accepted in an order issued on December 15, 2000.³ On June 15, 2001, CSC LLC assumed the rights and obligations of TransÉnergie, pursuant to the terms of a financing transaction between the parties.⁴

3. On March 3, 2003, as revised on December 15, 2003, CSC LLC filed the revised transmission reassignment procedures at issue here, and which are described below.

4. Separately, on August 14, 2003, in response to the blackout in the Northeast, the Secretary of Energy issued an emergency order authorizing the New York Independent System Operator (NYISO) and ISO-New England (ISO-NE) to activate the CSC through September 1, 2003.⁵ On August 28, 2003, due to the continuing shortage of electric energy and shortage of facilities affecting the reliability of electric service, the Secretary of Energy issued another emergency order authorizing the continued operation of CSC.⁶ With the issuance of this second emergency order, which is in effect until further notice, CSC began commercial operations.

Notice of Filing, Interventions and Protests

5. Notice of CSC's March 3 filing in Docket No. ER03-600-000 was published in the Federal Register, 68 Fed. Reg. 13,294 (2003), with comments, protests, and interventions due on or before March 24, 2003. ISO-NE, the Long Island Power Authority and its operating subsidiary LIPA (LIPA), and NYISO filed timely motions to intervene. LIPA filed comments in support of CSC LLC, and ISO-NE and NYISO filed protests. On April 25, 2003, CSC LLC and LIPA jointly requested that the Commission defer action on the proposed revisions to accommodate ongoing discussions. In response to a July 23, 2003 Commission Staff data request, on August 22, 2003, CSC LLC submitted a partial response to the data request and requested an extension of time. On October 1, 2003, and on November 3, 2003, respectively, CSC LLC submitted a response and a supplemental response to the July 23, 2003 data request.

6. Notice of CSC's December 15 filing in Docket No. ER03-600-001 was published in the Federal Register, 69 Fed. Reg. 62 (2003), with comments, protests, and interventions due on or before January 2, 2004. On January 5, 2004, ISO-NE filed a

³ TransÉnergie U.S., Ltd., 93 FERC & 61,289 (2000).

⁴ TransÉnergie U.S., Ltd., 95 FERC ¶ 61,410 (2001).

⁵ U.S. Department of Energy Order No. 202-03-1 (2003).

⁶ U.S. Department of Energy Order No. 202-03-2 (2003).

limited protest. Also on January 5, 2004, LIPA again filed comments in support of the revisions. The Interconnection Rights Holders Management Committee and NEPOOL Participants Committee filed motions to intervene. On January 20, 2004, LIPA submitted a response to ISO-NE's protest, and CSC LLC filed an answer to the comments and protests. Neptune Regional Transmission System, LLC (Neptune) filed an untimely motion to intervene and response to ISO-NE's protest on January 20, 2004.

March 3 Filing and Responsive Pleadings

7. On March 3, CSC LLC submitted revised procedures for customers to reassign their firm transmission rights over the CSC. CSC LLC explained that "much has transpired with respect to the CSC since the filing of the initial reassignment rights," thus necessitating the revisions. For example, CSC LLC noted that it held its open season and that LIPA contracted to purchase all of the firm transmission rights. CSC LLC also noted that the New England Power Pool (NEPOOL) filed tariff provisions to accommodate the CSC under NEPOOL's open access transmission tariff (NEPOOL OATT) and the Commission issued an order accepting such provisions.⁷ In response to these changes, CSC LLC filed its revised transmission reassignment procedures at issue here. The revised procedures, *inter alia*, (1) changed the deadline by which holders of firm transmission rights must notify CSC LLC and ISO-NE of released transmission rights, (2) established "default release" procedures if a holder of firm transmission rights fails to submit a schedule by a certain deadline, and (3) assigned priorities for reservations of transmission capacity released to the default release provisions. As part of the revised transmission reassignment procedures, CSC LLC also proposed to establish procedures for the curtailment and interruption of service based on transmission constraints.

8. ISO-NE and NYISO filed protests to CSC LLC's proposal. ISO-NE raised concerns about the time frame in which firm transmission rights holders must notify CSC LLC of releases; ISO-NE also raised procedural questions. NYISO raised questions about the costs of implementing the proposed changes.

December 15 Filing and Responsive Pleadings

9. In its December 15 filing, CSC LLC proposes substitute revised procedures for the reassignment of transmission rights. The revisions include introductory language clarifying that the transmission capacity reassignment provisions are consistent with and pursuant to the Merchant Transmission Facilities provisions of the NEPOOL OATT. The substitute revised procedures also change the deadlines for both voluntary and default releases to coincide with the bid/offer submission deadline for the NEPOOL Day-Ahead Market. Finally, the substitute revised procedures clarify curtailment and interruption

⁷ New England Power Pool, 100 FERC & 61,259 (2002).

priorities for firm and non-firm service on the CSC. CSC LLC requests an effective date of December 15, 2003, for the substitute revised procedures.

10. LIPA filed comments in support of CSC LLC's December 15 filing. LIPA contends that these proposed secondary market release procedures provide a framework for the release of unused transmission capacity that properly integrates (1) the long-term firm transmission rights awarded during the Commission-approved open-season auction, (2) the merchant transmission operation of CSC LLC pursuant to the NEPOOL OATT, and (3) the operation of the markets administered by ISO-NE.

11. ISO-NE filed a limited protest and comments. Although ISO-NE states it was consulted by CSC LLC, it states that the December 15 filing does not fully reflect those consultations. ISO-NE is concerned that the revised language may enable the holders of transmission rights to withhold unused transmission capacity through bidding and scheduling strategies. Further, ISO-NE notes that CSC LLC's proposal to retain a physical rights regime is fundamentally inconsistent with market principles established in New England's regional Standard Market Design (SMD-NE). ISO-NE contends that the secondary market release provisions for the CSC should be consistent with those for SMD-NE. ISO-NE therefore recommends that the December 15 filing be rejected and that CSC LLC be directed to develop secondary market release procedures that are consistent with SMD-NE.

12. In the event that the Commission does not reject the December 15 filing, ISO-NE proposes several modifications to the language (including elimination of advance reservations). The modifications are discussed below. Finally, ISO-NE requests that the Commission reject the currently-effective reassignment procedures as inadequate; ISO-NE notes that, until satisfactory procedures are adopted, the procedures set forth in Schedule 18 of the NEPOOL OATT would suffice.

13. CSC LLC, LIPA and Neptune filed motions for leave to respond and responses to the limited protest and comments of ISO-NE. In response to ISO-NE's contention that the use of physical rights is inconsistent with SMD-NE, CSC LLC notes that this issue was fully vetted in the SMD-NE proceeding and that the Commission has already found that transmission service on the CSC is subject to physical rights.⁸ CSC LLC also notes that, since ISO-NE did not request rehearing of the SMD-NE Order, its protest in this proceeding is essentially a collateral attack on the SMD-NE Order.

14. LIPA and Neptune also oppose ISO-NE's recommendation to eliminate advance reservations. They note that the Commission approved the use of advance reservations as

⁸ New England Power Pool, 102 FERC & 61,112 (2003), order on reh'g, 104 FERC ¶ 61,052 (2003) (SMD-NE Order).

part of the open season for the allocation of firm transmission rights on the CSC⁹ and also for all other merchant transmission projects approved to date.¹⁰ Further, they contend that potential customers will be unwilling to participate in an open season auction for merchant transmission capacity if their advance reservations for long-term firm transmission will later be eliminated. In addition, LIPA contends that ISO-NE's proposal fails to recognize the fundamental differences between merchant transmission facilities and NEPOOL Pool Transmission Facilities (PTF). Such differences include that merchant transmission owners do not have a rate base, the costs of the CSC facilities are not rolled into NEPOOL PTF rates, and there are no financial transmission rights over the CSC. Neptune similarly requests that the Commission make it clear to the marketplace that it stands behind its previous orders, which allowed advance reservations.

Discussion

A. Procedural Matters

15. 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. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,¹¹ given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay, we find good cause to grant Neptune's untimely, unopposed motion to intervene.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept CSC LLC's, LIPA's and Neptune's answers because they provided information that assisted us in our decision-making process.

⁹ TransÉnergie U.S., Ltd., 91 FERC ¶ 61,230 at 61,839 (2000); New England Power Pool, 99 FERC ¶ 61,338 at 62,454-55 (2002), order on clarification, 100 FERC ¶ 61,259 at P 26-27 (2002).

¹⁰ LIPA's January 20 Response at 7, citing Neptune Regional Transmission System, LLC, 103 FERC ¶ 61,213 (2003), and Conjunction LLC, 103 FERC ¶ 61,198 (2003).

¹¹ 18 C.F.R. ' 385.214(d) (2003).

B. Commission Conclusion**i. How Proposed Tariff Changes Affecting the CSC Should Be Filed**

17. Since CSC does not have its own tariff, service over the CSC is provided under the terms and conditions of the NEPOOL OATT. The question thus arises as to how changes in reassignment procedures should be filed with the Commission. In this case, CSC LLC requests that the substitute revised transmission reassignment procedures be accepted as a compliance filing, consistent with the Commission's treatment of TransÉnergie's initial filing of transmission reassignment procedures. Alternatively, CSC LLC notes that the procedures could be designated as a rate schedule under the NEPOOL OATT.

18. TransÉnergie originally proposed an open access transmission tariff for service on the CSC, but the Commission did not accept that tariff. Instead, the Commission required that service be provided under the open access transmission tariff of the ISO or RTO that operates the facilities.¹² Our intent in requiring that the CSC, and by extension other merchant transmission projects, be placed under an ISO or RTO tariff was to facilitate the operation and integration of such projects into the regional transmission grid. We did not intend to discourage or make it more difficult for merchant transmission projects to propose changes as circumstances warrant. When we approved the CSC, it was only a concept. Now, the NEPOOL OATT has language that governs certain aspects of the operation of the CSC and protocols have been developed by the ISOs on both ends of the CSC governing scheduling and operation of the CSC. Moreover, the CSC is currently operating (albeit pursuant to an emergency order of the Secretary of Energy). Against this backdrop, we recognize that at times it may be more appropriate for CSC LLC rather than NEPOOL to make filings relating to the CSC. We therefore provide guidance on who should file what for service on the CSC.

19. Changes to NEPOOL's OATT, including changes to Schedule 18, addressing the substantive provisions regarding service on the CSC, may be proposed by NEPOOL under Section 205 of the Federal Power Act (FPA) or by any party, including CSC LLC or LIPA, under Section 206 of the FPA.¹³ Changes include any new provisions or any modifications to existing provisions. The changes must be timely filed in accordance with our filing requirements. In this regard, since ISO-NE is operating the CSC, it is appropriate, for the convenience of interested entities (e.g. ISO-NE, NYISO, CSC LLC, LIPA, other potential customers, etc.) and to simplify record keeping, to have all operating-related documents in one place B in this case, the NEPOOL OATT.

¹² 91 FERC at 61,840.

¹³ 16 U.S.C. §§ 824d, 824e (2000).

ii. **Revised Reassignment Procedures**

20. In our initial order accepting TransÉnergie's CSC merchant transmission project, we stated:

A critical component of TransÉnergie's proposal is the ability for customers to sell firm transmission rights in the secondary market. The Commission believes that a vibrant secondary market for firm transmission rights on TransÉnergie's proposed interconnector will enhance competition in both the New York and New England markets.¹⁴

We further stated:

We direct TransÉnergie to work with RTOs as they develop in the Northeast to ensure that the RTOs are designed in a manner that accommodates TransÉnergie.¹⁵

21. Subsequently, on July 3, 2000, TransÉnergie filed its proposed procedures for the reassignment of transmission rights, which we accepted on December 15, 2000.¹⁶ On the basis of our decisions up to that point, including our acceptance of its reassignment procedures, TransÉnergie was able to successfully conduct an open season and obtain financing for the CSC. We do not intend to jeopardize the financing arrangements made based on our previous orders. Further, we want to continue to encourage merchant transmission projects and ISOs/RTOs to work cooperatively in developing procedures that accommodate the unique characteristics of such projects.

22. Under the December 15 proposed transmission reassignment procedures, there are three ways for transmission rights to be reassigned: (1) through direct assignment; (2) by posting on the CSC OASIS; and (3) through the default release procedure (which differs in certain respects from SMD-NE). The Commission anticipates that predominantly the first two methods will be used and that rarely, if ever, the default mechanism will be used. We also find it consistent with our policy to recognize the unique needs of merchant transmission projects to allow the default release procedures for merchant projects to differ from those under SMD-NE. We remind all market participants, however, that all merchant transmission project activities need to be open and transparent.¹⁷ If there is a concern about particular activities, there are several ways for

¹⁴ 91 FERC at 61,839.

¹⁵ Id. at 61,840.

¹⁶ See supra note 3.

¹⁷ Cf. 93 FERC at 61,973; 91 FERC at 61,839-40.

parties to raise that concern: by alerting the RTO/ISO market monitors, by calling the Commission's hotline, or by filing a complaint at the Commission.

23. ISO-NE is concerned that the revised tariff language may enable the holders of transmission rights to withhold unused capacity through bidding and scheduling strategies. Assigning 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. Moreover, as noted in the NUSCO Order,¹⁸ a merchant transmission project under the control of an ISO will be subject to monitoring for market power abuse. Mitigation by the ISO is a first line of defense against market power. And under ISO-NE's Market Rule 1, withholding transmission capacity is subject to mitigation.

24. Second, ISO-NE notes that CSC LLC's proposal to retain a physical rights regime, through the inclusion of advance reservations, is fundamentally inconsistent with market principles established in SMD-NE. ISO-NE contends that the transmission reassignment procedures for the CSC should be consistent with SMD-NE. As noted by LIPA and Neptune, the Commission has already found that CSC LLC's physical rights regime, with its advance reservations, is consistent with SMD-NE.¹⁹ Further, 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. ISO-NE has not demonstrated that these secondary market release provisions or any other CSC provisions are inconsistent with Schedule 18 in particular or, indeed, the NEPOOL OATT more generally.

25. Third, ISO-NE requests that tariff language concerning the procedures for transmission reassignment specifically state that any market participant obtaining firm transmission rights through the reassignment mechanism would be bound to the same procedures for transmission reassignment as LIPA. The Commission will not adopt ISO-NE's recommended tariff change. However, while not requiring a tariff change, the Commission nevertheless wants to make clear that all market participants that have transmission rights on the CSC, whether they were obtained through an open season or through the secondary market, are subject to the same procedures for transmission reassignment.

¹⁸ Northeast Utilities Service Company, 97 FERC ¶ 61,026 at 61,075 (2001) (NUSCO).

¹⁹ See SMD-NE Order, 102 FERC ¶ 61,112 at P 14-18.

26. Fourth, ISO-NE notes that Section 2 of CSC LLC's proposed procedures deals with the posting of available transmission capacity on OASIS nodes. ISO-NE further notes that, since the process for posting differs between the CSC LLC OASIS and the ISO-NE and NEPOOL OASIS, the reference to ISO-NE and NEPOOL should be removed. The Commission agrees and therefore requires CSC LLC to file revised language to remove the reference. The revised language should be filed within 15 days of the date of this order.

27. Fifth, ISO-NE proposes modifications to Sections 6 and 9 of CSC LLC's proposed procedures pertaining to the timing of releases and default releases, respectively. ISO-NE does not explain how CSC LLC's proposed language is inconsistent with Schedule 18 of the NEPOOL OATT, and the Commission does not find these provisions to be confusing. Accordingly, the Commission rejects ISO-NE's proposed revisions to Sections 6 and 9.

28. Finally, ISO-NE notes that the North American Electric Reliability Council and the Northeast Power Coordinating Council policies provide that it is the responsibility of the ISO where a constraint is located to determine what curtailments need to occur. ISO-NE notes that Section 11 of CSC LLC's proposed procedures does not make clear the NYISO's role with respect to curtailments. It therefore recommends that the language be revised to reflect the parallel roles of the NYISO and ISO-NE. The Commission agrees and therefore directs CSC LLC to file, within 15 days of the date of this order, revised language to reflect the role of the NYISO.

29. Pursuant to Section 206 of the FPA, the Commission finds the proposed substitute revised procedures filed by CSC LLC on December 15, as modified as provided above, to be reasonable, and therefore accepts them for filing, subject to the modifications described above. These changes supersede in their entirety the provisions filed by TransÉnergie on July 3, 2000 in Docket No. ER00-1-002.

30. The revisions are made effective as of the date of this order. The procedures should be designated by NEPOOL in the NEPOOL OATT. NEPOOL should promptly advise CSC LLC of the designation, so that it may be incorporated in the compliance filing due in 15 days.

The Commission orders:

(A) CSC LLC's proposed procedures for the reassignment of transmission rights filed on December 15, 2003 are hereby accepted for filing, subject to the modifications directed in Ordering Paragraph (D) below, effective as of the date of this order.

(B) CSC LLC's filing of March 3, 2003 is hereby rejected as moot, as discussed in the body of this order.

(C) CSC LLC's procedures for the reassignment of transmission rights filed on December 15, 2003, as revised should be designated by NEPOOL and placed in the NEPOOL OATT, as discussed in the body of this order.

(D) CSC LLC shall make a compliance filing within 15 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.