

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Regional Transmission Organizations

Docket No. RT01-99-000

**ADMINISTRATIVE LAW JUDGE MEDIATOR'S REPORT TO THE
COMMISSION**

(Issued September 17, 2001)

TO THE COMMISSION:

Pursuant to the Commission's July 12, 2001 Order Initiating Mediation in the above-captioned docket, and in accordance with the Commission's concurrent July 12, 2001 orders in related Docket Nos. RT01-2-000, RT01-10-000, RT01-86-000, RT01-94-000, RT01-95-000 and RT01-98-000 (collectively, the "July 12 Orders"), a 45 day mediation for the purpose of facilitating the formation of a single Regional Transmission Organization ("RTO") for the Northeastern United States was initiated by the undersigned Administrative Law Judge on July 24, 2001. The July 12 Orders directed the undersigned "to file a report within 10 days after the 45 day period, which will include an outline of the proposal to create a single Northeastern RTO, milestones for the completion of intermediate steps, and a deadline for submitting a joint proposal." This Report, and the accompanying "BUSINESS PLAN FOR THE DEVELOPMENT AND IMPLEMENTATION OF A SINGLE REGIONAL TRANSMISSION ORGANIZATION FOR THE NORTHEASTERN UNITED STATES" (the "Business Plan") which the Report supplements, is submitted in compliance with that directive.

I. PROCEDURAL HISTORY/BACKGROUND/METHODOLOGY:

In accordance with the Commission's requirements in Order No. 2000,¹ public utilities throughout the country submitted proposals seeking authorization to establish themselves as RTOs. Among those proposals were *Bangor Hydro-Electric Company, et al.* (Docket No. RT01-86-000); *New York Independent System Operator, Inc., et al.* (Docket No. RT01-95-000); *PJM Interconnection, L.L.C., et al.* (Docket No. RT01-2-

¹Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,092 (2000), *petitions for review pending sub nom, Public Utility District No. 1 of Snohomish County, Washington v. FERC*, Nos. 00-1174, *et al.* (D.C. Cir.).

000); and *PJM Interconnection, L.L.C., and Allegheny Power* (Docket Nos. RT01-98-000 and RT01-10-000). In the July 12 Orders, the Commission concluded it was necessary to combine these four (4) proposed RTOs into a single RTO in order to address seams issues among the Northeast region's three (3) existing Independent System Operators ("ISOs") and to establish efficient markets throughout the region. The July 12 Orders also reflected the Commission's belief that "resolution of issues associated with the formation of a single Northeastern RTO should be the subject of good faith negotiations among the parties in all of these proceedings." The July 12 Orders therefore directed all parties to these proceedings to participate in joint mediation to craft a proposal to create a single Northeastern RTO. The Commission directed the undersigned Administrative Law Judge to work in conjunction with former Florida Public Service Commission Chairman Joe Garcia² to mediate settlement discussions to that end among the parties for a period of 45 days.

The mediation commenced on July 24, 2001³ and ran through September 7, 2001. A total of over 400 persons representing ISOs, transmission owners, generators, marketers, Canadian entities, state regulators, regional reliability councils, power authorities, electric cooperatives, municipalities, new/emerging technologies, industrial customers, environmental and public interest groups actively participated in the mediation.⁴ In light of the vast scope and complexity of the substantive issues involved in the development and implementation of a single RTO for the entire Northeastern United States, as well as the diversity of interests represented, I purposefully cast the mediation task as *procedural* from the outset. Operating from the premise— confirmed throughout the course of the mediation— that attempting to *resolve* extremely contentious substantive issues among such a large and diverse interest group at this stage/in this constricted time frame would be unproductive, I confined the mediation task to formulating a detailed business plan for: (1) defining the Northeastern RTO's operational paradigm; (2) developing it's infrastructure and rules of the road; and (3) implementing the RTO across the entire region. The objective was to draft a "blueprint" for a

²I take this opportunity to express my appreciation to Chairman Garcia for his efforts throughout the mediation. His expertise, insight, assistance and contributions greatly enhanced the process.

³Although the mediation originally was scheduled to commence on July 19th in accordance with the July 12 Orders, the mediation commencement date was postponed to July 24th at the Commission's request to accommodate NARUC participants.

⁴A list of entities participating in the mediation is attached to this Report as Appendix 1. A number of the listed entities represent stakeholder groups.

subsequent process of RTO development and implementation, a central component of which would be stakeholder resolution of keystone substantive issues in accordance with the milestones established in the Business Plan (the "going-forward" process).⁵ To facilitate the stated objective, I required the participants to presuppose the fact of a Northeast RTO as envisioned by the July 12 Orders and to formulate a plan for actualizing the Commission's vision. I also foreclosed any challenge or debate with respect to the Commission's authority to mandate such an entity or to the Commission directive for the parties to participate in the mediation.⁶

The participants elected a "committee of the whole" mediation format. Consistent with this election, all mediation was conducted at the Commission in plenary sessions which every stakeholder had the opportunity to attend.⁷ The plenary sessions served as the platform for the collective to formulate and vet "straw" proposals addressing essential RTO elements (Market Design, Governance, Operations, Technology Assessment, Transmission Tariff, Transmission Planning, Interregional Coordination, etc.) on a weekly rolling basis. This methodology's efficiency and effectiveness was enhanced through a password-protected website, access to which was restricted to a participant list compiled and maintained by the mediator. The website enhancement assured transparency of the Business Plan formulation process to all participants: all proposals, suggestions, questions, comments and other materials submitted in connection with the mediation were required to be posted and maintained on the website.⁸ The website also

⁵This methodology also was specifically intended to promote maximum good faith participation in the mediation by eliminating any waiver/estoppel concerns which the participants otherwise might have had with respect to the resolution of substantive issues implicated in either the mediation or "going-forward" processes.

⁶As more fully discussed *infra*, the participants' good faith-- albeit reluctant-- acceptance of these heuristic devices is to be commended, and may not legitimately be interpreted as a waiver of any objection(s) or other concern(s) which they otherwise might have with respect to the mediation or their participation in it.

⁷Informal consensus building among smaller groups was encouraged and facilitated throughout the process. In addition, Chairman Garcia and I caucused with individual stakeholders, stakeholder sectors and coalitions virtually every non-mediation business hour from July 13th through September 7th.

⁸All materials posted to the website will remain available to the participants ("read only" format) through September 30, 2001. The materials thereafter will be copied to CD-ROM and the website closed down. The mediator will maintain the CD-ROM(s) as
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had the virtue of providing under-represented/less well-funded stakeholders with a mechanism for more meaningful input than they otherwise would have had in a resource-intensive proceeding of this nature.

To achieve optimal efficiency in the Business Plan formulation process, the plenary mediation sessions were confined to two (2) days per week for the first five (5) weeks. Each Tuesday, a pre-posted⁹ "straw" proposal addressing some primary element(s) of the Business Plan (Market Design, *e.g.*) would be vetted among the collective, modified and re-posted to the website; each Wednesday, the following week's "straw" proposal would be presented, explained, modified in response to plenary session comments and posted to the website. The process of finalizing the previous week's Business Plan component each Tuesday, then rolling out the following week's component each Wednesday for detailed scrutiny, analysis and electronic comments/ dialogue during the intervening period, repeated each of the first five (5) weeks and carried over into the sixth. The most problematic components (Governance, *e.g.*) were reserved until the final two (2) weeks, when plenary sessions addressing them could be conducted every day without jeopardizing the Business Plan's deliverability. For each "straw" component, important substantive issues were identified but held in abeyance for resolution in the "going-forward" process due to their potential to impede or derail the mediation.¹⁰

II. THRESHOLD ISSUES:

A. CONFIDENTIALITY:

My July 13, 2001 Notice Concerning Commencement of Commission-Directed Mediation specified that the mediation would be conducted on a confidential basis. That specification was based on my experience that confidentiality promotes a more robust and candid exchange of information and ideas among parties who perceive their interests to be at odds.

⁸(...continued)

protected materials, for release back to the participants only, for use in the "going-forward" process contemplated under the Business Plan.

⁹On the confidential website.

¹⁰These issues, categorized by Business Plan topic, are reflected in Appendix A to the Business Plan.

It will come as no surprise to the Commission that the press demonstrated keen and continuing interest in this mediation. Extremely important public interests were at issue. Unfortunately, a press presence during the mediation would have been inconsistent with the need for maximum candor among the participants. I was compelled to exclude the press for that reason. Before I did so, however, I expressly acknowledged that the public had a legitimate and important interest in this proceeding. I therefore advised the press that I had arranged for the Commission's Division of Press Services to serve as public liaison in this matter, that any queries concerning the mediation could be directed to that office, and that I would work through the Division of Press Services to provide as much responsive information as was appropriate. All press queries were accommodated in this manner.

The participants understood from the outset that both my Report and the Business Plan would be made public on September 17, 2001. That fact notwithstanding, any communication(s) made in the course of the mediation, as well as any material(s) prepared in connection with it (specifically including any communication(s)/material(s) posted to the mediation website), remain confidential and retain the protections provided under 18 C.F.R. § 385.606 (2001) until the participant(s) who made/submitted them expressly waive those protections.

B. COMMISSION-DIRECTED MEDIATION:

A significant number of participants expressed serious threshold objections, reservations or concerns with respect to the potential implications of their compliance with the July 12 Orders insofar as those orders: (1) *mandate* the formation of a Northeastern RTO; and (2) *require* them to participate in mediation to execute that mandate. Many of these objections, reservations and concerns are expressed in the various Requests for Rehearing, Clarification or Stay filed in response to the July 12 Orders. Some are not. Insofar as they are material to these proceedings, they may be categorized as jurisdictional, due-process-related and procedural.

As Chairman Garcia and I advised the participants, it is pointless to debate here whether the Commission has jurisdiction to require the formation of a single RTO for the entire Northeastern United States. Either it does or it does not. The ultimate answer lies in a Court of Appeals/U.S. Supreme Court interpretation of the Federal Power Act ("FPA"). Any due-process debate is similarly pointless. It ultimately falls within the ambit of the appellate courts to decide whether the Commission is required to proceed by way of notice and comment rulemaking. The participants' procedural concerns, however, are more immediately problematic. Mediation is, by definition, a *voluntary* process. It is fundamentally inconsistent to *compel* participation in a voluntary process. The July 12 Orders therefore posed a dilemma to the parties: (1) participate in good faith, and risk

waiver of legitimate objections to the process and— more important— to its product; or (2) refuse to participate, and risk having the product imposed without any input into the process.

To prevent this dilemma from derailing the mediation before it started, I established various mechanisms which afforded the participants an opportunity to express their objections/concerns and preserve their rights, yet still constructively contribute to the mediation exercise. I represented that this Report would reflect their threshold objections/concerns in general terms and without attribution to specific participants. In addition, I invited the participants to convey any individual objections/concerns directly to me with the understanding that I would maintain them in confidence.¹¹ I also provided the disclaimer reflected on the Business Plan cover. This methodology also was specifically intended to promote maximum good faith participation in the mediation by eliminating any waiver/estoppel concerns which the participants otherwise might have had with respect to the resolution of substantive issues implicated in either the mediation or "going-forward" processes. Having addressed the participants' concerns in this manner, I foreclosed any further challenge or debate with respect to the Commission's authority to mandate a Northeastern RTO or to the Commission directive for the parties to participate in the mediation. As previously noted, I instead required the participants to presuppose the fact of a Northeast RTO as envisioned by the July 12 Orders and to formulate a business plan for actualizing the Commission's vision.¹² I also purposefully confined the mediation to the *procedural* task of formulating a "blueprint" for a subsequent "going-forward" process of RTO development and implementation, an essential element of which will be stakeholder resolution of *substantive* issues in accordance with the milestones established in the Business Plan.

C. PLATFORM/BEST PRACTICES:

Consistent with the July 12 Orders, the Business Plan contemplates that the PJM RTO proposal will serve as the "platform" for the new market and RTO structures. The

¹¹ A number of participants took advantage of this invitation.

¹² I reiterate that the participants' good faith acceptance of these heuristic devices is to be commended, and may not legitimately be interpreted as a waiver of any objection(s) or other concern(s) which they otherwise might have with respect to the mediation or their participation in it.

Business Plan also accommodates the Commission's express expectation that the RTO proposal would incorporate "best practices" from NYISO and ISO-New England. I highlight the terms "platform" and "best practices" because the precise meanings and parameters of these critical terms were not defined in the July 12 Orders, and remained the subject of intense disagreement throughout the mediation. Although NYISO and ISO-New England each has designated deviations from the PJM platform which it believes constitute "best practices" for incorporation into the platform, there is no consensus on these designations. It would benefit the "going-forward" process for the Commission to provide additional guidance with respect to these terms' precise meanings and parameters, as well as any NYISO/ISO-New England practices which it deems "best practices."¹³ Additional Commission guidance with respect to whether particular "best practices" should supplement, enhance, modify or completely supplant aspects of the PJM platform would be similarly beneficial.

III. THE BUSINESS PLAN:

The entire mediation exercise was structured to produce a viable "blueprint" for the development/implementation of a single RTO for the Northeastern United States as its primary deliverable. Although the mediation process was often extremely contentious and challenging, it produced that deliverable in the form of a detailed and task-oriented Business Plan. The Business Plan outlines a comprehensive process for the development and implementation of fully-integrated markets throughout the Northeastern region, as well as a single RTO to administer those markets and to promote development of new infrastructure. Any attempt to restate the Business Plan in this Report would produce a redundant—and decidedly inferior—document. Accordingly, after briefly summarizing the Business Plan, this section of the Report supplements and clarifies the plan where I believe such supplementation and clarification will assist the Commission in its evaluation of, and in further orders concerning, the plan.

A. BUSINESS PLAN SUMMARY:

The Business Plan consists of eight (8) sections. Section One addresses the post-mediation process. The other sections address primary RTO formation issues that must be resolved for the new market and RTO. Section Two deals with governance,

¹³Although the Business Plan establishes consensus "Criteria for Determining Best Practices" (p. 2), these criteria will be more useful to evaluate non-ISO stakeholder nominations submitted in the "going-forward" process than in selecting among roughly equivalent ISO practices.

independent transmission companies ("ITCs"), market monitoring/mitigation, financing, cost recovery and information release. Section Three focuses on market design; Section Four concerns operations; Section Five covers technology assessment; Section Six addresses transmission tariff-related matters; Section Seven concerns regional transmission planning; Section Eight confronts interregional coordination. Each section is based on the express Commission expectation that Northeastern RTO formation will proceed from a PJM platform, and therefore begins by describing relevant aspects of the current PJM paradigm in some detail. Differences in approaches taken by NYISO and ISO-New England are noted for potential consideration as best practices in accordance with the Commission's express expectation in that regard. Any difference that NYISO or ISO-New England has nominated as the best practice in a particular area is highlighted with a boldface "[BP]." The Business Plan also incorporates a description of the Northeast Independent Transmission Company, L.L.C. proposed in Docket No. RT01-86-000 to assist the participants' "going forward" process consideration of the ITC paradigm as a component of a hybrid RTO.¹⁴

Each Business Plan section describes specific RTO and market implementation tasks and establishes clear milestones for accomplishing them. The Business Plan also includes a separate appendix for each section (Appendices A-1 through A-7) that lists stakeholder-identified issues pertaining to the corresponding topical sections. These are substantive issues related to all aspects of RTO development/implementation, and have been reserved to be considered at the appropriate stage(s) of the "going-forward" process.

The milestones for the RTO and market implementation tasks represent deadlines that the participants generally agree are realistic. Milestone *alternatives* are presented for the few critical areas where disagreement persists. The Business Plan contemplates that it may be possible to complete some tasks earlier than the date(s) targeted by the relevant milestone(s), and provides that this will be achieved whenever possible. The Business Plan also contemplates that the stakeholders will work to achieve the milestones for all of the essential RTO elements *in parallel*.¹⁵

¹⁴National Grid USA represents that a group of transmission owners, covering thirteen (13) states and comprising approximately 60% of the transmission assets in the Northeast, have agreed to work together to develop a proposal for an ITC to function as an integral component of a hybrid Northeastern RTO.

¹⁵This aspect of the "going-forward" process is depicted graphically on milestone charts incorporated into the Business Plan (pp. 6-12).

The milestones reflect consensus that the necessary technology assessment can be completed no later than seven (7) months after [an estimated November 1, 2001 issuance date of] a Commission order concerning the Business Plan (*i.e.*, by the second quarter of 2002). They also reflect general consensus that a regional transmission planning system can be developed by the fourth quarter of 2002, and that tariff-related issues can be resolved by the second quarter of 2003. The key area of difference— which will drive the overall RTO completion date— is the time required to complete the design and implementation of the Northeastern regional energy market based on the PJM platform as modified by best practices. The mediation produced three (3) alternative timetables for this task. Option 1-M anticipates that market design could be implemented in the fourth quarter of 2004, subject to extension if additional complexity is introduced or new design requirements become apparent. Option 2-M anticipates that certain market design components (not including the single energy market) could be operational beginning in the fourth quarter of 2002, with full implementation of the single Northeastern regional market by the third quarter of 2004. Option 3-M anticipates that the single energy market could be implemented by the fourth quarter of 2003.¹⁶

B. POST-MEDIATION PROCESS:

Many difficult substantive issues must be resolved among the stakeholders in the "going-forward" process which the Business Plan contemplates. It is clear that the process will benefit from every bit of guidance the Commission is able to provide with respect to Business Plan content and implementation— particularly with respect to the issues highlighted in the balance of this Report. It is equally clear that the stakeholders will continue to require some impartial referee to assist them in the process. In this regard, I recommend that the Commission initiate settlement judge procedures for the "going-forward" phase of this proceeding in accordance with 18 C.F.R. § 385.603 (2001). These procedures would have a number of advantages. As previously noted, *compulsory* mediation is problematic. Settlement judge procedures would obviate these problems. The settlement judge mechanism also would grant the participants an opportunity [albeit limited] to request a referee of their preference rather than having one imposed on them. Settlement judge procedures, moreover, are clearly defined in the Commission's regulations. Those regulations not only establish the settlement judge's authority, but a mechanism for redress if that authority is perceived to be inappropriately exercised. In light of these advantages, I respectfully encourage the Commission to initiate settlement judge procedures for the "going-forward" phase of this proceeding.

¹⁶The implementation timetable disparity among these options is a function of their underlying assumptions and trade-offs, and is discussed in greater detail *infra*.

The Commission should take note that the participants clamored for the opportunity to file formal written comments to the Business Plan and this Report. Although I advised them that-- as a *mediator*-- I lacked authority to prevent them from submitting written comments, I vigorously discouraged them from doing so. I also advised them that this Report would encourage the Commission **not** to entertain such comments. As a purely procedural matter, Commission regulations do not provide for the filing of comments addressing a report to the Commission. Neither do they provide for the filing of comments directed to a document like the Business Plan, which I am absolutely certain no participant would encourage the Commission to deem an offer of settlement submitted pursuant to 18 C.F.R. § 385.602 (2001) ("Rule 602").¹⁷ More important, a post-mediation opportunity to comment would effectively eviscerate the value of the mediation process. Any "comments" to the Business Plan properly should have been expressed and vetted in plenary session; that was the fundamental purpose of those sessions. I expressly advised the collective that the plenary sessions constituted their opportunities to "comment" when issue first was raised. It follows that any legitimate "comments" already should be reflected in the Business Plan. Any post-mediation "comments" therefore are likely to be mere position papers reverting to pre-mediation postures. If the Commission nevertheless deems it appropriate to entertain comments, I recommend that such comments be received in accordance with the provisions of Rule 602, which specifically provides for reply comments. I also encourage the Commission to issue an interim order concerning comments as soon as possible if it elects to entertain them.

The Business Plan reflects three (3) alternative approaches to governance, the choice among which impacts the post-mediation process. Not surprisingly, however, governance is the thorniest Business Plan topic.

C. GOVERNANCE/STAKEHOLDER PROCESS:

[COMMISSION CAVEAT: The Commission's conclusions concerning RTO governance have the potential to pre-determine other Business Plan issues. This is particularly true on the topics of Market Design and Technology Assessment. I encourage the

¹⁷I add that the July 12 Orders do not contemplate an opportunity to comment on the Commission-directed report. Moreover, any such comments would be premature in light of the fact that the Commission must issue a subsequent order concerning the Business Plan and Report. The participants will have a mechanism to "comment" on the Business Plan and Report in the form of Requests for Clarification, Reconsideration or Rehearing directed to that order.

Commission to bear this potential in mind, and to consider those issues on a discrete basis from governance.]

Each governance option contemplates that a new company, with a new board of directors ("Board"), will be established after the Commission issues its subsequent order concerning the Business Plan and Report. Each option contemplates that the Board will manage the "going-forward" process (including Business Plan implementation), with the advice and input of a new advisory stakeholder committee, during the RTO transition period. The options differ primarily with respect to Board composition and the extent to which permanent governance issues are resolved by the Business Plan (*i.e.* now) rather than during the "going-forward" process.¹⁸

Option 1-G does not address the Board composition issue. That is because it is supported by two (2) groups of participants favoring different Board compositions. A large group favors an eleven (11) member Board comprised of five (5) representatives from the PJM Board, three (3) representatives from the NYISO Board and two (2) representatives from the ISO-New England Board, with a CEO who would be the eleventh voting member of the Board. A substantially smaller group favors a Board comprised of an equal number of representatives from each ISO Board plus a voting CEO. Regardless of composition, the transition period Board under Option 1-G would make permanent Board nominations on which stakeholders would vote at the end of the transition period. The transition period Board would not have FPA §205 filing rights unless approved by the stakeholders holding those rights.

Option 2-G proposes a thirteen (13) member Board comprised of three (3) members from each ISO Board plus four (4) members elected by the stakeholders. Under Option 2-G, directors of existing ISO Boards could serve in a similar capacity on the RTO transition Board, but existing ISO Board Chairs and CEOs would have to resign their ISO positions before becoming RTO Chair or CEO, and the CEO would be non-voting. Option 2-G reserves permanent Board composition decisions to the "going-forward" process and to the transition Board and stakeholders. The transition Board would not have FPA §205 filing rights.¹⁹

¹⁸The participants conducted a preference ballot with respect to RTO Board composition as part of the mediation. The results of that ballot are tallied in Appendix E to the Business Plan.

¹⁹Some Option 2-G supporters favor FPA §205 filing rights for stakeholders and some favor those rights for the transition Board.

Option 3-G proposes an eleven (11) member Board comprised of five (5) representatives from the PJM Board, three (3) representatives from the NYISO Board, and two (2) representatives from the ISO-New England Board, with a CEO who would be the eleventh voting member of the Board. The Board is permanent from the outset under Option 3-G, and manages both the transition process and the new RTO after the transition period ends. The Board would have FPA §205 filing rights both during the transition period and thereafter.

The participants conducted a preference ballot with respect to RTO Board composition as part of the mediation. The results of that ballot are tallied in Appendix E to the Business Plan.²⁰ Those tallies reflect tremendous consensus-building efforts and many concessions among the stakeholders. They also reflect a significant degree of intractability— particularly with respect to Board composition. It is my evaluation that the stakeholders will be unable to progress further without Commission guidance or assistance. I therefore encourage the Commission to provide whatever guidance it deems appropriate with respect to which, if any, of the governance options (or specific features) it favors and why. The preceding summaries are just that, and do not adequately convey the various options' subtleties. The Commission should conduct a careful analysis of each governance option as it is presented in detail in the Business Plan. Each option is reasonable and viable. Each has unique virtues. Each reflects legitimate conceptions of "balance." The choice among them— or their syntheses-- will require normative judgments. To assist the Commission in making those judgments, I submit the following observations:

Option 3-G is the most thoroughly developed. It is the only option which resolves permanent Board composition and completely defines the stakeholder committee process and FPA § 205 rights from the outset.²¹ Consistent with the July 12 Orders, it is based on the PJM platform, but deviates from that platform in a few fundamental respects which its

²⁰A few participants were unable to endorse any option.

²¹Although significantly larger coalitions endorse other options, I note that Option 3-G is the most satisfactory to a group of Northeast state commissions and consumer advocates for this reason. That group consists of: New England Conference of Public Utility Commissioners; Pennsylvania Public Utilities Commission; New York State Public Service Commission; Maryland Public Service Commission; D.C. Public Service Commission; Vermont Department of Public Service; and Pennsylvania Office of Consumer Advocate. Of this group, only Pennsylvania Public Utilities Commission and Pennsylvania Office of Consumer Advocate are among the stakeholders formally endorsing Option 3-G.

advocates consider best practices. Board composition is weighted in deference to PJM.²² Option 3-G also *implies* that the RTO Board would be dedicated exclusively to the RTO from inception, and would not perform dual RTO/ISO duties. A potential advantage of this feature is that RTO-dedicated Board members would focus exclusively on the RTO and would have little or no bias/incentive to favor the interests, views, technologies, etc. of the ISOs from which they came.²³ Option 3-G has the least stakeholder support.

Option 2-G's most distinguishing features are equal Board member allocations among the three (3) existing ISOs²⁴ and an additional four (4) independent Board members selected by stakeholders. An obvious potential advantage of this option is direct stakeholder influence on the Board. Another potential advantage is numerical parity among the ISO-designated Board members. This feature treats the ISOs as raw equals, a characteristic which NYISO/New York Transmission Owners characterize as crucial. Rationales for numerical equivalence among ISO-designated Board members include: enhanced Board credibility among all sectors; diminished Board member ability to impose ISO-specific biases/ practices or to favor ISO-specific interests, views, technologies, etc.; more balanced consideration of ISO-specific circumstances and concerns (*e.g.*, load pockets, market degradation, reliability). Option 2-G has significant and diverse stakeholder support.

Option 1-G is supported by the largest and most diverse stakeholder group. Since PJM is among its principal sponsors, Option 1-G clearly satisfies the July 12 Orders' expectation with respect to PJM platform. Option 1-G proceeds from the controversial, but well-supported, premise that development/implementation of a Northeastern RTO in accordance with the July 12 Orders may not legitimately be considered a "merger of equals." Consistent with this premise, Board composition is weighted in deference to PJM.²⁵ Primary among the identifiable rationales for weighting the Board in deference to

²²Potential rationales for such weighting are presented in the discussion of Option 1-G, *infra*.

²³Dedicated personnel may or may not be an advantage on the Board. In contrast, it is my strong sense from the mediation that RTO-dedicated *staff* is absolutely essential to optimal RTO implementation. I encourage the Commission to endorse that measure.

²⁴Like the other options, Option 2-G treats PJM and PJM West (Allegheny Power) as a single entity.

²⁵Four (4) entities endorsing Option 3-G, including ISO-New England, do not endorse the Board structure reflected in that option. Instead, they endorse a ten (10)

(continued...)

PJM is that in reality the Northeastern RTO will encompass *four* (4) regions/control areas,²⁶ two (2) of which (PJM and PJM West) are being melded. Mathematically, this melded entity would be entitled to five and one-half (5½) members on an eleven (11) member Board. In addition, my research indicates that the combined PJM/PJM West entity will represent approximately 54% of the Northeastern region's total system load.²⁷ The fact that the PJM paradigm received substantially more favorable treatment in the July 12 Orders than the other ISO proposals also might favor deference to PJM's preferred governance structure.

With the noteworthy exception of Option 3-G, the stakeholder governance process is the most ill-defined aspect of the Business Plan. Option 3-G comprehensively defines a viable stakeholder committee process. That process might be adaptable to any of the governance options. Most stakeholders, however, do not endorse it. In the alternative, a number of contentious issues will have to be resolved by— or for— the stakeholders. Among them: (1) whether the stakeholder role should be purely advisory or whether they should retain limited decisional authority; (2) appropriate sector number and composition; (3) whether sub-sectors are appropriate; (4) appropriate voting protocols/weighting/splitting; and (5) *meaningful* accommodation of heretofore marginalized interests (*e.g.*, environmental, public, renewables, new/emerging technologies).²⁸ Here, again, it is my evaluation that the stakeholders will be unable to progress further without Commission guidance. I therefore encourage the Commission to provide whatever guidance it deems appropriate with respect to the specified issues, which are detailed in the "Stakeholder Governance Strawman" incorporated into the Business Plan (pp. 29-35). In conjunction

²⁵(...continued)

member Board with equal allocations among the three (3) existing ISOs plus a voting CEO.

²⁶The Commission specifically acknowledged this fact in the July 12 Orders. *See PJM Interconnection, L.L.C.*, 96 FERC ¶ 61,061, at p. 61,232 (2001).

²⁷I note that Option 3-G allocates RTO Board representation in accordance with relative system loads. Other criteria (relative populations/values of markets administered, *e.g.*) might provide additional support or favor a different allocation.

²⁸In addition, the "going-forward" process itself should be structured better to accommodate these interests' participation and input. Under-represented/less well-funded stakeholders were decidedly disadvantaged by the time and resource-intensive structure of the mediation process.

with that guidance, the Commission might consider initiating settlement judge procedures to assist the stakeholders.²⁹

D. MARKET DESIGN:

The key consideration that will determine the overall RTO implementation date is the time required to design, test and implement the Northeastern regional energy market. As previously noted, the Business Plan reflects three (3) alternative timetables for these tasks. Option 1-M anticipates that market design could be implemented in the fourth quarter of 2004, subject to extension if additional complexity is introduced or new design requirements become apparent. Option 2-M anticipates that certain market design components (not including the single Northeast regional energy market) could be operational beginning in the fourth quarter of 2002, with full implementation of the regional market by the third quarter of 2004. Option 3-M anticipates that the single regional energy market could be implemented by the fourth quarter of 2003. The implementation timetable disparity among these options is a function of their underlying assumptions and trade-offs. It is my evaluation that the Commission will have to make its own assessment of the competing policy considerations and determine the appropriate timetable. To assist the Commission in that regard:

Option 1-M anticipates that the new RTO (transition) Board would develop an appropriate implementation plan (including coordination with existing ISOs) prior to systems and market implementation. It also anticipates that RTO market rules, tariffs, operating criteria, business processes, implementation teams and functional requirements would be completed during an initial twelve (12) month period— *before* launching into a 24 month systems and market implementation phase. Option 1-M proponents believe that this methodology best ensures orderly transition from existing markets because it: (1) considers existing ISO responsibilities/resource limitations; (2) accommodates the seven (7) month technology assessment reflected in the Business Plan; and (3) is uniquely consistent with the Business Plan consensus principles (pp. 1-2) that market design be based on the PJM platform, but also incorporate best practices from other ISO markets— particularly those concerning ITCs, ancillary service/demand response programs, energy/ancillary service market co-optimization, precise automated generator control, local reliability rules and load pocket mitigation measures. Option 1-M proponents assert that this methodology alone appropriately balances the consensus goal of implementing a single regional electricity market as soon as possible with the risk management required to be successful in such a complex undertaking.

²⁹If initiated, such procedures should be independent from those previously recommended for the "going-forward" process and should utilize a different referee.

Option 1-M is presented in detail in Appendix B to the Business Plan. Its supporters are listed on page 71 of the Business Plan, and include NYISO and ISO-New England.³⁰ It exhibits the virtues of "up front" best implementation practices and risk management. The twelve (12) month planning phase expressly accommodates best practices determination/implementation, technology assessment and stakeholder input. Option 1-M contemplates a (relatively) gradual transition between existing ISOs and the RTO. Its "management executes approved plan" approach also *may* be a virtue insofar as it promotes efficient implementation.³¹ Estimated time to complete RTO transition: 36 months.

Option 2-M contemplates that the Northeastern regional market could be phased-in over a twelve (12) to 35 month period. It anticipates that some market systems will require little if any modification and may be implemented on an expedited basis, thereby capturing interim market benefits prior to full implementation. Option 2-M contemplates that a best practices/technology assessment would be conducted under the auspices of an independent RTO Board during the first twelve (12) months— *prior* to phased-in implementation over the next 23 months. Option 2-M proponents believe that this methodology comprises the shortest and most cost-effective process to achieve a reliable Northeastern regional market because it: (1) assures that market reliability and efficiency are protected through supervised assessment/implementation of best practices prior to the costly implementation and software development; and (2) achieves accelerated benefits through phased implementation.

Option 2-M is presented in detail in Appendix C to the Business Plan. Its supporters are listed on page 75 of the Business Plan, and include the New York Transmission Owners and the Ontario Independent Electricity Market Operator ("IMO").³² Its distinguishing feature is phased implementation intended to capture interim market benefits. It also exhibits the virtues of "up front" best practices and technology assessments. The twelve (12) month best practices/technology assessment process expressly accommodates stakeholder input. Option 2-M's Board-driven approach also *may* be a virtue insofar as it promotes efficient implementation. Estimated time to complete RTO transition: 35 months.

³⁰Numerous stakeholders, including PJM, support this option as a fallback from Option 3-M, which they strongly favor.

³¹I underscore the fact that this approach presupposes a transition Board.

³²Curiously, Option 1-M also lists IMO as a supporter.

Option 3-M is the most aggressive market proposal. It also far outstrips the other options in diversity and extent of stakeholder support. Option 3-M anticipates that systems implementation/market trials would require 24 months, but that systems implementation could commence as early as November 1, 2001. Option 3-M's aggressive schedule is premised on implementation of the framework designated "Regional Networked Market Concept" which is presented in Appendix D to the Business Plan.³³ In essence, the framework constitutes a wholesale extension of the current PJM platform across the entire Northeastern region *without* the detailed pre-implementation best practices or technology assessments contemplated by the other options. Existing local control centers and energy management systems would be retained to address local reliability issues/act as data servers to the regional market system under Option 3-M. Its proponents argue that Option 3-M already addresses the local reliability best practices identified by NYISO and ISO-New England, and allows three (3) months during the post-mediation process to determine which additional pre-identified best practices should supplement the PJM framework. They concede that some pre-identified best practices could not be implemented by the fourth quarter of 2003, but maintain that most of those practices could be incorporated at market start-up without affecting the anticipated implementation date if adopted in the first three (3) months and, if desired, could be implemented after initial market start-up (*i.e.* by the fourth quarter of 2004).

Option 3-M is presented in detail in Appendix D to the Business Plan. Its supporters are listed on pages 78-79 of the Business Plan. Option 3-M's support is extensive, broad-based, and includes PJM, PJM West and TransEnergie (U.S. and Canada). Its distinguishing feature is speed. Estimated time to complete RTO transition: 24 months.

The similarities among the preceding options are far more striking than their differences. Ideally, the best aspects from each could be melded into one another. For example, Option 2-M's phased implementation/interim market benefit capture feature reasonably should be incorporated into whatever option is selected.

As previously noted, the implementation timetable disparity among the preceding options is a function of their underlying assumptions and trade-offs. On its face, Option 3-M is attractive. It ostensibly could implement a viable Northeastern regional energy market a full year earlier than either of the other options. It indisputably is based on the Commission-endorsed PJM platform. It has overwhelming support. Nevertheless, I encourage the Commission carefully to consider Option 3-M's underlying assumptions and

³³Due to a typographical error, Option 3-M is designated "Option 2M" in Appendix D.

trade-offs. The PJM platform is sound and proven— within its region. That region, however, exhibits a substantially lower degree of divested generation than New York and New England. The same observation applies to load pocket problems. PJM does not have a Boston or a New York City in its territory. I highlight these differences [there are others as well] because the primary assumption underlying Option 3-M is that the *current* PJM platform can adequately address market pressures and reliability concerns it has not yet fully confronted. With respect to trade-offs, the July 12 Orders reflect an express Commission expectation that the Northeastern RTO would be based on the PJM platform, but also would incorporate the best practices employed in the other regions. Option 3-M does not provide a meaningful opportunity to identify those practices, let alone implement them.³⁴ More troubling is Option 3-M's failure to provide for an adequate "up-front" technology assessment. As discussed further *infra*, ensuring technological (*i.e.* operational software) adequacy is absolutely essential from the outset. It was the various software technical consultants' consensus that the appropriate timeframe for that assessment was seven (7) months.

The preceding discussion smacks of a polemic against the PJM platform. It is not.³⁵ I left the mediation confident that the PJM paradigm will prove a more than adequate platform for the Northeastern RTO— *provided* it incorporates essential best elements from the other ISOs, and provided further that impatience, haste and greed are not permitted to drive RTO implementation at the expense of sound policy. Any polemic is directed to— and as a caution to the Commission concerning— those interests who would sacrifice optimal RTO market benefits in the long run to exploit more immediate economic opportunity in a sprint.

The mediation obviously has convinced me of the benefits of the substantial "up front" evaluation processes reflected in Options 1-M and 2-M. Of these options, I would encourage the Commission to endorse Option 1-M as the appropriate starting point for RTO market design. I also would encourage the Commission to endorse enhancing Option 1-M by assigning priority to the identification of market systems which may be implemented on an expedited basis to capture interim benefits, as well as identification/ resolution of "critical path" issues that might accelerate phased implementation of additional market systems to the same end.

³⁴I also note that PJM was unwilling during the mediation to concede that *any* practice pre-identified by another ISO in fact constituted a best practice.

³⁵Nor is it any reflection on PJM, to whom I take this opportunity to express sincere gratitude for their initiative, professionalism and hard work throughout the mediation.

E. TECHNOLOGY ASSESSMENT:

None of the software experts whom I consulted believes the Northeastern RTO will require an entirely new software system. Neither does any of them believe that any currently-employed software is capable of managing a system as large and complex as the RTO.³⁶ The Northeastern RTO will constitute the largest energy market in the world. The complexity of the technology it will take to implement and administer that market is staggering. I learned during the course of the mediation that the complexity of electric system management software is second only to that of the banking industry. I also learned that there are very, very few vendors who design such software, and those vendors have a tremendous economic incentive to overestimate their/their software's capabilities to secure such lucrative contracts. Once entrenched, moreover, it would be exceedingly difficult and expensive to switch vendors in the event the original software proved inadequate. And that would be the least of the problems.

Accordingly, it is my strong recommendation that independent, *non-vendor*, experts be involved in the technology assessment from the outset. These experts should be involved in both the IT and applications technologies assessments, and should be required to demonstrate that they have no financial interest whatsoever in the outcomes of those assessments. This will assure that the RTO has the advantage of continuing and unbiased expert opinions with respect to software provider representations and capabilities throughout the assessment process and beyond.

IV. CONCLUSION:

It is my overall conclusion that the accompanying Business Plan constitutes a viable "blueprint" for the development and implementation of a single RTO for the Northeastern United States. I encourage the Commission to give it careful consideration, and to endorse it to the greatest extent possible, consistent with this Report.

Respectfully submitted this 17th day of September, 2001.

³⁶They do believe some existing *features* may be scalable to the RTO.

H. Peter Young
Administrative Law Judge Mediator

**REGIONAL TRANSMISSION ORGANIZATIONS
DOCKET NO. RT01-99-000
(NORTHEASTERN REGION)**

PARTICIPANT LISTING

A

AES New Energy
AES New York LLC
Alcoa Power Generating Inc.
Allegheny Electric Co-op.
Allegheny Energy, Inc.
American Chemistry Council (ACC)
American Forest & Paper Association (AF&PA)
American Iron and Steel Institute (AISI)
American National Power Inc. (ANP)
American Wind Energy Association
Aquila
Automated Power Exchange (APX)

B

Baltimore Gas & Electric Company
Bangor Hydro-Electric Company
Board of Public Utilities of the City of Jamestown, New York
BP Energy Company
Braintree Electric Light Dept.

C

Calpine Eastern Corporation
Capstone Turbines
Central Hudson Gas & Electric Corporation
Central Maine Power Company
Central Vermont Public Service Corporation
Chambersburg, PA
Chicopee, MA
Cinergy Services, Inc:
 Cinergy Capital and Trading, Inc.
 Cincinnati Gas & Electric Company
 PSI Energy, Inc.
City of Jamestown, New York

City and Towns of Hagerstown, Thurmont, Williams-Port, MD
and the Town of Front Royal, VA

City of New York

Commonwealth Chesapeake Co., LLC

Competitive Power Suppliers

Concord Electric Company

Conectiv Energy:

Atlantic City Electric Company

Delmarva Power & Light

Con Edison Company of New York

Con Edison Energy

Con Edison Solutions

Connecticut Municipal Electric Energy Cooperative

Conservation Services Group

Consolidated Edison Company of New York, Inc.

Constellation Power Source

Credit Suisse First Boston International

Cross Sound Cable LLC

D

Delaware Division of the Public Advocate

Delaware Municipal Electric Corporation, Inc.

Delaware Public Service Commission

District of Columbia Office of the People's Counsel

District of Columbia Public Service Commission

Distributed Power Coalition of America

Dominion Energy

Duke Energy North America, LLC

Dynegy Inc.

E

Easton Utilities Commission of Easton, MD

E Cubed Company LLC and the Joint Supporters

Edison Electric Institute (EEI)

Edison Mission Energy

Edison Mission Marketing & Trading

Electricity Consumers Resource Council (ELCON)

El Paso Merchant Energy

Energy Management, Inc.

Enron Energy Services, Inc.

Enron Power Marketing, Inc.

DOCKET NO. RT01-99-000 3

Entergy Power Generation Corp.
Exelon Generation Company, LLC
Exeter & Hampton Electric Co.

F

First Energy Corp.
Fitchburg Gas and Electric Light Co.
FPL Energy, LLC
FTI Consulting Inc.

G

GPU Energy:
 Jersey Central Power & Light Company
 Metropolitan Edison Company
 Pennsylvania Electric Company

H

H.Q. Energy Services (U.S.), Inc.
Hydro One Inc.

I

Industrial Energy Consumers Group:
 ELCON, ACC, AISI, AF&PA
Independent Power Producers of NY, Inc.

K

Keyspan Technologies, Inc.
Keyspan-Ravenswood, Inc.

L

LG&E Energy Corp.
Long Island Power Authority

M

Maine Office of the Governor
Maine Office of the Public Advocate
Maryland Dept. of Natural Resources Power Plant Research Program
Maryland Energy Administration
Maryland Office of People's Counsel
Maryland Public Service Commission

Massachusetts Division of Energy Resources
Massachusetts DTE
Massachusetts Energy Consumers Alliance
Massachusetts Municipal Wholesale Electric Company (MMWEC)
Massachusetts Office of the Attorney General
Massachusetts Public Interest Research Group
Metropolitan Transportation Authority of the City of New York
MHI
Mid-Atlantic Area Council
Mid-Atlantic Power Supply Association (MAPSA)
Mirant Americas Energy Marketing
Mirant Americas, Inc.
Morgan Stanley Capital Group Inc.
Multiple Intervenors
Municipal Electric Utilities Association of New York State (MEUA)

N

National Energy Marketers Association
National Grid USA
NEPOOL Industrial Customer Coalition
New Brunswick Power Corp.
New England Conference of Public Utilities Commissioners, Inc. (NEPUC)
New England Power Pool (NEPOOL)
New England Renewable Power Producers (NERPPA)
New Hampshire Office of Consumer Advocate
New Jersey Board of Public Utilities
New Jersey Division of the Ratepayer Advocate
New England Inc. ISO
New York ISO
New York Power Authority
New York State Consumer Protection Board
New York State Electric & Gas
New York State Public Service Commission
New York State Reliability Council
New York State Transmission Owners (Member Systems)
New Power Company
Niagara Mohawk Power Corporation
Northeast Independent Transmission Companies (NE-ITC)
Northeast Power Coordinating Council
Northeast Utilities System Companies
NRG Energy, Inc.

NSTAR Electric and Gas

O

Old Dominion Electric Cooperative
Ontario Independent Electricity Market Operator (IMO)
Ontario Power Generation
Orange Rockland Utilities, Inc.
Orion Power Holdings, Inc.
Orion Power Midwest
Orion Power New York

P

Pace Law School Energy Project
PECO Energy Company
Pennsylvania Office of Consumer Advocate
Pennsylvania Public Utility Commission
Pennsylvania Retail Consumers
PG&E Energy Trading-Power, L.P.
PG&E Generating
PG&E National Energy Group
PJM Industrial Customer Coalition
PJM Interconnection, L.L.C.
PJM Transmission Owners
PJM West
PSEG Companies:
 PSEG Energy Resources & Trade LLC
 Public Service Electric and Gas Co.
 PSEG Power, LLC
Potomac Electric Power Company (PEPCO)
Power Development Company, LLC (PDC)
PPL Electric Utilities Corp.
PPL Energy Plus, LLC
Price Responsive Load Coalition
Project for Sustainable FERC Energy Policy
Public Utility Law Project

R

Reading Municipal Light District
Reliant Energy Northeast Generation, Inc.

RETX

Rhode Island Attorney General
Rhode Island Division of Public Utilities & Carriers
Rochester Gas and Electric Corporation

S

Select Energy, Inc.
Shell Energy Services Company, L.L.C.
Sithe New England Holdings
Sithe Power Marketing, L.P.
South Hadley, MA
Strategic Energy

T

Taunton Municipal Lighting Plant
Tractebel North America
Trans Alta Marketing, U.S.
Trans Canada Power Marketing, LP
Trans Énergie US Ltd., a Division of Hydro-Quebec
TXU Energy Trading

U

UGI Utilities, Inc.
Union of Concerned Scientists
United Illuminating Company
Unitil Power Company
USGen New England, Inc.

V

Vermont Electric Power Company, Inc. (VELCO)
Vermont Department of Public Service
Vermont Electric Power Company, Inc.
Virginia State Corporation Commission

DOCKET NO. RT01-99-000

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W

Westfield, MA

Williams Companies, Inc.

Wisvest Connecticut, LLC